IN THE EMPLOYMENT COURT
WELLINGTON

[2013] NZEmpC 117
WRC 3/13

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	LEE MORGAN Plaintiff
AND	WHANGANUI COLLEGE BOARD OF TRUSTEES Defendant

Hearing:	By written memoranda of submissions filed on 30 May and 7, 17 and 21 June 2013
Appearances:	David Burton and Fred Hills, counsel for plaintiff Peter Churchman QC, counsel for defendant
Judgment:	2 July 2013

JUDGMENT NO 2 OF CHIEF JUDGE G L COLGAN

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[1] The question for decision in this challenge to a determination of the Employment Relations Authority[1] is whether the Authority correctly determined not to consider evidence of conversations between the parties' legal advisers before Mr Morgan's dismissal.

[2] Although the plaintiff has elected to challenge the Authority's determination by hearing de novo, in which the Court will make its own decision on the case before it, because the Authority's determination involved the exercise of a discretion, it is important to have regard to its reasoning. As to the Court's ability in law to do so, see *Davies v Dove Hawke's Bay Inc*.[2]

[1] 29 January 2013.
[2] [2013] NZEmpC 83 [3]-[5].

[3] Mr Morgan was dismissed following his intervention in an altercation between pupils at the school at which he was a teacher, Whanganui College. In the course of the school's investigation about Mr Morgan's conduct, both parties had legal representation. Before the Whanganui College Board of Trustees (the Board) concluded its investigations and determined to dismiss Mr Morgan, the legal advisers had a conversation about potential outcomes of the Board's investigation. The Board says that this conversation was conducted, by agreement, in confidence in the sense that it was agreed that what was said could not be later given in evidence in related proceedings. Mr Morgan's lawyer relayed to him what had transpired during the conversation and he now wants the Authority to call for, and consider, evidence about what was discussed between the legal representatives.

[4] The parties have now submitted to the Court an agreed statement of relevant facts which has enabled a face to face hearing to be dispensed with, but which includes some detail of two areas where there is disagreement between the witnesses about what was or was not said. Counsel have, however, invited the Court to determine the preliminary admissibility issue without resolving these disagreements. The question for determination now is whether conversations which included those disputed facts, are inadmissible. If they are inadmissible, irrespective of the truth of either account, then there will be no need for the Authority to resolve the disagreement. If the conversations are admissible and the Authority considers it should take them into account then it will probably have to do so.

[5] I do not, however, go so far as Mr Churchman has submitted and agree that the plaintiff is inviting the Court to rule that the defendant's solicitor committed perjury. Not only has the solicitor not given evidence on oath, which is an essential ingredient of perjury, but all I have is an indication of what he will say if he gives evidence in the Employment Relations Authority about his discussions with the plaintiff's legal adviser. Simply because witnesses disagree about their recollections of events does not mean that the witness whose evidence is not accepted has committed perjury. Indeed, that is very rarely so, including in this jurisdiction.

[6] Rather, the plaintiff's submissions emphasise the nature of the evidence that the plaintiff's lawyer will give (and inferentially of any cross-examination of the

Board's lawyer) about the matters which have been identified in the agreed statement of facts as being in issue between those two witnesses, and for the purpose of persuading the Court that such evidence should be admissible.

[7] In these circumstances, I propose to confine my consideration of the disputed facts to those set out in the agreed memorandum for the purpose of determining whether evidence of those conversations should be admitted in the Authority and, if so, whether the circumstances constitute an exception to the privilege that might otherwise apply to them.

[8] The following account of relevant events is taken from the parties' statement of agreed facts.

[9] On 29 March 2012 Mr Morgan restrained a student physically in the course of separating students engaged in what is described as a "bullying incident". Mr Morgan reported the incident to the school's management and was requested to provide a report about the incident which he did on the following morning, 30 March 2012.

[10] By 5 April 2012, when Mr Morgan met with senior management of the school, he had what is described as a "legal representative" (identified only as a Mr Robinson). Whether Mr Robinson is a practising lawyer, an employment law advocate, or a representative with another status, is not clear but this probably does not matter for the purpose of the present admissibility question. His role is described as a legal representative.

[11] There was a meeting on 5 April 2012 at which the incident was discussed and there is no suggestion that what passed between the parties at that meeting is inadmissible in the proceeding. The meeting was adjourned to enable the school to seek legal advice.

