IN THE EMPLOYMENT COURT
WELLINGTON

[2013] NZEmpC 13
WRC 28/12

IN THE MATTER OF	proceedings removed from the Employment Relations Authority
AND IN THE MATTER OF	a challenge to objection to disclosure
BETWEEN	NEW ZEALAND POST PRIMARY TEACHERS' ASSOCIATION First Plaintiff
AND	ROBERT GRAY Second Plaintiff
AND	CAMBRIDGE HIGH SCHOOL First Defendant
AND	SECRETARY FOR EDUCATION Second Defendant

Hearing: 1 February 2013
(Heard at Wellington)

Appearances: Tanya Kennedy, counsel for the plaintiffs
Antoinette Russell, counsel for the defendants

Judgment: 13 February 2013

INTERLOCUTORY JUDGMENT OF JUDGE A D FORD

Introduction

[1] In a minute dated 4 December 2012, Chief Judge Colgan made a fixture in this proceeding for 1 February 2013, which was the first available date after the Court vacation, to deal with a number of defended interlocutory applications. The substantive hearing is scheduled for 6, 7 and 8 March 2013. As it turns out, for one reason or another, several of the interlocutory issues that had been identified are no

longer in contention. The hearing before me was confined to two issues relating to disclosure.

[2] The defendants seek disclosure (to which the plaintiffs object) of:

1. a list of the first plaintiff's, (NZPPTA) members;

2. internal NZPPTA emails between NZPPTA officials or employees regarding an email from Ms Sarah Borrell of 15 July 2011, the subject line of which was "Without prejudice proposal around qualifications".

[3] The proceeding involves the interpretation and application of certain provisions of a collective agreement covering secondary school teachers, in particular a Variation, dated 27 September 2011, (the Variation) to the collective agreement (which affected the pay of provisionally registered secondary school teachers). The Secretary for Education does not accept the NZPPTA's interpretation of the provisions in question. The plaintiffs' claims were commenced by the filing of a statement of problem in the Employment Relations Authority (the Authority) but in a determination[1] dated 23 October 2012, the Authority ordered that the matter be removed to the Court to hear and determine without any investigation by the Authority.

Defendants' request for list of NZPPTA members

[4] In argument before me, the defendants were referred to as "the Ministry" and, for convenience, I will continue to refer to them either as "the Ministry" or simply as "the defendants". Counsel for the defendants, Ms Russell, claimed that the list of NZPPTA members was required, "to enable the Ministry to determine, further to the allegations at [43] and [48] of the statement of claim, how many teachers are potentially affected by the dispute, and, for the purposes of remedies, who they are."

[5] In [43] of the statement of claim, the plaintiffs make the following comment on the Ministry's position in relation to the interpretation issues in question:

[1] [2012] NZERA Wellington 130.

> 43. The Ministry's position on this issue is unclear and information is outstanding to show how all of the affected teachers (who are NZPPTA members) have been affected.

[6] In response, the defendants pleaded in their statement of defence:

> 43. They deny that information is outstanding, and say that payroll information on all affected teachers was provided to the NZPPTA on 26 October 2012. They say further that the NZPPTA has refused to provide the Ministry with a list of members.

[7] Paragraph [48] of the statement of claim, which was the other allegation Ms Russell relied upon, appears in the section dealing with remedies and is simply a claim for interest on behalf of "affected teachers" in respect of any proven underpayment of salary.

[8] Ms Russell submitted that the Ministry could not provide accurate data to the NZPPTA without the provision of a list of its members. Counsel referred to the Court's equity and good conscience jurisdiction and to regulations emphasising "the importance of ensuring the speedy and efficient disposition of cases" submitting:

> 20. ... if the Court decides the substantive issue in the NZPPTA's favour, the list will be required in order for the judgment to be implemented, and its disclosure at this stage will enable the Ministry to prepare more effectively for its implementation.

[9] Ms Russell further contended that the list of NZPPTA members was required in terms of s 236 of the Employment Relations Act 2000 (the Act), "in order to establish plaintiffs' counsel's authority for representing those members".

