

**IN THE EMPLOYMENT COURT OF NEW ZEALAND
AUCKLAND**

**I TE KŌTI TAKE MAHI O AOTEAROA
TĀMAKI MAKĀURAU**

**[2020] NZEmpC 30
EMPC 68/2018**

IN THE MATTER OF	an application for judicial review
AND IN THE MATTER OF	an application for admissibility of evidence
BETWEEN	ROLAND SAMUELS Applicant
AND	EMPLOYMENT RELATIONS AUTHORITY First Respondent
AND	CAROLYN LANG Second Respondent
AND	GOURMET FOODS LIMITED Third Respondent

Hearing: On the papers

Appearances: Applicant in person
Appearance for respondents excused
J Catran, counsel assisting the Court

Judgment: 13 March 2020

**INTERLOCUTORY JUDGMENT (NO 4)
OF CHIEF JUDGE CHRISTINA INGLIS
(Application for admissibility of evidence)**

[1] This judicial review application has had a lengthy history. Mr Samuels is now representing himself, having previously been represented by another advocate. The proceeding was originally set down for hearing on 12 November 2019 but was adjourned on Mr Samuels' application. An issue has now arisen in relation to admissibility. The issue arises in the context of an affidavit dated 15 October 2019,

which Mr Samuels attempted to file but which was rejected on the basis that leave was required.

[2] Ms Catran, counsel appointed to assist the Court, does not object to leave being granted but does take issue with two things. The first objection is directed at three proposed annexures to the affidavit, which she asks the Court to rule inadmissible. The essential basis on which objection is taken is that the documentation relates to without prejudice communications. The second objection is directed at an audio recording obtained in the course of another investigation meeting conducted by the same Authority Member, which Ms Catran says is irrelevant. Concerns are also raised as to whether it was obtained improperly.

[3] I record that Ms Catran has raised a number of other issues in relation to Mr Samuels' affidavit, including the extent to which it contains submissions rather than evidence, and irrelevancies. While affidavits should not contain such material, I agree that in the present case it may be more efficient to leave these issues to be worked through, as necessary, at the hearing.

Approach to the admission and acceptance of evidence in the Employment Court and in this case

[4] As s 189 of the Employment Relations Act 2000 makes clear, this Court is not bound by the strict rules of evidence applying in some other courts. Rather, the Employment Court may: "accept, admit, and call for such evidence and information as in equity and good conscience it sees fit." As observed in *Lyttelton Port Co Ltd v Pender*.¹

[52] ... The references to "evidence" and "information", and the power to not only admit evidence and information but "accept" and "call for" it, indicate a clear Parliamentary intention that the Employment Court be empowered to undertake a much fuller inquiry than would be possible under strict rules of evidence. It follows that it is not enough that the Court be satisfied that a brief of evidence contains a hearsay statement and that none of the exceptions in the Evidence Act applies.

[53] To put it another way, consideration of whether or not evidence and/or information should be "admitted", "accepted" or "called for" in this Court will be informed by a broader inquiry than simply whether the proposed evidence

¹ *Lyttelton Port Co Ltd v Pender* [2019] NZEmpC 86 (footnotes omitted).

and/or information would be admissible in the High Court, although the principles expressed in the Evidence Act, including those in s 6, may assist in the assessment process. The starting point is, however, the Court's broad discretion in s 189, and it is the twin principles of equity and good conscience which must be looked to for the guiding light in exercising the Court's discretion under that provision.

[5] In order to deal with the objections which have been raised, it is necessary to say a little more about the proceedings and what they relate to. Mr Samuels is an advocate. He represented a client in a matter before the Employment Relations Authority and did so on a contingency basis. The Authority Member awarded costs in Mr Samuels' client's favour, and made the following observations in the determination:²

[43] The investigation meeting took less than half a day. The reasonableness of the costs incurred must be proportionate to Ms Lang's success. The usual practice of the Authority is to order a contribution to costs on a daily [tariff] basis. In this case that [tariff] would amount to \$2,250.