[12] Mr John Unsworth, a Whanganui solicitor, was instructed for the school and on 11 April 2012 Messrs Unsworth and Robinson had a telephone discussion. The agreed statement says:[3]

> … Mr Unsworth requested the conversation be "without prejudice". Mr Robinson agreed. For the purposes of this current proceeding Mr Morgan and the Defendant agree that Mr Unsworth said the following to Mr Robinson:
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> a. He had been instructed by the school to telephone Mr Robinson regarding Mr Morgan, to have a without prejudice conversation. Mr Robinson agreed to proceed on a without prejudice basis.
>
> b. He was aware that a meeting had occurred between the School, Mr Morgan and Mr Robinson as his legal representative.

[13] I do not propose to set out all the conflicting accounts of the telephone conversation between Messrs Unsworth and Robinson. The following is Mr Robinson's account which the plaintiff wishes the Authority to consider but which the Board opposes (and with which Mr Unsworth disagrees).

[14] The plaintiff's evidence from Mr Robinson will be that Mr Unsworth told Mr Robinson that the school's headmaster had talked with the Chair of the Board and that they had concluded that Mr Morgan's actions amounted to serious misconduct that would justify dismissal. Mr Robinson's evidence will be that Mr Unsworth inquired whether Mr Morgan wished to end his teaching career as a person dismissed for serious misconduct or whether he would prefer to tender his resignation. Mr Robinson will say that when he asked whether compensation would be available for Mr Morgan, Mr Unsworth's response was that there would be no severance pay because people who are dismissed for serious misconduct cannot expect anything other than their legal entitlements.

[15] The statement of agreed relevant facts continues that after this telephone conversation there was email correspondence between Messrs Unsworth and Robinson about issues raised in the telephone conversation. This email correspondence was also stated to be on a without prejudice basis.

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[3] At [7].

[16] As a result of that meeting and the subsequent email correspondence, Mr Unsworth advised Mr Robinson that the school's disciplinary process would need to continue during the following week so that the matter could be resolved before the next school term started.

[17] That disciplinary process recommenced with a meeting on 18 April 2012, attended by the parties and their legal representatives. There is no suggestion that the contents of this meeting were a continuation of, or on the same basis as, the previous communications by telephone and email between Messrs Unsworth and Robinson. That meeting, too, was adjourned to enable Mr Unsworth to advise his client, the school.

[18] The agreed statement of facts then relates a further conversation between Messrs Unsworth and Robinson before which "Mr Unsworth told Mr Robinson he would like to have a second without prejudice discussion with him and Mr Robinson accepted the without prejudice basis of that discussion". Again, the following is the controversial evidence intended to be called by the plaintiff but with which Mr Unsworth disagrees and the Board says the Authority should not consider.

[19] The plaintiff wishes to call evidence that Mr Unsworth told Mr Robinson that if Mr Morgan resigned, his resignation would be accepted and the matter would not need to be reported to the Teachers' Council because the inquiry could be closed without making any formal decisions. The plaintiff seeks to adduce Mr Robinson's evidence that Mr Unsworth told him that an immediate decision by Mr Morgan was required, I infer, as to whether the plaintiff was to resign.

[20] The statement of facts records that Mr Robinson spoke to the plaintiff and then advised Mr Unsworth that Mr Morgan would need time to discuss his position with his union.

[21] These discussions between the legal representatives did not produce an agreed resolution, and the school concluded the disciplinary process, dismissing Mr Morgan on 23 April 2012.

The case for the plaintiff

[22] For three reasons the plaintiff says that although the parties agreed, by their legal representatives, that those representatives' discussions would be "without prejudice", the law should not allow the exclusion of the contents of these in evidence in the Authority.

[23] The first ground is that there was then no dispute amenable to resolution between the parties. The second ground is that the communications were "threatening and unambiguously improprietous" and were used to put improper pressure on the plaintiff to resign or face dismissal for serious misconduct. The third ground against exclusion is that the communications:

> …threatened the Plaintiff, expressly and by implication, with intent to cause him to act in accordance with the will of the Defendant and so amounted to blackmail in accordance with s 237 of the Crimes Act 1961.

The need for a dispute

[24] In support of the first ground the plaintiff says that when his solicitor agreed to speak with the defendant solicitor "without prejudice" on 11 April 2012, he, the plaintiff, was unaware that the defendant's solicitor would propose in those discussions what he did. That was because the defendant had not then stated a concluded view about the outcome of its investigation. The plaintiff submits that the existence of a dispute is a pre-requisite for the application of the "without prejudice" rule applicable to communications between parties.

