IN THE EMPLOYMENT COURT OF NEW ZEALAND
AUCKLAND

I TE KŌTI TAKE MAHI O AOTEAROA
TĀMAKI MAKAURAU

[2019] NZEmpC 89
EMPC 5/2019

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
AND IN THE MATTER OF	an application to strike out
BETWEEN	GARY MARTINSEN Plaintiff
AND	TARGET INTERNATIONAL (NZ) LIMITED Defendant

Hearing: On the papers

Appearances: D Purusram and T Pillay, counsel for plaintiff
B Edwards and M Lister, counsel for defendant

Judgment: 31 July 2019

INTERLOCUTORY JUDGMENT OF JUDGE J C HOLDEN
Application to strike out

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[1] The plaintiff, Mr Martinsen, has challenged a determination of the Employment Relations Authority that found that Mr Martinsen's dismissal by the defendant, Target International (NZ) Ltd (Target), was justified.[1]

[2] In his statement of claim, Mr Martinsen refers to a telephone discussion between him and Mr Bielby, the Managing Director of Target, on Friday 14 July 2017. The conversation Mr Martinsen refers to in his statement of claim included a proposal

[1] *Martinsen v Target International (NZ) Ltd* [2018] NZERA Auckland 395.

by Mr Bielby that Mr Martinsen resign from Target on terms that would be included in a full and final settlement agreement.

[3] Target has applied to strike out that paragraph of the statement of claim because Target says it describes a without prejudice conversation, which is privileged and therefore not admissible in Court proceedings. This judgment resolves that application.

[4] Mr Martinsen opposes the application to strike out, saying that the conversation was not without prejudice but was part of Target's disciplinary process. He wishes to rely on the conversation in support of his claim that his dismissal was unjustifiable. Nevertheless, Mr Martinsen accepts that Mr Bielby called him with a settlement offer on 14 July 2017.

The conversation occurred after a preliminary decision had been made

[5] It is common ground that Target's disciplinary process commenced in late June 2017 and that Mr Martinsen was suspended.

[6] Target investigated allegations made about Mr Martinsen's conduct and, on 6 July 2017, it provided Mr Martinsen with a letter that set out its preliminary findings. Then, on 12 July 2017, Target advised Mr Martinsen's lawyer of its preliminary decision, which was to terminate Mr Martinsen's employment without notice.

[7] It was following that communication that Mr Bielby called Mr Martinsen to relay his settlement proposal. Mr Bielby says that, prior to having the discussion, he had asked Mr Martinsen whether he would be willing to have an off-the-record and without prejudice discussion, and that Mr Martinsen agreed to do so. Mr Martinsen says he agreed to Mr Bielby calling him but disputes that there was any agreement that the discussion would be without prejudice.

[8] Mr Martinsen says that when Mr Bielby made the settlement proposal he said, if Mr Martinsen did not accept the proposal, he would be dismissed. Mr Martinsen also says that Mr Bielby pressured him to make an immediate decision because

Mr Bielby was on leave on Monday and wanted the matter sorted out before he went on holiday.

[9] Mr Martinsen did not accept the proposal put forward by Mr Bielby within the timeframe identified by Mr Bielby (Mr Bielby says it was rejected outright; Mr Martinsen says he wanted to discuss the proposal with his lawyer). He was dismissed on 17 July 2017.

Without prejudice communications are made to settle disputes

[10] For a communication to be without prejudice, there must be a dispute or difference between the parties and the communication must include an offer of terms for settlement.[2] In the employment context, a "dispute or difference" includes a situation where there is a serious problem in the employment relationship that could give rise to litigation.[3] No particular form of words is necessary for a communication to be recognised as without prejudice, if the intention of the offeror is clear.[4]

[11] Sometimes the parties will agree at the outset of a conversation that it is to be on a without prejudice or "off the record" basis, but a party to a dispute also may unilaterally make an offer of settlement on a "without prejudice" basis.[5]

Target's offer was without prejudice

[12] Here there is a dispute between the parties as to whether there was express agreement that the conversation on 14 July 2017 was without prejudice, but I do not need to determine that issue. The context is clear. Target had made a preliminary decision to dismiss Mr Martinsen; there were serious problems in the employment relationship and litigation was reasonably in prospect; the purpose of Mr Bielby's call was to convey an offer to resolve matters by way of a settlement agreement, which he did; the offer was not accepted, and Target completed its formal process.

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2 *Morgan v Whanganui College Board of Trustees* [2014] NZCA 340, [2014] 3 NZLR 713, [2014] ERNZ 80 at [13].
3 At [16]-[18].
4 *D F Hammond Land Holdings Ltd v Elders Pastoral Ltd* (1989) 2 PRNZ 232 (CA) at 9.
5 See, for example, *Hallwright v Forsyth Barr Ltd* [2013] NZEmpC 134.

[13] The offer made by Mr Bielby was without prejudice.

Evidence of the offer would not be admitted

[14] The starting point in considering whether the without prejudice offer would be admitted in the Employment Court is s 189 of the Employment Relations Act 2000.[6] Pursuant to that provision, the Court may accept and admit such evidence or information as in equity and good conscience it thinks fit. This requires a broader enquiry than might be required in other courts by the Evidence Act 2006, although the settled principles of the common law and of that Act provide some guidance.

[15] Without prejudice communications are privileged under both the common law and s 57 of the Evidence Act. This privilege recognises that parties are to be encouraged to negotiate settlements of disputes, secure in the knowledge that whatever is said openly and honestly for that purpose will remain confidential.[7]

[16] The protection against disclosure of without prejudice communications is at least as important in the context of employment relationships as in other areas. The Employment Relations Act emphasises the importance of parties endeavouring to resolve employment relationship problems quickly and directly between them.[8] The objective of reducing the need for judicial intervention is made explicit by s 3(a)(vi) of that Act. Without prejudice discussions are a longstanding, important and frequent feature of attempting to resolve employment relationship problems, and 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 Employment Relations Authority or the Employment Court.[9]

[17] There are no compelling countervailing reasons for the without prejudice offer made by Mr Bielby to Mr Martinsen to be before the Court. Evidence about it would not be admitted. It follows that it cannot be referred to in the pleadings.

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6 *Lyttelton Port Co Ltd v Pender* [2019] NZEmpC 86 at [49]-[53].
7 *Morgan v Whanganui College Board of Trustees*, above n 2, at [11].
8 Employment Relations Act 2000, ss 101(ab), 143(b).
9 *Morgan v Whanganui College Board of Trustees*, above n 2, at [27].

[18] Accordingly, paragraph 32 of the statement of claim is struck out. An amended statement of claim omitting that paragraph is to be filed and served by Mr Martinsen within 10 working days of this judgment. Target may wish to file and serve a statement of defence to the amended statement of claim, but that is not required.

[19] Costs are reserved.

J C Holden
Judge

Judgment signed at 4 pm on 31 July 2019