IN THE EMPLOYMENT COURT OF NEW ZEALAND
AUCKLAND

I TE KŌTI TAKE MAHI O AOTEAROA
TĀMAKI MAKAURAU

[2021] NZEmpC 6
EMPC 261/2020

IN THE MATTER OF	an application for special leave to remove a proceeding to the Employment Court
AND IN THE MATTER OF	an application for orders in respect of privileged communications
BETWEEN	MELISSA BOWEN Applicant
AND	BANK OF NEW ZEALAND Respondent

Hearing: On the papers

Appearances: M O'Brien, counsel for applicant
P Muir and RM Rendle, counsel for defendant

Judgment: 4 February 2021

INTERLOCUTORY JUDGMENT OF JUDGE KATHRYN BECK
(Application for orders in respect of privileged communications)

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[1] The respondent, Bank of New Zealand (BNZ), has applied for orders in respect of what it says are privileged communications referred to by the applicant, Melissa Bowen, in her affidavit dated 31 August 2020 and filed in support of an application for special leave to remove a proceeding from the Employment Relations Authority.

[2] The grounds for the application are set out in a memorandum of counsel for BNZ dated 14 September 2020.

[3] Following BNZ's applications for orders, Ms Bowen filed an amended affidavit dated 25 September 2020 in which the references to the relevant

communications were removed from the amended affidavit. In accordance with the memorandum of counsel for BNZ dated 29 September 2020, it no longer seeks an order that these communications be removed from Ms Bowen's affidavit.

[4] Ms Bowen says that there is no longer a live issue before the Court and that no further orders are required or appropriate.

[5] BNZ says that issues still remain before the Court as to whether it has a claim to privilege over the communications set out in para 26 of Ms Bowen's affidavit sworn on 31 August 2020 and if so, whether such privilege was waived. It also seeks an order that the recording of the communications be destroyed.

Background

[6] In 2017 Ms Bowen brought claims in the Employment Relations Authority (the Authority) that she was unjustifiably dismissed and unjustifiably disadvantaged by BNZ during her employment with it. Her claims are denied by BNZ.

[7] On 11 September 2017 Ms Bowen and BNZ took part in a case management conference call organised by the Authority. Present on behalf of BNZ were its Employee Relations Manager (the manager), and its lawyer. They attended the call together in the lawyer's offices. Ms Bowen was with her representative and the other applicant. They attended the call together at her representative's home.

[8] At the conclusion of the case management conference, the Authority Member stated, "That's all that I need" and asked both parties if they were "happy". He went on to say "Thanks very much, bye now" and BNZ's lawyer responded, "Ok great thank you, bye". At that point, both the lawyer and the manager were under the impression that the call had ended.

[9] Unaware of the fact that the line remained open and that Ms Bowen was still on the line and could hear them, the manager and the lawyer proceeded to converse. It is now apparent that Ms Bowen had been recording the conference call, although she had not advised anyone of this at the time. She continued to record the lawyer and

the manager's discussion. The discussion touched on advice given by the manager to colleagues during the early stages of the employment relationship problem.

[10] It appears that BNZ remained in the dark as to the existence of this recording or that Ms Bowen had listened to the discussion between its manager and its lawyer until after Ms Bowen filed her affidavit on 31 August 2020 in support of her application for removal. BNZ asserts that the conversation was intended to be confidential and was conducted for the purpose of BNZ obtaining legal advice from its lawyer. As a result, BNZ claims that the conversation is protected by legal privilege and that it has not taken any steps to waive this privilege.

Is the issue now moot?

[11] Ms Bowen's primary response to the claim of privilege is that, because the references to the alleged privileged communication have been removed in her amended affidavit, there is no live issue before the Court. She cites a number of authorities which hold that it would not be proper for a court to decide a moot or academic question without there being some actual controversy between the parties.[1]

[12] Ms Bowen argues that issues of privilege and waiver should be decided only if and when those issues arise, depending on what evidence is subsequently filed. It submits that it would be inappropriate for the Court to determine the waiver issue without all of the relevant evidence before it.