[44] The tariff has been set to recognise that a variety of representatives appear in the Authority including qualified, registered professionals who are required to adhere to a professional code of conduct and unregulated advocates who have no such obligations. Ms Lang's representative is an unregulated advocate and as such does not have the expenses and [obligations] of his qualified and registered counterparts.

[45] Taking all of the circumstances into account I consider a reasonable contribution to Ms Lang's costs is \$1,000.

[6] Mr Samuels took issue with the way in which the Authority Member approached the costs-setting exercise and filed an application for judicial review. The scope of the pleadings was an issue which came before the Court at a relatively early stage.³ A strike-out judgment was later issued on a consent basis.⁴ For present purposes, the matters now at issue can be summarised as: whether the Authority had jurisdiction to request the contingency fee contract, and have regard to it, in determining costs; whether Mr Samuels had a right to natural justice on the question of costs payable to his client; and, if he had a right to natural justice, what the content of that right was and whether it was breached by the Authority in determining costs.

² *Lang v Gourmet Foods Ltd* [2018] NZERA Auckland 37 (Member Campbell).

³ See *Samuels v Employment Relations Authority* [2018] NZEmpC 138, (2018) 10 NZELC 79-097.

⁴ *Samuels v Employment Relations Authority* [2019] NZEmpC 55.

[7] The three documents annexed to Mr Samuels' intended affidavit which Ms Catran submits ought to be ruled inadmissible are: an email dated 21 July 2017 headed "Without Prejudice save as to costs"; an attachment to that document which is an offer of settlement (also dated 21 July 2017); and a letter of 7 January 2019. The settlement offer attached to the 21 July email was made in the case underlying these proceedings. The 7 January letter was addressed to Mr Samuels but related to another matter. The letter contained an offer to settle and is headed "... Personal Grievance Without Prejudice Saves as to Costs."

[8] As I understand the argument, Mr Samuels says that the offer documentation is privileged, except as to costs; the matter now before the Court relates to costs and so the privilege does not bite. He also says that if the three documents are privileged, the interests of justice weigh in favour of their admission into evidence. In addition, Mr Samuels wishes to refer to the 7 January letter to show that the Authority Member's approach to costs has had a detrimental impact on him personally and on his business as it has been picked up by other representatives.

[9] The three documents are clearly privileged. As Judge Holden recently explained:⁵

[15] 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.

[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. 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.

[10] There are cases where the Court may admit or accept privileged material. This is not one of them. While I accept that the documents broadly relate to costs, I do not

⁵ *Martinsen v Target International (NZ) Ltd* [2019] NZEmpC 89 (footnotes omitted).

accept that they are of material relevance to the matters at issue in this proceeding, which relate to the way in which the Authority Member approached the allocation of costs between the parties (rather than the way in which the parties themselves communicated on possible resolution). The 7 July letter relates to a different proceeding altogether. It is not relevant to an assessment of whether the Authority was in breach of any natural justice requirements in the case before the Court. I am unable to discern any compelling countervailing reasons for the without prejudice offers to be before the Court. The documentation should not be annexed to the affidavit.

[11] The second issue relates to the admissibility of a covert recording which was made by Mr Samuels during the course of an Employment Relations Authority investigation meeting. The meeting related to a matter other than the one presently before the Court. Mr Samuels says it is relevant because it reflects the way in which the Authority Member has approached issues such as costs in the past and supports his argument that he has suffered reputational damage as a result of the Authority's determination in this case. Mr Samuels also says that the probative value of recordings, even where they might have been improperly obtained, may nevertheless lead to them being admitted in evidence.

[12] I fail to see how the recording is relevant to the matters at issue in the judicial review proceedings. The recording is not to be admitted in evidence.

Conclusion

[13] Mr Samuels is granted leave to re-file his affidavit of 15 October 2019, but it must be in an amended form. It must not annex the three documents referred to in this judgment and nor may it refer to the audio recording. Mr Samuels must re-file the affidavit no later than 10 working days from today's date.

[14] Costs are reserved.

Christina Inglis
Chief Judge

Judgment signed at 9 am on 13 March 2020