**IN THE COURT OF APPEAL OF NEW ZEALAND**

**CA498/2013**
**[2014] NZCA 340**

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| BETWEEN | KENNETH LEE MORGAN<br>Appellant |
| AND | WHANGANUI COLLEGE BOARD OF TRUSTEES<br>Respondent |

Hearing: 10 July 2014

Court: Ellen France, Randerson and Harrison JJ

Counsel: D Burton and F Hill for Appellant
P B Churchman QC and L S Castle for Respondent

Judgment: 22 July 2014 at 2.00 pm

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**JUDGMENT OF THE COURT**

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**A The appeal is dismissed.**

**B The appellant must pay costs to the respondent for a standard appeal on a band A basis together with usual disbursements.**

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**REASONS OF THE COURT**

(Given by Harrison J)

## Introduction

[1] Kenneth Lee Morgan, who was employed as a senior teacher at Wanganui Collegiate School, was dismissed by the Whanganui College Board of Trustees for serious misconduct. He has brought a personal grievance proceeding against the Board under the Employment Relations Act 2000 (the Act). At an interlocutory

stage the Employment Relations Authority (the Authority) declined Mr Morgan's application to admit evidence of statements made in two conversations between legal representatives of the parties which took place on an agreed "without prejudice" basis.[1] The Chief Judge dismissed Mr Morgan's appeal to the Employment Court.[2]

[2] This Court granted Mr Morgan leave to appeal against the Employment Court's decision on the following question of law:[3]

> Was the Employment Court correct to determine that the relevant communications between the parties or their representatives were protected by privilege or otherwise inadmissible?

[3] In granting leave the Court identified three sub-questions as requiring consideration:

(1) Are the Employment Court decisions in this case and in *Bayliss Sharr v McDonald*[4] inconsistent as to the requirement and scope for a "dispute" – the common law justification for invoking the protection of a without prejudice communication?

(2) Is a more nuanced approach required in the employment law context where statements made in privileged communications may constitute evidence of constructive dismissal?

(3) Are any of the relevant communications capable in law of constituting an established exception to the protected status of privileged communications?

[4] Counsel advanced argument in the same sequence. We shall address the appeal accordingly. However, it is necessary first to say a little more about the relevant facts as recited in an agreed statement submitted by counsel in the Employment Court.

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1 The Authority made its determination in a Minute dated 29 January 2013; a failed challenge to the Employment Court confirms that Minute was a "determination" as is required: *Morgan v Whanganui College Board of Trustees* [2013] NZEmpC 55.

2 *Morgan v Whanganui College Board of Trustees* [2013] NZEmpC 117.

3 *Morgan v Whanganui College Board of Trustees* [2013] NZCA 587.

4 *Bayliss Sharr v McDonald* [2006] ERNZ 1058 (EmpC).

**Facts**

[5] The Board employed Mr Morgan as a teacher at Wanganui Collegiate from 1999 to April 2012.

[6] On 29 March 2012 while on duty in the school grounds Mr Morgan intervened in a physical dispute between two boys. In the course of separating the boys he placed one in a headlock. He promptly reported the incident to another teacher.

[7] On 5 April Mr Morgan and his then legal representative, Mr Robinson, met with the headmaster and deputy head to discuss the incident. He admitted that his action was wrong and might technically constitute serious misconduct. He apologised but said that dismissal was unnecessary.

[8] On 11 April the Board's lawyer, Mr Unsworth, spoke with Mr Robinson by telephone. At Mr Unsworth's request, they agreed their discussion would be without prejudice. While there is a measure of consensus about some of what was said, the participants differ in other material respects. In essence, Mr Morgan asserts that Mr Unsworth (1) reported that the headmaster and chairman of the Board had agreed Mr Morgan's action constituted serious misconduct which would justify dismissal; and (2) enquired whether Mr Morgan wanted to end his teaching career as a person dismissed for serious misconduct or would prefer to tender his resignation.

[9] Correspondence followed between the legal representatives, also on a without prejudice basis. On 12 April Mr Robinson advised Mr Unsworth that Mr Morgan did not intend to resign.

[10] On 18 April a formal disciplinary meeting was held. Mr Morgan accepted that his actions amounted to serious misconduct but on a technical basis only and at the low end of the scale. The meeting was adjourned for the Board to consider the issue further. Messrs Unsworth and Robinson then had a second without prejudice discussion which was inconclusive. An apparent obstacle to resolution was the Board's refusal to pay compensation to Mr Morgan. The Board concluded the disciplinary process and on 23 April dismissed Mr Morgan.