[10] Anticipating an NZPPTA argument that disclosure of its membership would involve issues of confidentiality and privacy, Ms Russell submitted that no public interest concerns would be involved in disclosure of the list of NZPPTA members because of the conditions imposed in reg 51 of the Employment Court Regulations 2000 (the regulations) which protected the integrity and confidentiality of all documentation made available through the disclosure process.

Plaintiffs' objection

[11] The grounds upon which the plaintiffs object to disclosure of "a list of the NZPPTA members" are:

> 1.1 The document listing around 18,000 NZPPTA members is not relevant to the resolution of these dispute proceedings (regulation 37 and 38); and
>
> 1.2 In the alternative, if disclosed, would be injurious to the public interest (regulation 44(3)) in terms of confidentiality and/or privacy of information.

[12] On the issue of relevancy, both counsel referred to reg 38(1) which provides:

> **38 Relevant documents**
>
> (1) For the purposes of regulation 37 and regulation 40 to 52, a document is relevant, in resolution of any proceedings, if it directly or indirectly–
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> (a) supports, or may support, the case of the party who possesses it; or
>
> (b) supports, or may support, the case of the party opposed to the case of the party who possesses it; or
>
> (c) may prove or disprove any disputed fact in the proceedings; or
>
> (d) is referred to in any other relevant document and is itself relevant.

[13] Ms Kennedy, counsel for the plaintiffs, cited the following passage from *Airways Corporation of New Zealand v Postles*:[2]

> The pleadings define the ambit of the proceedings and thereby define the issues to which questions of relevance must be related.

Counsel also submitted, in reliance upon *Woolf v Kelston Girls' High School Board of Trustees*[3] that the test is actual relevance, not merely potential relevance.

[14] Ms Kennedy submitted that on the pleadings the matter before the Court involves a dispute over the interpretation, application and operation of clauses in a collective agreement between the Secretary for Education and the NZPPTA. Counsel stressed that on the Ministry's own assessment no more than 1,957 teachers

[2] [2002] 1 ERNZ 71 (CA) at [5].
[3] AC28A/00, 13 July 2000 at 2.

could be affected by the litigation and as the NZPPTA had a membership of approximately 18,000, the list of NZPPTA members was not relevant to the resolution of this proceeding.

[15] In the alternative, counsel for the plaintiffs' submitted that if the Court holds that the information is relevant then disclosure should not be ordered because it would be "injurious to the public interest", in terms of reg 44(3)(c), in that personal information relating to approximately 16,000 members "would be disclosed for no legitimate purpose".

Discussion on disclosure of NZPPTA members

[16] In *Lawrence v Ian Lock and John Sheahan as liquidators of ex CED Foods (in liquidation)*,[4] Judge Couch, consistently with the passage cited from *Postles* in [13] above, stated:

> [14] The starting point in determining whether any document is relevant to particular proceedings is the pleadings. That is because the pleadings describe the case of each party and, to a large extent, identify issues of fact.

[17] I agree with Ms Kennedy that the issues defined in the pleadings are issues relating to the dispute between the parties over the interpretation, application and operation of particular clauses in the collective agreement and, as such, I cannot see how a list of NZPPTA members is going to be relevant to the determination of the issues so identified. Should the plaintiffs be successful then it will become necessary for the parties to focus on the position of the individual teachers affected by the decision who are represented by the NZPPTA but the identity of those individuals is not relevant now to the substantive issues before the Court.

[18] In their statement of claim, the plaintiffs specifically seek an order reserving leave to refer individual cases to the Court if necessary should they be successful in their substantive action. In [48] they also plead:

> 48. There are likely to be a significant number of teachers affected and the NZPPTA will need to work through each of its members pay calculations where the teacher is affected.

[19] In response, the defendants plead:

[4] [2012] NZEmpC 9.

> 48. They admit that approximately 1,800 full time teacher equivalents are paid on the trained scale in qualification groups that could be affected, based on a snapshot of Ministry of Education payroll data.

[20] As stated, I do not consider that the list of NZPPTA members is relevant to the substantive issues before the Court. The defendants do not refer to any specific limb of reg 38(1) in support of their claim that the list of members is relevant. The plaintiffs acknowledge in their pleadings that if they are successful in their claim then it will be necessary for the parties to carry out the further exercise of identifying the NZPPTA members affected by the decision and then the payroll data will need to be analysed to determine the extent of the relief to be granted in each individual case. In this regard, Ms Kennedy flagged the possibility of problems being encountered in analysing the payroll data arising from issues relating to the Novopay payroll system. As also noted above leave is sought, should it become necessary, to refer any individual case back to the Court. It seems to me that this is the proper and sensible way of dealing with the matter.