[13] BNZ argues that the authorities relied on are distinguishable given that, in those cases, the parties were no longer in dispute over the issues. It points out that there is still obvious disagreement between the parties on the issue of privilege and that Ms Bowen is effectively reserving the right to put the communication at issue at any point depending on what evidence is filed. BNZ is concerned that Ms Bowen will refer to these communications at a later point in the proceedings and asserts that she has

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1 *Hutchinson v A* [2015] NZCA 214, [2015] NZAR 1273 at [11]; *Ventec Corporation v Auckland and Tomoana Freezing Works IOUW* [1989] 3 NZILR 274 (CA) at 275; *Maddever v Umawera School Board of Trustees* [1993] 2 NZLR 478 at 502.

signalled her intention to do so. Further, despite Ms Bowen filing an amended affidavit, the original affidavit remains on file and has not been disposed of.

[14] I am satisfied that there is a live and justiciable issue to be decided. There is no authority for the claim that all of the evidence must be before the Court in order to determine the issues of privilege and waiver. The Court regularly assesses and makes decisions on preliminary issues in order to prevent them from disrupting proceedings. There is a clear disagreement between the parties on the issue and a strong possibility of the communication being raised in evidence. Also, as BNZ points out, the affidavit of 31 August 2020 remains on the Court file.

Lawyer-client privilege

[15] As a preliminary point, it should be noted that, while it is well-accepted that communications between a legal adviser and their client are generally protected by privilege and that this privilege is enshrined in the Evidence Act 2006, the starting point in this Court is s189(2) of the Employment Relations Act 2000. The Court has an equity and good conscience jurisdiction with regards to the admission of evidence, whether it is strictly legal evidence or not. However, the Evidence Act is an important point of reference in the Court's exercise of this jurisdiction when the admissibility of evidence is challenged and will guide the exercise of the equity and good conscience test.[2]

[16] Section 54(1) of the Evidence Act states:

> **Privilege for communications with legal advisers**
>
> (1) A person who requests or obtains professional legal services from a legal adviser has a privilege in respect of any communication between the person and the legal adviser if the communication was—
>
> (a) intended to be confidential; and
>
> (b) made in the course of and for the purpose of—
>
> (i) the person requesting or obtaining professional legal services from the legal adviser; or
>
> (ii) the legal adviser giving such services to the person.
>
> (1A) The privilege applies to a person who requests professional legal services from a legal adviser whether or not the person actually obtains such services.

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[2] *Maritime Union of New Zealand Inc v TLNZ Ltd* [2007] ERNZ 593 (EmpC) at [14].

[17] Similarly, s 56 sets out that communication between a legal adviser and any other person, for the dominant purpose of preparing for a proceeding, is subject to privilege.

[18] BNZ claims that the conversation overheard by Ms Bowen is protected by one or both of these privileges.

[19] Counsel for Ms Bowen argues that the communication is not the subject of privilege. He says that the conversation in question did not constitute the requesting or obtaining of legal services and was not for the dominant purpose of preparing for legal proceedings. At most, he says the conversation could be viewed as background information irrelevant to legal advice that BNZ's lawyer could provide on the substantive dispute. He characterises the conversation as "more akin to gossip".

[20] I do not accept this characterisation. Given the advanced nature of the employment relationship problem and the fact that the conversation took place immediately after a case management conference, I do not accept that the discussion can be reduced to "gossip". The lawyer was present on the call as BNZ's legal adviser and the subsequent discussion touches on BNZ's continuing employment obligations, the advice given by the manager and how it was received by those she advised. These topics are not ancillary to the obtaining or giving of legal services in the circumstances. They are inherently connected to the lawyer's provision of legal services in the ongoing proceedings. I accept that it is more likely than not that the dominant purpose of this discussion was to prepare for the ongoing proceedings.