## Decision

*(a) Was there a dispute?*

[11] The rule protecting without prejudice communications from admission as evidence in Court proceedings is well settled. Its existence is justifiable on two complementary bases.[5] First, as a matter of public policy, the rule is designed to encourage parties to negotiate settlements of disputes (using that phrase in the broad sense), secure in the knowledge of two things – that whatever is said openly and honestly for that purpose will remain confidential; and that if those negotiations are unsuccessful any statements or offers made adverse to the maker cannot be considered in determining liability in later litigation. Second, as a matter of contract, the law should recognise the sanctity of the parties' agreement to communicate on a without prejudice basis with its underlying expectations of absolute confidentiality and protection.

[12] The law has allowed exceptions to this rule, again based largely on considerations of public policy, and we shall return briefly to them. But the guiding precept is that "the Court should be very slow to lift the umbrella [of protection] unless the case for doing so is absolutely plain".[6]

[13] In its original formulation the rule required as a precondition to its invocation: (1) the existence of a dispute or negotiations and (2) the offer of terms for settlement.[7] That prerequisite has since been compendiously described as a difference,[8] and its scope is much wider than it was historically.[9] The protection extends to negotiations where at the time of the communications "the parties contemplated or might reasonably have contemplated litigation if they could not agree".[10] That is because such a construction of the rule "fully serve[s] the public

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5 *Sheppard Industries Ltd v Specialized Bicycle Components Inc* [2011] NZCA 346, [2011] 3 NZLR 620 at [23]–[32], applying *Oceanbulk Shipping and Trading SA v TMT Asia Ltd* [2010] UKSC 44, [2011] 1 AC 662 at [19]–[29] and [41]; and *Brown v Rice* [2007] EWHC 625 (Ch) at [25].

6 *Ofulue v Bossert* [2009] UKHL 16, [2009] 1 AC 990 at [2].

7 *In re Daintrey, ex parte Holt* [1893] 2 QB 116.

8 *Rush Tompkins Ltd v Greater London Council* [1989] 1 AC 1280 (HL) at 1299D.

9 *Oceanbulk Shipping and Trading SA*, above n 5, at [27].

10 *Barnetson v Framlington Group Ltd* [2007] EWCA Civ 502, [2007] 1 WLR 2443 at [34]. We note this statement was made in the employment law context and so is of particular assistance in the present case.

policy interest underlying it of discouraging recourse to litigation and encouraging genuine attempts to settle whenever made".[11]

[14] In support of Mr Morgan's appeal, Mr Burton, as he had done apparently in the Employment Court, relied on Judge Couch's decision in *Bayliss Sharr*.[12] He cited the judgment for the proposition that the without prejudice rule cannot be invoked, at least in the employment law context, unless a dispute is in existence. To satisfy that requirement, there must be something capable of being litigated in the nature of a significant difference between the expressed views of the parties about an issue concerning them both.

[15] Here, Mr Burton submitted, when the legal representatives first communicated on a without prejudice basis, the Board had neither found serious misconduct nor imposed an appropriate penalty. Mr Morgan had no cause of action on which to litigate with the Board. He could not even threaten litigation. Thus there was no dispute. To the contrary, Mr Morgan had in fact accepted that his action amounted to serious misconduct. There was no basis for invoking the rule.

[16] In rejecting this argument, the Chief Judge held:[13]

> [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. [Mr Morgan] 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 [off] 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.

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11 *Barnetson*, above n 10, at [34].
12 *Bayliss Sharr*, a*bove* n 4.
13 *Morgan v Whanganui College Board of Trustees*, above n 2.

[17] We agree with the Chief Judge. The word "dispute" is not a term of art; its use was not meant to be exclusive.[14] And, as noted, "negotiations" or the broader term "difference" will suffice. None of these phrases warrant a narrow construction where something has arisen between the parties which must be resolved and they have expressly agreed their communications should be protected for that purpose.

[18] In our view the common law protection must include a situation where, as the Chief Judge found, there is a serious problem in the employment relationship – that is, a problem relating to or arising out of the employment relationship.[15] To that we would add the requirement that the problem is one that could give rise to litigation, the result of which might be affected by an admission made during negotiations.[16]

[19] Whether the parties are in dispute or a state of negotiations is a fact-specific question. Once Mr Morgan admitted assaulting a student, the Board was bound to take disciplinary action. Significantly, Mr Morgan was accompanied by his legal representative when on 5 April 2012 he met with the headmaster and deputy head to discuss the incident. By then he must have appreciated both the seriousness of the incident and the possibility that the Board's decision about it might adversely affect his legal position.[17] Axiomatically there was an employment relationship problem which required prompt resolution: should Mr Morgan be dismissed, or subject to some lesser sanction such as censure with a written warning? In other words, and as Mr Burton accepted before us, by the time of the first discussion the parties were not in agreement about what consequences should follow Mr Morgan's admission of wrongdoing.