[21] With respect, I see little merit in the final submission advanced by Ms Russell on behalf of the defendants, namely, that the list of NZPPTA members is required to be produced pursuant to s 236 of the Act in order to establish plaintiffs' counsel's authority for representing those members. That was not one of the grounds referred to in the defendants' application for disclosure and hence, no doubt, it was not referred to by Ms Kennedy in her written submissions. Ms Russell acknowledged that under s 18 of the Act the NZPPTA is entitled to represent its members in relation to any matter involving their collective interests as employees but she submitted that, as there is also a claim for interest in this case, the NZPPTA is required to provide authority to represent its members pursuant to s 236 of the Act. A list of members is not the same thing, however, as an authority for representation. Again, the defendants do not refer to any specific limb of reg 38(1) that identifies an authority to represent as a relevant document. In any event, the claim for interest is an incidental claim which may or may not become relevant depending upon the outcome of the substantive proceeding.

[22] For the foregoing reasons, I decline to order production of the list of NZPPTA members.

Defendants' request for disclosure of internal NZPPTA emails

[23] The defendants also seek disclosure of two internal NZPPTA emails dated 17 and 18 July 2011. The plaintiffs object to such disclosure upon the grounds that the emails are not relevant in terms of regs 37 and 38 and, in the alternative, that their disclosure would be injurious to the public interest in terms of regulations 44(3)(c) in that they discuss an email the NZPPTA received from Ms Borrell (Ministry of Education) dated 15 July 2011 which was expressed to be "without prejudice". The plaintiffs refuse to waive privilege and also object to the disclosure of Ms Borrell's email.

[24] The context of Ms Borrell's email of 15 July 2011 was succinctly summarised by Ms Russell in her submissions as follows:

> 24.1. In April 2011, the NZPPTA wrote to the Ministry requesting a meeting of the Issues Committee about several issues concerning the calculation of salaries of overseas-trained teachers.
>
> 24.2. The result of the meeting was that the Secretary for Education requested that Ms Borrell and an advocate from the NZPPTA meet to attempt to resolve the issues of disagreement that led to the meeting.
>
> 24.3. Ms Borrell's 15 July 2011 email set out a proposal for a way forward regarding these issues.
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> 24.4. The positions reached by the parties in this process were ultimately incorporated in the Variation.

[25] Ms Russell submitted:

> 25. The emails between NZPPTA officials or employees regarding Ms Borrell's email of 15 July 2011 are likely to be relevant to the NZPPTA's understanding of the position at that time in the discussion, and potentially their understanding of existing practice.
>
> 26. Disclosure of documents is consistent with the Employment Court's recent practice of allowing evidence of pre-contractual negotiations to be filed, with issues of admissibility and relevance to be addressed in submissions: *Tatua Co-Operative Dairy Co Limited v New Zealand Dairy Workers' Union Te Runanga Wai U Inc* (2011) 9 NZELR 107 at [13].

[26] Ms Borrell's email was headed, "**Subject:** Without prejudice proposal around qualifications." It was sent on Friday, 15 July 2011: "**To:** Sarah Borrell; Marion Norton; Kevin Bunker; Judie Alison". The email was written in anticipation of a

meeting planned for the following Monday afternoon. In essence, Ms Borrell's without prejudice proposal was that if the NZPPTA would agree to "3 provisos" which she outlined in her email then she would put a proposal (which she outlined) to the Secretary for Education "and the wider meeting" that could be included in the new collective agreement.

[27] Ms Russell submitted that even though the words "without prejudice" were in the subject line, Ms Borrell's email was not "without prejudice" because it "was sent in the context of the discussions about a possible variation to the collective agreement." It was not sent "in connection with an attempt to settle or mediate a dispute." In this regard, counsel relied upon s 57(1) of the Evidence Act 2006 which provides:

> **57 Privilege for settlement negotiations or mediation**
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> (1) A person who is a party to, or a mediator in, a dispute of a kind for which relief may be given in a civil proceeding has a privilege in respect of any communication between that person and any other person who is a party to the dispute if the communication–
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> (a) was intended to be confidential; and
>
> (b) was made in connection with an attempt to settle or mediate the dispute between the persons.