[21] Section 54(1)(a) requires that, for privilege to apply, there had to be an intention that the communication be confidential. I have no difficulty finding that this was the case. BNZ's lawyer and its manager were clearly under the misapprehension that the call was disconnected. They would not have engaged in such a discussion otherwise. Ms Bowen herself noted that they were "obviously unaware that I was still on the line"

[22] In response, Mr O'Brien argues that the failure to take due precautions to ensure they were not being overheard was reckless to the extent that the cloak of confidentiality did not exist, and privilege could not apply. No authority is cited for this position. While it could be argued that, if a conversation was held in a context where there could be no reasonable apprehension of confidentiality, it may not attract privilege, that is not the case here. The mistaken belief that the call had ended was an unfortunate error. However, the conversation was conducted in the offices of a legal adviser in the belief that it was a private conversation between a lawyer and client in the immediate aftermath of a teleconference in relation to legal proceedings. Both the lawyer (who is no longer acting in this proceeding) and the manager give evidence of this in their respective affidavits. I find that a clear expectation of confidentiality existed.

[23] Even if Ms Bowen is correct and confidentiality was not present, which I do not accept, I am satisfied that the dominant purpose of the communication was preparation for the ongoing proceedings. Notably, s 56 contains no requirement that confidentiality be intended.

Waiver

[24] Section 65 of the Evidence Act sets out the circumstances in which privilege, including privilege held under ss 54 and 56, may be waived:

> **65 Waiver**
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> (1) A person who has a privilege conferred by any of sections 54 to 60 and 64 may waive that privilege either expressly or impliedly.
>
> (2) A person who has a privilege waives the privilege if that person, or anyone with the authority of that person, voluntarily produces or discloses, or consents to the production or disclosure of, any significant part of the privileged communication, information, opinion, or document in circumstances that are inconsistent with a claim of confidentiality.
>
> (3) A person who has a privilege waives the privilege if the person—
>
> (a) acts so as to put the privileged communication, information, opinion, or document in issue in a proceeding; or
>
> (b) institutes a civil proceeding against a person who is in possession of the privileged communication, information, opinion, or document the effect of which is to put the privileged matter in issue in the proceeding.

> (4) A person who has a privilege in respect of a communication, information, opinion, or document that has been disclosed to another person does not waive the privilege if the disclosure occurred involuntarily or mistakenly or otherwise without the consent of the person who has the privilege.
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> (5) A privilege conferred by section 57 (which relates to settlement negotiations or mediation) may be waived only by all the persons who have that privilege.

[25] BNZ states that no such waiver occurred.

[26] Mr O'Brien submits that waiver has occurred in two ways: by the disclosure in circumstances inconsistent with a claim of confidentiality, and through BNZ putting the disputed communication at issue.

[27] In relation to the first alleged waiver of privilege, Ms Bowen again calls into question the recklessness of the conversation. It is submitted that BNZ's representatives should have known (or ought to have known) that the call would remain open until they hung up the phone. By acting as they did, she submits that they have acted in a manner inconsistent with a claim of privilege.

[28] This argument faces difficulty in light of s 65(4) which clearly states that there is no waiver of privilege if the disclosure occurs involuntarily, mistakenly or without the holder's consent. An involuntary disclosure has been defined as when the act is other than a conscious act of will.[3] Examples given of involuntary disclosure include situations such as privileged documents falling from a briefcase, being inadvertently disclosed along with a non-privileged document, or where computer hardware had been sold without privileged material being permanently deleted.[4]

[29] All of these scenarios involve an error or oversight that could potentially be described as careless or reckless. However, all were found to constitute an involuntary disclosure. Section 65(4) recognises that human error occurs and provides a safeguard. Despite Ms Bowen's allegations of recklessness and disregard, it is clear that there was a mistaken belief on the part of BNZ's representatives that the call had ended and, as a result, the disclosure was involuntary. I do not agree that there was a

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3 *Body Corporate 191561 v Argent House Ltd* (2008) 19 PRNZ 500 (HC) at [38].

4 At [38]; *Rollex Group (2010) Ltd v Chaffers Group Ltd* [2012] NZHC 1332, NZAR 746 at [64].

level of disregard shown by the representatives that went beyond human error. I find that the disclosure was involuntary or mistaken and privilege was not waived.