[20] The question then is whether, if it was not resolved, the problem could give rise to litigation where the result might be affected by something said by the legal representatives when they first communicated without prejudice. In conceptual terms, the disciplinary process required two steps. At the first step, a finding of

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14 *In re Daintrey, ex parte Holt*, above n 7, at 119.

15 Employment Relations Act 2000, s 5 "employment relationship problem".

16 *The Prudential Assurance Co Ltd v Prudential Insurance Co of America* [2002] EWHC 2809 (Ch) at [20].

17 While each case depends on all the circumstances, violence in the workplace has often been held to be serious misconduct justifying dismissal: see Andrew Gray (ed) *Mazengarb's Employment Law* (looseleaf ed, LexisNexis) at [ERA103.35] and the authorities cited therein.

serious misconduct would be a formality given Mr Morgan's admission. The second potentially contentious step of determining the penalty remained for decision or settlement. If Mr Morgan was dismissed, a personal grievance claim against the Board was a real possibility, as this proceeding confirms. Both discussions took place in that context and are protected, as the parties expressly agreed, by the privilege attaching to without prejudice communications.

[21] It is unnecessary for us to determine whether Judge Couch was correct in *Bayliss Sharr* that the employee had been constructively dismissed. However, we disapprove of two elements of his reasoning. First, with respect, the Judge was wrong to find that the without prejudice protection does not attach unless there is a significant difference between the expressed views of the parties about a matter concerning them both, and does not apply to correspondence created to prevent a dispute arising rather than to compromise an existing dispute. That approach is unduly restrictive and contrary to the authorities. As we have found, the protection attaches to without prejudice communications if there exists a serious employment relationship problem that could give rise to litigation, the result of which might be affected by an admission made during negotiations.

[22] Second, Judge Couch was wrong in holding that:[18]

> there remains a residual jurisdiction to consider evidence of "without prejudice" communications where the effect of excluding will be more prejudicial than admitting it.

[23] In relying on this principle, the Judge was apparently following an earlier decision of the Chief Judge.[19] However, the law has never recognised a residual discretion of this nature to admit without prejudice communications. Mr Churchman QC pointed out that the Authority had a statutory discretion to take into account such evidence and information as in equity and good conscience it thinks fit, whether strictly legal evidence or not.[20] In ruling that the communications were inadmissible, the Authority was exercising that statutory discretion.

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18 *Bayliss Sharr*, above n 4, at [49].

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

20 Employment Relations Act, s 160(2).

[24] However, as the Chief Judge correctly noted, the Authority must be guided by settled principles of common law and relevant provisions of the Evidence Act 2006, even though it does not govern proceedings in the Authority.[21] Section 57(1) of the Evidence Act supports the Chief Judge's conclusion. It materially 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
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> (b) was made in connection with an attempt to settle or mediate the dispute between the persons.

[25] Mr Burton submitted that special considerations apply in the employment law context. In his submission the protection attaching to a without prejudice communication could not apply unless and until the parties had undergone the natural justice process of a formal hearing and the employer's finding of serious misconduct. Only then would it be permissible to start confidential negotiations. Otherwise the Courts would sanction unlawful conduct which circumvented the machinery of the Act and widened the gap of inequality inherent in the employment relationship.

[26] We disagree. One of the objects of Part 9 of the Act, which deals with personal grievances, disputes and enforcement, provides at s 101(ab) that employment relationship problems are more likely to be resolved quickly and successfully if they are first raised and discussed directly between the parties. To similar effect, as Mr Churchman emphasised, one of the objects of Part 10, which provides for the dispute resolution mechanisms under the Act, is to:[22]

> recognise that employment relationships are more likely to be successful if problems in those relationships are resolved promptly by the parties themselves …

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21 *Morgan v Whanganui College Board of Trustees*, above n 2, at [81].

22 Employment Relations Act, s 143(b).

[27] Early settlement of disputes is as important in the employment field as elsewhere regardless of special provisions governing settlement of statutory claims.[23] The objective of reducing the need for judicial intervention is made explicit by s 3(a)(vi) of the Act. With the benefit of extensive and informed experience in the field, the Chief Judge confirmed that without prejudice discussions are "a longstanding, important and frequent feature of attempting to resolve employment relationship disputes".[24] Moreover, as he noted in the same passage, it is distinctly in the broader public interest that such practices should continue, with the parties safe in the knowledge that what they say is protected from admission before the Authority or the Employment Court.

[28] Moreover, Mr Morgan would stand at real risk of suffering a serious disadvantage on adoption of Mr Burton's approach. That is because the Board was required to report to the Teachers Council its reason to believe that a teacher has engaged in serious misconduct.[25] By then, the damage to Mr Morgan would have been done. On Mr Burton's argument, the Board would have been precluded from pre-empting this result by finding a settlement directly with Mr Morgan.