[28] Ms Russell submitted:

> 31. The meaning of "dispute" for the purpose of the common law version of the privilege protecting settlement negotiations was considered by the UK Court of Appeal in *Barnetson v Framlington Group Ltd* [2007] 1 WLR 2443. The Court stated at [34] that:
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> > ...the crucial consideration would be whether in the course of negotiations the parties contemplated or might reasonably have contemplated litigation if they could not agree.
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> 32. Similarly, in *O'Brien v The New Zealand Home Loan Co Ltd* (HC, Auckland, CIV-2010-404-8323, 22 July 2011), Christiansen AJ noted at [26] that, for the purposes of s 57(1) of the Evidence Act:
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> > ... the term "dispute" not only covers disputes in the sense of litigation being threatened or seriously contemplated but any attempt to resolve liability arising out of the breach of a legal obligation.
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> 33. Applying these authorities to the present case, it is clear that no "dispute" existed. As noted at paragraph 24.1 above, the NZPPTA had requested a meeting of the Issues Committee to consider several

> issues. The fact that the Issues Committee was convened does not mean that there was a "dispute" between the parties.

[29] Ms Russell then referred in her submissions to the function and purpose of the Issues Committee as set out in a note to the collective agreement and continued:

> 33.2. The meeting of the Issues Committee is thus part of the ongoing framework of discussion between the NZPPTA and the Ministry.
>
> 33.3. In the present case, the matter resolved between the parties through the Issues Committee process led to the negotiation and signing of the Variation. That Variation is the basis of this litigation. If it had not been signed, there would have been no "legal obligation" between the parties to dispute (as required by *O'Brien v The New Zealand Home Loan Co Ltd*), and hence no basis on which litigation could have been contemplated (as required by *Barneston v Framlington Group*).

Plaintiffs' objection to disclosure of internal emails

[30] Ms Kennedy confirmed that the plaintiffs did not waive privilege in relation to the Sarah Borrell email dated 15 July 2011 or in respect of the two internal NZPPTA emails. She identified the NZPPTA emails as, first, an email from Marion Norton to Kevin Bunker and Judie Alison (all NZPPTA officials) headed "Without prejudice proposal around qualifications" dated 17 July 2011 and, secondly, an email with the same heading from Judie Alison to Marion Norton, Kevin Bunker and Bronwyn Cross (Deputy General Secretary of the NZPPTA) dated 18 July 2011. Ms Kennedy submitted that the emails were not relevant in that they formed part of the negotiations leading up to the Variation. In this regard, counsel cited in support the following passage from Lord Hoffmann's five principles of contractual interpretation: "The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent" - as stated in *Investors Compensation Scheme Limited v West Bromwich Building Society* [1997] UKHL 28; [1998] 1 WLR 896 at 912-913 (referred to in *Progressive Meats Limited v Pohio & ors* [2012] NZEmpC 103 at [29]).

[31] In the alternative, Ms Kennedy submitted that if the Court determined that the three emails were relevant, they should still be excluded on the basis that they were subject to the "without prejudice" privilege which the plaintiffs were not prepared to waive. Ms Kennedy referred to and relied upon the following extract from *Phipson on Evidence* (16th ed), London, Sweet & Maxwell, 2005, at [24-14]:

> Written or oral communications which are made for the purpose of a genuine attempt to compromise a dispute between the parties may generally not be admitted in evidence.

[32] On the issue of whether or not there was a "dispute", Ms Kennedy accepted that, while the use of the words "without prejudice" are not determinative of the issue, the decision of this Court in *Idea Services Ltd (in Statutory Management) v Barker*,[5] confirmed that the use of those words indicates that the information is prima facie "privileged for admission from evidence". Ms Kennedy submitted that the defendants needed to establish that there "was not a 'dispute' and that the communication was not a genuine attempt to settle the dispute".