[30] Ms Bowen also argues that BNZ has put the disputed communication at issue and, in doing so, waived privilege. The High Court considered this form of waiver in *AstraZeneca Ltd v Commerce Commission*:[5]

> Waiver occurs where a party both asserts reliance upon the privileged communication and also seeks to inject the substance of the communication in evidence. At that point an abuse of the privilege exists. The claimant cannot have the benefit of reliance upon the substance of the advice and still seek to shield that advice from disclosure to the other side. To permit this would give rise to unfairness in the required sense, in that the party's conduct would be offensive to the trial process.

[31] This Court has followed *AstraZeneca* on a number of occasions.[6] *McCullagh v Robert Jones Holdings Ltd* states that the typical example of a waiver under s 65(3)(a) would be where a party justifies their actions by saying they had followed legal advice they had received; at that point, they have put the legal advice at issue and waived privilege over it.

[32] The nub of Ms Bowen's argument is that BNZ is seeking to claim privilege over this communication, while advancing a position in the substantive matter which (it says) contradicts the communication. This is not the same as the scenarios contemplated in *AstraZeneca* or *McCullough*. BNZ is not asserting privilege over the conversation between its manager and its lawyer, all the while seeking to insert that conversation into its evidence.

[33] It seems that Ms Bowen's real concern is that BNZ may take position(s) in the proceeding that could be rebutted or called into question if she was able to use the overheard conversation or information gained from it. This is not what is meant by the reference in s 65(3)(a) to putting the privileged information at issue. To put it at issue, BNZ would need to refer to the conversation in evidence or argument in a manner where fairness would demand that Ms Bowen was also able to refer to it.

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5 *AstraZeneca Ltd v Commerce Commission* [2008] TCLR 116 (HC) at [39].

6 *Sawyer v Vice-Chancellor of the Victoria University of Wellington* [2017] NZEmpC 154; *Matsuoka v LSG Sky Chefs New Zealand Ltd* [2017] NZEmpC 68.

[34] There is no evidence before the court of BNZ putting the communication or its substance at issue. As such, there is no evidence that it has acted in such a way that constitutes a waiver. To apply s 65(3)(a) in the manner argued by Ms Bowen would be to misconstrue the provision and its intention.

Conclusion

[35] BNZ has established that there was intention that the communication between its lawyer and its manager was confidential and I am satisfied that it was made in the course of, and for the purpose of, obtaining and providing legal services. Therefore, privilege is established under s 54 of the Evidence Act.

[36] I am also satisfied that the communication, being made in the immediate aftermath of a case management conference with the Authority, was made for the dominant purpose of preparing for the ongoing legal proceedings. As such, privilege is also attached by way of s 56.

[37] The conduct of the BNZ representatives did not go beyond a mistake or an involuntary disclosure and therefore does not constitute a waiver. Similarly, there is no evidence that BNZ has acted to put the privileged communication at issue in a manner that would constitute a waiver. I find no waiver of privilege occurred.

[38] As noted by Ms Bowen this Court has the jurisdiction to consider any evidence or information it sees fit, whether strictly legal evidence or not. In the circumstances, I do not find any reason why an exercise of this jurisdiction would point away from the application of the established principles with regards to privilege. The lawyer-client privilege is well-established in this Court's practice and features in its regulations;[7] there is no evidence before the court that justifies a departure from this fundamental principle on the grounds of equity and good conscience.

[39] I find that the communication between BNZ's lawyer and its manager, recorded by Ms Bowen on 11 September 2017, is privileged and that this privilege has not been waived. I find that it is not admissible.

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[7] See for example Employment Court Regulations 2000, reg 44.

[40] Given that the affidavit of Ms Bowen dated 31 August 2020 remains on the Court file, Ms Bowen must take steps to attend the Court and redact the parts of para 26 that refer to the privileged communication.

[41] BNZ also seeks an order that Ms Bowen destroy any copies in her possession of the recording she made of the privileged communications. No authority is cited regarding my ability to make such an order and I am not satisfied that it is necessary in the circumstances. BNZ has established the communication is confidential and privileged. The expectation around the treatment of such material is well established;[8] it should not be retained or disclosed, nor should there be any copies made or any notes taken of it.

[42] Costs are reserved.

Kathryn Beck
Judge

Judgment signed at 4 pm on 4 February 2021

[8] Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, r 13.9.