[29] In argument Mr Burton adopted an alternative and modified position. He submitted the parties could not embark on without prejudice negotiations without first invoking the mediation procedures available under the Act.[26] However, this submission faces the same statutory obstacle – the parties are encouraged to solve a problem promptly between themselves, that is, without the assistance of a mediator. And, as Mr Churchman submitted, the Act provides mediation as the "primary problem-solving mechanism", not the only one.[27]

[30] In conformity with this clearly expressed object, the Act does not require submission to mediation before a personal grievance claim is made. Additionally

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23 *Barnetson*, above n 10, at [34].

24 At [47].

25 Arguably that obligation arose even before the first without prejudice discussion: see the Education Act 1989, s 138AM, and the New Zealand Teachers Council (Making Reports and Complaints Rules) 2004, rr 9 and 15.

26 Employment Relations Act, ss 144–155.

27 Employment Relations Act, s 3(a)(v). The learned authors of *Laws of New Zealand* Employment (online ed) at [55] point out that mediation is the "next step", to be undertaken only "[o]nce any informal or internal processes for resolution have been exhausted". Such processes must include voluntary without prejudice discussions.

mediation would have had no practical effect. There is nothing to suggest that in this case the parties would at mediation have taken different positions from those adopted in negotiations between themselves. Also, whatever they might have said in mediation would be subject to strict confidentiality rules.[28]

[31] We add that the decisions of the Authority and Employment Court in this case are a justified recognition of the parties' agreement to discuss their differences without prejudice. There is no evidence that Mr Robinson acted without Mr Morgan's authority in reaching an agreement with Mr Unsworth. It is irrelevant that the agreement was initiated by the Board. Mr Morgan was a willing participant. What was said was in the agreed expectation of absolute confidentiality. In these circumstances each party should be held to its agreement.

*(b) Constructive dismissal*

[32] As noted, the law allows exceptions to the without prejudice rule. One is that unlawful conduct can never attract protection.[29] Mr Burton submitted that statements tantamount to constructive dismissal fall into that category.

[33] It is unnecessary for us to determine that point on the facts of this particular case. As Mr Churchman emphasised, no question of constructive dismissal arises here. Mr Morgan rejected the Board's offer. He declined to avoid the disciplinary process by resigning. In any event, as the Chief Judge found, even on the construction of the disputed facts most favourable to Mr Morgan, he would have had no basis for claiming constructive dismissal.[30] He was not dismissed constructively but expressly.

[34] Furthermore, Mr Burton confirmed that Mr Morgan did not seek to have evidence of the two discussions admitted for the purpose of proving constructive dismissal. Instead, he sought its admission to support an argument of predetermination. On that basis it is difficult to understand why Mr Morgan has pursued this challenge and lost the best part of two years in advancing his personal

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28 Employment Relations Act, s 148.
29 *Bradbury v Westpac Banking Corporation* [2009] NZCA 234, [2009] 3 NZLR 400 at [83].
30 *Morgan v Whanganui College Board of Trustees*, above n 2, at [72] and [78].

grievance claim. Even on Mr Robinson's account of the first discussion, Mr Unsworth's statements were equivocal.

*(c) Exception to protection*

[35] Mr Burton identified what he submitted were two related elements of the Board's unlawful conduct – one was the making of threats and the other was the existence, to the civil standard, of blackmail. Both, he said, constitute an abuse of a privileged occasion and lose the common law protection.[31] In particular, Mr Burton submitted, the Board through Mr Unsworth made threats of serious and adverse consequences if Mr Morgan refused to resign, satisfying the criminal test of blackmail to the civil standard.

[36] Again we can deal with this submission shortly. There was no threat: as noted, the Board was bound to report a finding of serious misconduct to the Teachers Council. And there is nothing in the agreed statement of facts that might possibly support a finding of blackmail. The extremity of this allegation did not assist Mr Morgan's appeal. In our judgment a more obvious inference is available from the agreed statement of facts: it is that the Board was attempting in good faith to assist Mr Morgan by offering to accept his resignation, thereby obviating the statutory consequences which would flow from a finding of serious misconduct justifying dismissal.

**Result**

[37] The appeal is dismissed.

[38] In the absence of a good reason why costs should lie where they fall, costs are to follow the event. Mr Morgan must pay costs to the Board for a standard appeal on a band A basis together with usual disbursements.

Solicitors:
Cullen – The Employment Law Firm, Wellington for Appellant
Horsley Christie, Whanganui for Respondent

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[31] *Unilever Plc v The Proctor & Gamble Co* [2000] 1 WLR 2436 (CA) at 2444F–G.