[33] As to the meaning of the word "dispute", Ms Kennedy referred to the decision of Judge Couch in *Bayliss Sharr & Hansen v McDonald*,[6] and in particular the following passage:

> [46] As to the meaning of the term "dispute" in this context, it is clear that in recent years the application of the "without prejudice" rule has been extended by a broader construction of the word which does not limit it to situations in which litigation has either been commenced or threatened. On any view of the mater, however, for a dispute to exist there must be a significant difference between the expressed views of the parties about the matter concerning them both.

Judge Couch went on to find that, on the facts there was no dispute between the parties and as the communications and correspondence in question were not, therefore, for the purpose of "compromising a dispute" it ought not to be protected by "without prejudice" privilege.

[34] Turning to the facts of the present case, Ms Kennedy submitted that while a number of open exchanges had occurred between the parties in June and July 2011 (Ms Borrell for the Ministry and Mrs Norton for the NZPPTA) about the matters the NZPPTA had referred to the Issues Committee, the email from Ms Borrell dated 15 July 2011 was expressly headed "Without prejudice proposal around qualifications" and she talked about finding "the way through" the issues. In that context, Ms Kennedy submitted, her email, "was to resolve the issues that were in dispute between the parties". In reference to the other two emails, Ms Kennedy submitted, in relation to the first dated 17 July 2011, that as Mrs Norton was not

[5] [2012] NZEmpC 112 at [28].
[6] [2006] ERNZ 1058.

going to be able to attend the meeting scheduled for Monday 18 July 2011, she emailed some comments on Ms Borrell's email to Mr Bunker and Ms Alison who would be attending the meeting. In the other email dated 18 July 2011, Ms Alison reported back to Mrs Norton and Mrs Cross on a "three-way phone conversation" she and Mr Bunker had had with Ms Borrell in the knowledge that the meeting planned for that day was likely to be postponed until Monday, 25 July 2011.

Discussion on the "without prejudice" issue

[35] The principles relating to the privilege attached to without prejudice correspondence were recently reviewed in this Court in the *Idea Services* case. Judge Inglis there confirmed[7] that the label attributed to a communication by a party is not determinative of its status and simply entitling a letter "without prejudice" does not render it a privileged communication. Judge Inglis also confirmed that, absent a court order to the contrary, the consent of all parties is required in order to have without prejudice correspondence produced in evidence because the privilege is held jointly by the parties.[8] Judge Inglis referred to s 57(1) of the Evidence Act 2006 which creates a privilege in respect of any communication between a person who is a party to a dispute of a kind for which relief may be given in a civil proceeding and any other person who is a party to the dispute if the communication was intended to be confidential and was made in connection with an attempt to settle the dispute. While this Court is not bound by the Evidence Act 2006, for the reasons touched upon by Judge Inglis, it has historically sought to apply the Act in issues relating to the admission of evidence.

[36] In *Bayliss Sharr & Hansen*, Judge Couch emphasised that the "without prejudice rule" cannot apply in the absence of an existing dispute between the parties to the communication in question. On this issue, his Honour stated:

> [43] In Keane A, *The Modern Law of Evidence* (6th edition), Oxford, Oxford University Press, 2006, the author says, at 664:
>
> > *The essential pre-condition for a claim to without prejudice privilege is the existence of a dispute. The privilege is the existence of a dispute. The privilege, therefore, will not protect correspondence designed to prevent a dispute arising.*

[7] At [28].
[8] At [29].

> [44] In support of this last statement, the author cites the decision in *The Prudential Assurance Co Ltd v The Prudential Insurance Company of America*[9] where the Vice-Chancellor Justice Strand 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. He then said:
>
> > *It does not appear to me that the considerations of public policy described by Oliver LJ in* Cutts v Head *and referred to with approval by Lord Griffiths in* Rush & Tompkins *[1989] 1 AC 1280, 1299 have any application to these communications. Nothing had been said or done by either party which was likely to give rise to any litigation the outcome of which may 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.*[10]

[37] I find these authorities of particular relevance to the facts of the present case. In *Willis Trust Company Ltd and anor v Green and anor*,[11] Harrison J stated: "Whether or not a dispute exists is of an intensely factual nature". Ms Kennedy made available to the Court the two contentious emails from Mrs Norton and Ms Alison dated 17 July and 18 July 2011 respectively. Ms Borrell's earlier email of 15 July 2011 had been made available to the Court by Ms Russell.