[25] In this regard the plaintiff relies on the judgment of this Court in *Bayliss Sharr and Hansen v McDonald*.[4] That case was, like this, about an employment relationship in which there were difficulties as a result of what was described as a "disciplinary meeting" at which the parties were represented. Shortly after the meeting began, it was agreed by the representatives that they would have a private discussion "off the record" and that they did so. In the course of the meeting the representatives agreed that in return for the employee being paid a sum of money, she would resign her employment. The disciplinary meeting did not go further, but

[4] [2006] ERNZ 1058.

subsequently there was a misunderstanding between the parties about the outcome of those negotiations. In these circumstances the Employment Relations Authority declined to resolve the conflict of evidence between the participants in the negotiations. The employee's case in the Employment Relations Authority was that a binding agreement had been reached between the parties in that meeting and the employee sought both a declaration to that effect and an order that the employer pay a sum of money in accordance with the agreement. Alternatively, the employee alleged that she had been dismissed constructively and unjustifiably. As the Court noted on the employer's challenge to the Authority's determination, its refusal to determine what had occurred at the meeting effectively dismissed the employee's first cause of action based on a contract.

[26] Addressing the content of the "off the record" discussions between the *McDonald* representatives and subsequent correspondence between them, the Court recorded that the Authority had regard to that evidence potentially for two purposes. As already noted, the first was to decide whether the parties had reached a binding agreement about the termination of the employee's employment and the payment to her of compensation and other monies. The Authority declined to make a decision about that issue. Second, the Authority referred to and relied on evidence of those "off the record" communications in reaching its conclusion that the employee had been dismissed constructively.

[27] The judgment in *McDonald* refers to an earlier judgment of this Court about the issue, *Jackson v Enterprise Motor Group (North Shore) Ltd*:[5]

> I consider that what was probably meant by the parties in this case was, as the Authority expressed it, an intention that the meeting and its subject matter be "in confidence" or, colloquially, "off the record".

[28] The Judge in *McDonald* then examined various text book and judgment based definitions of what is known as the "without prejudice" rule in litigation or circumstances of potential litigation. The Judge described as "the classic statement of the scope of the rule" what was said in *Re Daintrey, ex parte Holt*:[6]

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[5] [2004] 2 ERNZ 424 at [17].
[6] [1893] 2 QB 116 at 119.

> … the rule which excludes documents marked "without prejudice" has no application unless some person is in dispute or negotiation with another, and terms are offered for the settlement of the dispute or negotiation. …

[29] Judge Couch in *McDonald* concluded that the word "dispute" in this context has long been taken to mean that the parties must either be engaged in litigation or at least that litigation must have been threatened before the "without prejudice" rule will apply.

[30] This had, however, been expanded somewhat in a judgment of the High Court in *Butler v Countrywide Finance Ltd,*[7] dealing with the meaning of "negotiations" in this context, where Barker J said:

> Whilst not strictly in dispute because there were no Court proceedings either pending or threatened, the parties were in negotiation; therefore the documents should be protected from disclosure under the "without prejudice rule.

[31] As Judge Couch in *McDonald* noted, in *Butler* the parties had been in a commercial dispute for a long time and had been conducting a lengthy negotiation in an effort to resolve it. Judge Couch concluded that the reference to the parties being in "negotiation" meant negotiation relating to an existing dispute.

[32] Judge Couch in *McDonald* disagreed with the judgment of the High Court in *City Realties (Rural) Ltd v Wilson Neill Ltd*.[8] In that case a High Court Master advanced and applied a policy argument that a successful conclusion to negotiations could mean the avoidance of potential litigation. Judge Couch concluded that this view was "inherently flawed". That was because, he said, litigation would only be a likely outcome of negotiations if those negotiations related to an existing dispute. Judge Couch said:[9] "… a failure to reach agreement in negotiations unrelated to an underlying dispute would not give rise to a cause of action".

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[7] (1992) 5 PRNZ 447.
[8] (1996) 9 PRNZ 164.
[9] At [38].

[33] Further, Judge Couch found that the conclusion in the *City Realties* case was inconsistent with a judgment of the Court of Appeal in *D F Hammond Land Holdings Ltd v Elders Pastoral Ltd*[10] where Hardie Boys J said:[11]

> 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.

[34] Judge Couch concluded that the reference by Hardie-Boys J to "negotiation" meant "negotiation of disputes". Judge Couch also concluded in *McDonald* that the proposition that the "without prejudice" rule may apply in the absence of an existing dispute, is also inconsistent with the views expressed by the authors of the various texts of which he provided several examples.

