IN THE EMPLOYMENT COURT
AUCKLAND

[2013] NZEmpC 134
ARC 20/13

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	GUY HALLWRIGHT Plaintiff
AND	FORSYTH BARR LIMITED Defendant

Hearing: On the papers

Appearances: Kathryn Beck, counsel for plaintiff
Peter Churchman QC, counsel for defendant

Judgment: 19 July 2013

INTERLOCUTORY JUDGMENT OF JUDGE CHRISTINA INGLIS

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[1] The plaintiff applies for orders enabling him to use two pieces of correspondence in evidence in this proceeding (Exhibit A and Exhibit B). The application is opposed on the basis that the correspondence is protected from disclosure by the without prejudice rule. Counsel agreed that the application could be dealt with on the papers.

[2] Exhibit A comprises a letter written by the plaintiff to the defendant, dated 26 July 2012. The letter followed a meeting between the parties. The second part of the letter (which has been redacted) commences with the words:

> Taking all of the above into account and on a without prejudice basis, proposed terms…

[3] The first part of the letter, to which the application relates, sets out the background to the position said to have been taken by the defendant at the earlier meeting, a willingness to resolve the situation by agreement, and a list of factors that

would be relevant to any agreement (including the length of time the plaintiff had worked for the defendant and the costs associated with his relocation to take up his position, his salary package, his age and anticipated ability to find alternative employment, and the value of shares held in the defendant company).

[4] Exhibit B is the defendant's response to the plaintiff's letter of 26 July 2013.

[5] The plaintiff submits that Part 1 of Exhibit A is open correspondence and was written by him on that basis. It is submitted that as he is the author he can invoke (or not) any privilege in respect of it. In relation to Exhibit B it is submitted that it was not marked "without prejudice", does not contain a counter proposal, and does not otherwise continue settlement negotiations.

[6] The defendant submits that the plaintiff does not have the sole ability to revoke or waive privilege in Exhibit A. It is submitted that Part 1 of Exhibit A cannot sensibly be separated from Part 2, is reasonably incidental to it, and was put forward as an inducement or reasoning to encourage the defendant to accept the offer contained in Part 2 of the letter. Mr Churchman also submits that the fact that Exhibit B is not marked "without prejudice" is not determinative of whether it is privileged, and while Exhibit B did not contain a counter-offer it was part of a series of without prejudice correspondence and contained a rejection of the plaintiff's earlier offer.

[7] It is well established that written or oral communications made for the purpose of resolving a dispute may generally not be admitted in evidence. The policy underlying the rule is equally well established, namely to encourage parties to settle their disputes without fear of anything said during the course of such negotiations being used to their prejudice in proceedings. The underlying policy is particularly apposite in the employment relations sphere where, as the Chief Judge pointed out in *Jackson v Enterprise Motor Group (North Shore) Ltd*:[1]

> It is in the public interest that such practices ["off the record" discussions between parties seeking to resolve employment relationship issues] be allowed to continue in the safe knowledge that the fact of them and

[1] [2004] 2 ERNZ 424 at [17].

> particularly their contents will not be disclosed to the Authority or to the Court or any other person 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.

[8] The plaintiff accepts that a dispute existed between the parties as at the date the correspondence was written.

[9] In *D F Hammond Land Holdings Ltd v Elders Pastoral Ltd*[2] the Court of Appeal held that:[3]

> 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. This being the purpose of the rule, strict adherence to form is not necessary: for example the use of the words "without prejudice" is not necessary if the intention is clear; Cross on Evidence (4th NZ ed) para 10.43. On the other hand, the use of the words will not necessarily protect the entire contents of the communication. Statements that have no bearing on the negotiations will not be protected. Protection will be accorded only to statements that are reasonably incidental to the negotiations; Field v Commissioner for Railways for New South Wales (1955) 99 CLR 285, 292. If they are independent of the negotiations, they are admissible in evidence.

[10] While a number of affidavits were filed setting out the background to the correspondence, and what was said to be the plaintiff's intention when he wrote the letter of 26 July, the documents speak for themselves. Part 2 of Exhibit A (which contains a without prejudice offer) plainly relates to Part 1 and is inextricably linked to it. This is reinforced by the way in which Part 1 is crafted and the linking words between the two parts.

[11] Part 1 makes it clear that the parties are seeking to resolve their differences by agreement. The plaintiff says that he would prefer to retain his position within the firm but is willing, "rather than go down a formal track", to "attempt to resolve the situation by agreement." Six factors that he says would need to be reflected in any agreed resolution are then listed, immediately before the proposed terms. Part 1 is plainly directed at supporting the proposal contained in Part 2, and directed at

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[2] (1989) 2 PRNZ 232 (CA).
[3] At 9.

encouraging the defendant to accept the offer. I agree with Mr Churchman that the two parts of the letter cannot be artificially separated as the plaintiff suggests.

[12] The privilege that attaches to Part 2 of the letter also extends to Part 1 of Exhibit A.

[13] I do not accept that such an approach is inconsistent with public policy and is liable to set a dangerous precedent, as counsel for the plaintiff suggests. It remains open to a party to follow up any without prejudice communication with open correspondence that places their position clearly on the record.

[14] Nor do I accept the submission that the privilege in Exhibit A was the plaintiff's to unilaterally waive. The consent of both parties is required to put the contents of without prejudice communications in evidence.[4]

[15] Exhibit B commences with the words: "I refer to our meeting on Monday 23 July and to your without prejudice letter to me dated 26 July." It concludes with the observation that:

> While we had hoped to be able to talk reasonably with you about this matter and find an amicable outcome, that is clearly not going to happen. Accordingly, I am obliged to institute a disciplinary investigation and will write to you formally about that separately.

[16] The fact that Exhibit B is not entitled "without prejudice" is not determinative of its status. It was clearly written in response to the plaintiff's without prejudice letter, and it expressly says so. It is well settled that the protection can extend to further documents in a chain of correspondence.[5]

[17] Ms Beck submits that Exhibit B does not contain an acceptance, rejection or counter-offer and accordingly was not correspondence made in connection with an attempt to settle a dispute. However, the gist of the letter is clear – comprising a rejection of the settlement offer put forward in the plaintiff's without prejudice correspondence. I cannot accept that the fact that the without prejudice offer was rejected, rather than accepted or a counter-offer put forward, lifts the protection that

[4] See, for example, *Idea Services Ltd (in Stat Man) v Barker* [2012] NZEmpC 112 at [29].
[5] *McGechan on Procedure* (online looseleaf ed, Brookers) at [HR8.25.16(c)]

would otherwise be afforded to it. The letter was a response to the without prejudice offer, was part of the chain of without prejudice communications, and is privileged.

[18] The plaintiff's application is accordingly declined.

[19] Reference is made in submissions filed on behalf of the plaintiff to meetings that preceded the correspondence in Exhibits A and B, and whether they were conducted on a without prejudice basis. The application itself is restricted to the status of Exhibits A and B, and has been dealt with on that basis.

[20] The defendant is entitled to costs, which are reserved for later determination.

Christina Inglis
Judge

Judgment signed at 10 am on 19 July 2013