[38] I do not accept that the emails in question should be excluded on the ground that they are irrelevant. Although, as Ms Kennedy submitted, the law relating to contractual interpretation excludes declarations of subjective intent arising out of the negotiations, objective evidence is admissible. As was stated by Tipping J in *Vector Gas Ltd v Bay of Plenty Energy Ltd*:[12]

> It is necessary, however, to distinguish between the subjective content of negotiations; that is, how the parties were thinking, their individual intentions and the stands they were taking at different stages of the negotiating process on the one hand, and, on the other, evidence derived from the negotiations which shows objectively the meaning the parties intended their words to convey. Such evidence includes the circumstances in which the contract was entered into, and any objectively apparent consensus as to meaning operating between the parties.

[39] Although it is always difficult at the interlocutory stage to assess the significance of potential evidence, from my perusal of the emails it would appear that they may well be able to provide relevant objective evidence as to meaning

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[9] [2002] EWHC 2809 (Ch).
[10] At [20].
[11] HC Auckland, CIV-2006-404-809, 25 May 2006 at [52].
[12] [2010] NZSC 5 at [27].

which may be of assistance in the contractual interpretation exercise contemplated by the proceeding.

[40] In relation to the issue of whether the emails related to a "dispute" attracting the without prejudice privilege, it is important to bear in mind the context in which the emails came into existence. The background is summarised in [24] above. In April 2011, the NZPPTA had requested that the Issues Committee should meet to discuss certain matters relating to the calculation of salaries of overseas-trained teachers. Those matters were duly worked through between the parties and the negotiations culminated in an agreement being reached in August 2011. The August agreement subsequently became the Variation to the collective agreement which gave rise to the present litigation. At the time the emails were written, however, in July 2011, there was no dispute between the parties. The dispute arose subsequently in relation to the interpretation and application of the agreed Variation dated 27 September 2011.

[41] Confirmation that there was no dispute at the time the emails were written is apparent from the plaintiffs' statement of claim. Paragraph 15 refers to the function of the Issues Committee established under the collective agreement which is to, "meet from time to time, upon request of any of the named organisations, to consider and resolve any outstanding or new issues about teachers' qualifications in relation to salary. These may be either individual cases or more general qualification or teaching qualification issues. ..." The statement of claim continues:

> 20. Following this meeting of the Issues Committee on or about 16 June [2011] Marion Norton for the NZPPTA and Sarah Borrell of the Ministry of Education met several times to negotiate a variation to the 2011 - 2013 STCA.
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> 11 August 2011 Memorandum of Agreement to Vary the 2011 - 2013 STCA
>
> 21. The work of Marion Norton for the NZPPTA and Sarah Borrell of the Ministry of Education, culminated on 11 August 2011 in a memorandum of agreement between the NZPPTA and the Ministry of Education, which stated that:
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> *...The advocates recommend that the following is considered as the basis for a variation to the STCA:*
>
> ...

[42] In other words, there is no allegation in the pleadings that any dispute existed between the parties in July 2011, at the time the emails in question were written, and that observation is consistent with my own conclusions based on the evidence before the Court. The dispute giving rise to the present litigation arose sometime subsequent to the 11 August 2011 memorandum of agreement.

[43] Those findings are sufficient to dispose of the interlocutory issues before the Court. There is another aspect of the case which was not dealt with in written submissions but I did raise the matter with counsel towards the end of argument and that is whether the two internal emails could be said to fall within the ambit of s 57(1) of the Evidence Act 2006 given that they were not communications between the parties to the alleged dispute. Having heard oral submissions on the point, I am bound to say that I was not persuaded that the internal emails are sufficient to qualify for the s 57(1) without prejudice privilege but it is not necessary for me to take this matter any further.

Conclusions

[44] For the reasons stated, I find that the NZPPTA membership list is not relevant to any disputed matter in the present proceeding and I make no order for its disclosure.

[45] I find that Ms Borrell's email of 15 July 2011 and the two internal NZPPTA emails in response are relevant and are not protected from disclosure by "without prejudice" privilege. The parties already have Ms Borrell's email. The two internal emails are to be produced to the defendants forthwith.

[46] Costs are reserved.

A D Ford
Judge

Judgment signed at 3.30 pm on 13 February 2013