[35] Further, Judge Couch relied on the judgment of the English High Court in *Prudential Assurance Co Ltd v Prudential Insurance Co of America*[12] which decided that "without prejudice" privilege did not apply to correspondence which was created to prevent a dispute arising, rather than to compromise an existing dispute. Strand V-CJ in that case said:[13]

> … Nothing had been said or done by either party which was likely to give rise to any litigation the outcome of which might be affected by any admission made in the course of these negotiations. And if the protection of the 'without prejudice' rule is extended to communications of this nature the effect will be to withhold from the court evidence which may be material in many diverse contexts without good reason.

[36] Judge Couch, in *McDonald*, concluded that the "without prejudice" rule cannot apply in the absence of an existing dispute between the parties to the communication in question.

[37] As to the meaning of the word "dispute" in this context, Judge Couch acknowledged that the rule has been extended recently by a broader construction of

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[10] (1989) 2 PRNZ 232.
[11] At 236.
[12] [2002] EWHC 2809 (Ch).
[13] At [20].

the word which does not limit it to situations in which litigation has either been commenced or threatened. He concluded, however:[14]

> … On any view of the matter, however, for a dispute to exist there must be a significant difference between the expressed views of the parties about a matter concerning them both.

[38] Returning to the facts of the *McDonald* case, the Judge concluded that there was nothing to suggest that there was an actual dispute between the parties at the time the representatives spoke privately. The employer was dissatisfied with the employee's performance and had initiated a disciplinary meeting to discuss this dissatisfaction with her. The Authority did not make any factual findings about what occurred at the meeting including, especially and critically, any finding that the employee disagreed with the views of the employer about her performance or that those views were even explained to her. In these circumstances Judge Couch was unable to infer that there was a dispute between the parties, when the "without prejudice" discussions took place. Accordingly, the "without prejudice" rule was inapplicable to what was said between them on that day or in their subsequent correspondence.

[39] Judge Couch went on to find that he would have reached the same conclusion even if he had found that there was a dispute between the parties in existence before the private meeting. The Judge accepted, as had been noted in the *Enterprise Motor Group* case, that there remains a residual discretion to consider evidence of "without prejudice" communications for where the effect of excluding them will be more prejudicial than that of admitting them.

[40] Addressing the facts of this case, Mr Burton, counsel for the plaintiff, submits that in the absence of such a dispute capable of generating litigation, the communications at issue cannot be categorised as privileged.

[41] The plaintiff accepts, however, that litigation need neither have been commenced nor threatened for such communications to be privileged. Mr Burton says that the significant conflict between the legal advisors about what was said

[14] At [46].

necessitates the admission of the evidence to resolve that conflict. It is sufficient, counsel submits, that at the stage these discussions took place the employer may not then have made up its mind concerning about the allegations of misconduct against Mr Morgan.

[42] So, counsel for the plaintiff submits, his then legal adviser, Mr Robinson, "could not have known there was a dispute prior to agreeing to without prejudice discussions, as the defendant had not formed a position in terms of penalty". In this case also, the plaintiff says, the Court cannot infer the existence of a dispute, even although Mr Morgan did not dispute what he was alleged to have done but rather said that it did not warrant the sanction of dismissal. So, the plaintiff says, if the employer had not made up its mind about any sanction that it may have imposed on Mr Morgan, then it could have formed no view and accordingly there could have been no dispute. The plaintiff says that the meeting that he was required to attend could not have been a dispute resolution meeting but was, in fact, a "disciplinary meeting".

[43] I do not disagree with the essence of what Judge Couch decided in *McDonald* about "without prejudice" communications between parties' representatives. But the issue is a broader one in this case than whether there was or was not a dispute between the parties that had manifested itself in litigation or even that might have done so. The attachment of the "without prejudice" label to those discussions has probably contributed to, or exacerbated, the undue focus on that particular phrase as it is often used in formal communications between parties to litigation. It is what the legal advisers intended by its shorthand use, rather than the precise words they used, that is important. In that sense, the phrase "off the record" probably captures better the spirit of what was intended by the legal representatives.

[44] Mr Morgan's conduct was under scrutiny by his employer. It was misconduct (as Mr Morgan conceded from an early stage) which might have led to a number of sanctions, even to dismissal which in fact occurred. No doubt because of the seriousness of that situation, Mr Morgan engaged a legal representative to both advise and represent him. Accepting that he had misconducted himself, Mr Morgan

wished to obtain the best outcome possible including the retention of his job and the avoidance of professional disciplinary investigation and sanctions.

[45] The purpose of the legal representatives speaking "off the record" was to explore potential agreed outcomes including, from Mr Morgan's point of view, one that he might find acceptable in the circumstances. It was inherent in these "off the record" discussions that either side might make concessions for the purpose of obtaining a settlement which, if one was not agreed, the maker of those concessions would not wish to be held to in subsequent litigation. That applied equally to Mr Morgan and to the Board. That is what was meant by the parties' legal representatives when they proposed and agreed to holding those discussions "without prejudice" or as I have described it, "off the record".

[46] In addition to agreeing to cloak their discussions with this privilege for advantageous reasons, there were, and must have been known to the parties' representatives to have been, potential disadvantages to doing so. These included, if no resolution was able to be reached, the inability to expose a concession made, a weakness acknowledged, or anything else that was said for the purpose of obtaining a settlement which could not be achieved. That is the situation Mr Morgan now faces, his legal representative having, on his behalf, agreed to that risk by agreeing to the discussions being "off the record".

[47] Such discussions are a longstanding, important and frequent feature of attempting to resolve employment relationship disputes. Parties, and especially their representatives, hold such meetings and discussions frequently and much litigation, or potential litigation, is resolved or narrowed in scope by frank exchanges that are "off the record". It is in the broader public interest that such practices be allowed to continue in the safe knowledge that the fact of them, and particularly their contents, will (except in some extraordinary circumstances) not be disclosed to the Authority or the Court subsequently. Such procedures lubricate the machinery of employment dispute resolution. Indeed, the emphasis in the problem resolution provisions in the Employment Relations Act 2000 is supportive of this approach.

[48] As a matter of public policy and pragmatic employment relations, parties should not be permitted to agree to hold such off the record discussions but to then be able to insist that they are on the record when a settlement is not achieved.

[49] Although I agree that a "without prejudice" offer to settle litigation requires the existence of at least a dispute before privilege would attach to the offer, that is not the only circumstance in which discussions or negotiations between parties' representatives may attract such agreed privilege. Here, there was clearly a serious problem in the employment relationship. The employer was investigating an incident of what Mr Morgan accepted was serious misconduct in his employment. The plaintiff was at risk of a range of sanctions up to and including his dismissal and being reported to the Teachers' Council with potential consequent serious professional registration implications. When Mr Morgan's legal representative agreed to Mr Unsworth's proposals to hold discussions on the record, Mr Robinson knew or ought reasonably to have known that that was Mr Morgan's position. It was open to Mr Robinson to have declined to have discussions with Mr Unsworth on this basis. I do not accept, therefore, the necessity for there to be a dispute (narrowly defined) before the privilege can be asserted in respect of inter-lawyer discussions during an employer's investigations of alleged misconduct.

[50] More generally, the plaintiff asserts the error of the defendant's approach by saying that, for the Court to agree with it would countenance employer's entering into "without prejudice discussions during disciplinary proceedings at will" and that if privilege were to attach to such communications, this would allow employers to conclude investigative and disciplinary proceedings and to "exit unwanted employees" by the back door. It is said that judicial endorsement of such strategies would fail to meet the statutory objectives in s 143(a) of the ER Act to support successful employment relationships and the good faith that underpins them.

[51] Rhetorically, Mr Burton submits that there is "no public interest in creating a license for employers to prey on employee fear of dismissal in order to invoke privileged communications" and that such would "only add to the already inherent inequality of bargaining power that … exists in employment relationships".

[52] I disagree with that analysis of the position. The evidence outlined does not constitute an allegation of such unconscionable conduct by the employer that it should be exposed contrary to a deliberate agreement by professional advisers not to do so.

[53] Addressing the issue of Mr Robinson's (and thereby the plaintiff's) agreement to engage in discussions "without prejudice", Mr Burton submits that the common law does not allow privilege of such communications simply because the parties agreed to engage on this basis. Authority for that proposition is said to include the legal textbook *The Evidence Act 2006: Act and Analysis*[15] and the judgment in *New Zealand Institute of Chartered Accountants v Clarke.*[16]

[54] The *Clarke* case arose out of a quasi-criminal prosecution of a person, not a member of a professional body, who purported to use letters indicating that he was, in a letter written to the Disputes Tribunal. The District Court had ruled that evidence of the letter on which the charge rested was not admissible on the grounds that it was a privileged communication, made to advance a settlement offer without prejudice and that it would not have been right to set aside the privilege on the grounds of the writer's dishonesty. Keane J in the High Court determined that, to attract privilege, the letter needed to be sent within the context of a civil "dispute of a kind for which relief may be given in civil proceedings". The Judge determined that there did not need to be a civil action in train when the letter was written and s 57(1) of the Evidence Act 2006 afforded the letter a privilege capable of being enforced under s 53(4). The High Court held that it did not matter that the source of the privilege lay in an unrelated dispute which was civil in character. So long as the letter attracted a s 57(1) privilege, the District Court was empowered under s 53(4) to order that it not be disclosed in a criminal or civil proceeding.

[55] The High Court in *Clarke* also determined that the privilege rule is intended to protect admissions against interest in settlement negotiations should the matter go to trial and that this is the rationale for s 57 of the Evidence Act 2006 as well as at common law. The prosecutor's wish not to rely on the content of the letter but only

[15] Richard Mahoney and others *The Evidence Act 2006: Act and Analysis* (2nd ed, Thompson Reuters Brookers, Wellington, 2010) at [EV 57.04].
[16] [2009] 3 NZLR 264.

on its "peripheral features" (the date, signature and professional designation of the writer) meant it lay beyond the privilege that s 57(1) conferred.

[56] Not only, however, is the matter not determined in the Authority or this Court by the provisions of the Evidence Act, but the nature of the *Clarke* case and this being so different means that it does not assist in the resolution of the case which is essentially about the employment relations practices of parties and their advisers during employment investigations.

An exception to privilege?

[57] The "without prejudice" or "off the record" privilege just described is, however, not absolute or to be upheld invariably. If the conduct of one party during such discussions is not in good faith or is not for the purpose genuinely of obtaining a resolution of the issue between the parties, or is otherwise so egregious that it is unconscionable, evidence of those exceptional circumstances (including what was said) will be permitted as part of the determination of the justification for the party's actions.

[58] Mr Morgan submits that even if the Court finds that there was in existence a dispute at the time of the relevant communications, any agreement to engage in "without prejudice" communications cannot mean that, regardless of their content, the conversations can never be the subject of any scrutiny. That is said to be emphasised by s 57(3) of the Evidence Act which sets out instances where statutory evidential privilege will not apply. The plaintiff invites the Court to follow the guidance of the Evidence Act in this regard, even although it is not bound thereby.

[59] In support of this submission, the plaintiff relies on the judgment in *Unilever Plc v Procter & Gamble Co*[17] which elaborates on the exceptions to, or limits on, the scope of privilege which may allow "… one party … to give evidence of what the other said or wrote in without prejudice negotiations if the exclusion of the evidence would act as a cloak for perjury, blackmail or other unambiguous impropriety." Finally in this regard, Mr Burton submits that the Court (and the Authority) have a

[17] [2001] 1 All ER 783(EWCA) at 792.

residual discretion to consider evidence of "without prejudice" communications where the effect of excluding them will be more prejudicial than admitting them.[18]

[60] I accept the general correctness of these propositions, but note that it is not appropriate to delineate any more precisely what, in general, egregious conduct may or may not cause the privilege to be lost. That will ultimately be a matter for the Authority or the Court in the exercise of principled discretion to determine on the particular facts of the case which will be almost infinitely different.

[61] To determine whether the case is within that category of exceptions and so the privilege attaching to the off the record communications is lost, it is necessary to examine what the evidence is or will be made available to persuade the Authority or the Court to admit evidence of those discussions including potentially and, as in this case, to determine which of two contrary accounts is the more probable.

[62] That is the course that the plaintiff asks the Court to undertake in this case by reference to the plaintiff's summary of the evidence he intends to present, if permitted, about what he says Mr Unsworth said and did.

Blackmail

[63] This leads on to the plaintiff's submission that Mr Unsworth's utterances amounted to the commission of the criminal offence of blackmail. Counsel says they were, therefore, so egregious that they ought to be examined by the Authority to determine the fairness and reasonableness of the employer's actions going to the justification for Mr Morgan's dismissal.

[64] I must, of course, make it very clear at this point that this Court cannot and does not determine whether Mr Unsworth was guilty of the serious criminal offence of blackmail as is alleged by the plaintiff. Indeed it is, in my view, unfortunate that counsel for the plaintiff has chosen so to label Mr Unsworth's conduct although, as will be seen, that is certainly not the only case in which that course has been adopted recently. Far better would have been simply to have described what would be said in

[18] *Jackson v Enterprise Motor Group (North Shore) Ltd* [2004] 2 ERNZ 424 at [19].

evidence if that were admissible, and to then submit that the consequence of that should be the disqualification of the privileged nature of those discussions.

[65] Nevertheless, Mr Burton having chosen to so categorise Mr Unsworth's conduct, I must address that.

[66] Coincidentally, materially similar allegations have been examined by this Court in two recent cases, albeit ones in which the privilege sought to be avoided was the statutory privilege attaching to discussions in mediation. Nevertheless, what constitutes "blackmail" in these particular circumstances has been addressed by the Court and I propose to apply similar considerations in this case.

[67] The most recent judgment is *George v Auckland Council.*[19] In that case the Court found that a threat to issue proceedings against a grievant if her grievance was not withdrawn was so unlikely to have amounted to blackmail of the grievant that the statutory mediation privilege should not be waived by the Court. The Court in *George* followed another recent judgment, *Hamon v Coromandel Independent Living Trust.*[20]

[68] In both *George* and *Hamon* the Court found blackmail not to have been established (*George*) and an inappropriate test (*Hamon*). *George*, in particular, nevertheless sets out the essential ingredients of the offence of blackmail and leaves open the possibility of loss of the privilege if those constituents of the offence are established, to a civil standard, in another case.

[69] Section 237 of the Crimes Act 1961 defines blackmail as follows:

[19] [2013] NZEmpC 76.
[20] [2013] NZEmpC 56

> **237 Blackmail**
> (1) Every one commits blackmail who threatens, expressly or by implication, to make any accusation against any person (whether living or dead), to disclose something about any person (whether living or dead), or to cause serious damage to property or endanger the safety of any person with intent—
> (a) to cause the person to whom the threat is made to act in accordance with the will of the person making the threat; and
> (b) to obtain any benefit or to cause loss to any other person.
> (2) Every one who acts in the manner described in subsection (1) is guilty of blackmail, even though that person believes that he or she is entitled to the benefit or to cause the loss, unless the making of the threat is, in the circumstances, a reasonable and proper means for effecting his or her purpose.
> (3) In this section and in section 239, benefit means any benefit, pecuniary advantage, privilege, property, service, or valuable consideration.

[70] In *George* the threat was said to be that unless the employee withdrew and abandoned her personal grievance, the employer would allege that she had herself acted in breach of her employment agreement and would commence legal proceedings for damages against her. That was held not to be blackmail.

[71] In this case too, the evidence intended to be adduced for the plaintiff about what is alleged to have been said in the "without prejudice" discussions does not amount to blackmail of him by the Board's solicitor or is otherwise so egregious that it should not remain protected by privilege.

[72] Rather than threatening, expressly or by implication, to make an accusation against Mr Morgan to disclose something about him or to cause serious damage to property or to endanger the safety of any person, the evidence indicates that Mr Unsworth proposed that the Board would not either dismiss and/or report Mr Morgan to the Teachers' Council if he resigned. The Board and its solicitor would have been entitled in law to have both continued the process which led to Mr Morgan's dismissal and to have reported that outcome to the Teachers' Council. Subject to the Board establishing the justification for those actions if called upon by Mr Morgan in subsequent personal grievance proceedings, its proposal was to forego a lawful course of action if Mr Morgan agreed to resign. So, on the facts, the Board's actions failed to meet the test set out in s 237(1) of the Crimes Act.

[73] The plaintiff also relies on the judgment of this Court in *Tinkler v Fugro PMS Pty Ltd & Pavement Management Services Ltd*.[21] That case involved an allegation that an agreement in settlement of a dispute between and employer and an employee was entered into under duress and should be declared void. The grounds for doing so were said by the employee to have been that the employer's representative told him that if irregularities in the employer's financial records could not be explained by the employee, the employer would refer those matters to the police.

[74] The issues in the *Fugro* case are, however, so different from those faced in this that the judgment is of no real assistance in this case. The case required a determination whether a binding agreement had been entered into between the parties. For that purpose, evidence was heard of what transpired between them: it was not a case of privilege in those communications being asserted.

Unambiguous impropriety

[75] Finally, the plaintiff submits that the content of what was said by the Board's solicitor was, even if not blackmail, unambiguously improper. Counsel submits that the evidence will be that during the conversations, the defendant's solicitor "threatened the plaintiff with adverse consequences if he did not choose to resign", being that his reputation would be blighted by dismissal for serious misconduct and that the defendant would report the matter to the Teachers' Council. Counsel says that this amounted to improper pressure in the sense that a reasonable employee would have been unable to resist it, thus bringing about the employee's dismissal.

[76] The plaintiff says, correctly, that whether a threat was made by the Board's lawyer to the plaintiff's, is a question of fact to be proved if the content of the discussions is admissible and, in particular, whether Mr Unsworth referred to Mr Morgan being reported to the Teachers' Council. As Mr Burton points out, s 139AM of the Education Act 1989 requires employers in the sector to report serious teacher misconduct and the criteria for doing so are set out in the New Zealand Teachers' Council (Making Reports and Complaints) Rules 2004.

[21] [2012] NZEmpC 102.

[77] Counsel submits that the defendant had a discretion, in all the circumstances of the case then known, whether to categorise the incident with the student as one of physical abuse of a child or young person, or of the physical abuse or ill-treatment of the child or young person. I agree, but conclude that this favours the defendant's stance on this question rather than the plaintiff's.

[78] Without setting out the section or the rule, although having considered them, I accept that it would have been possible for the Board to have dealt with the incident in a way that would not have required it to report Mr Morgan to the Teachers' Council. It follows that the offer of settlement held out to him in the discussions, if indeed that occurred as the plaintiff says, was not illusory or otherwise misleading or in bad faith. It was not egregious or unconscionable conduct. The plaintiff has not established a case for lifting the privilege attaching to the discussions.

Decision

[79] I am satisfied that the relevant discussions by telephone, by email and in person between Messrs Unsworth and Robinson, which are the subject of this challenge to admissibility, were all undertaken with a view to attempting to resolve by agreement the outcome of an allegation of serious misconduct by Mr Morgan, other than by the plaintiff's dismissal or other serious employment sanction. There is no dispute between the parties about what happened in the incident and that this may have constituted, or perhaps even did constitute, serious misconduct by Mr Morgan as a teacher. The plaintiff's focus was not on what happened on 29 March 2012 or even that it may have amounted to serious misconduct. Rather, Mr Morgan's case was, and is, about what should have been the consequences of that to him and that, in turn, was the subject matter of the discussions between Messrs Unsworth and Robinson.

[80] Admissibility of evidence in Employment Relations Authority investigations is governed by the very broadly discretionary s 160 of the ER Act. It provides materially:

> **160 Powers of Authority**
> (1) The Authority may, in investigating any matter,—
> (a) call for evidence and information from the parties or from any other person:
> …
> (2) The Authority may take into account such evidence and information as in equity and good conscience it thinks fit, whether strictly legal evidence or not.

[81] The Evidence Act 2006 does not govern proceedings in the Employment Relations Authority although, as in the case of this Court which operates under a very similar provision governing evidence, questions of admissibility in civil proceedings generally and under the Evidence Act are relevant to the Authority's exercise of its discretion to refuse to admit evidence.

[82] It is necessary to determine how the legal advisers intended their conversation to be treated at the time they embarked upon it. There is no single or magic formula used by lawyers or other representatives in employment matters to describe such agreements, certainly not even a standard (although not invariable) one as in the case of offers to settle litigation made in writing and labelled "without prejudice". Lawyers or other representatives may uses phrases such as "Can we speak off the record?", "Can we speak confidentially?", or "Can we speak without prejudice?". These are all shorthand labels for discussions that are intended to remain in confidence in the sense that they cannot be used subsequently in litigation. Such discussions are not in absolute confidence because they can and indeed must be relayed to clients, but this will (or at least should) usually be with an explanation about the confidentiality agreement. Nor are they absolute in the sense that their protected status may be lost if they consist of, or include, unambiguous impropriety, bad faith or other egregious conduct. There will be times when one party will not agree to a discussion on this basis so that the party wishing to explore a resolution will need to decide whether it is still worthwhile to do so, although that is not the case here.

[83] I conclude that the legal advisers agreed that their discussions would not be able to be included in evidence in any subsequent proceedings that might arise, as has indeed happened. The lawyers' was a bona fide attempt to head off litigation by attempting to resolve a potential personal grievance before it arose. That was a

common and sensible approach by employment law advisers in the interests of their clients. It accorded with the statutory objective under s 143(b) of the ER Act that employment relationship problems are best resolved promptly by the parties themselves.

[84] The Authority exercised properly its discretion to not call for evidence and to otherwise not permit evidence of these conversations or emails that were agreed between the legal advisers would not be used in such proceedings as have now arisen. The plaintiff's challenge to the Authority's determination is dismissed and, because of the effect of s 183(2), I make an order to the same effect as the Authority's.

[85] On this aspect of the case, the defendant is entitled to costs which are reserved.

GL Colgan
Chief Judge

Judgment signed at 8.30 am on Tuesday 2 July 2013