IN THE EMPLOYMENT COURT OF NEW ZEALAND
WELLINGTON

I TE KŌTI TAKE MAHI O AOTEAROA
TE WHANGANUI-A-TARA

[2022] NZEmpC 72
EMPC 78/2021

IN THE MATTER OF	proceedings removed in full from the Employment Relations Authority
AND IN THE MATTER OF	admissibility of evidence
BETWEEN	REEGAN LAWTON Plaintiff
AND	STEEL PENCIL HOLDINGS LIMITED (IN LIQUIDATION) First Defendant
AND	ORMOND BRIAN STOCK Second Defendant
AND	MINISTRY OF BUSINESS, INNOVATION AND EMPLOYMENT Intervener

Hearing:	On the papers
Appearances:	P McBride, counsel for plaintiff K Dalziel, counsel for second defendant
Judgment:	3 May 2022

INTERLOCUTORY JUDGMENT (NO 3) OF JUDGE J C HOLDEN
(Admissibility of evidence)

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[1] Following the issue of the substantive judgment in this matter, Mr Stock, the second defendant has, by memorandum, sought costs against Mr Lawton, the plaintiff.[1]

[1] *Lawton v Steel Pencil Holdings Ltd (in liq)* [2021] NZEmpC 199.

[2] In applying for costs, Ms Dalziel, counsel for Mr Stock, attached to her memorandum a letter from Mr Stock's then solicitor to Mr McBride, the solicitor for Mr Lawton, dated 26 November 2020 (the offer letter). Mr Lawton objects to the admissibility of the offer letter and the parties now seek a ruling from the Court on that objection. Attached to their joint memorandum is a redacted version of the offer letter, which the parties consider properly set the boundaries for the Court's ruling on this point. The offer letter reads:

> 26 November 2020
>
> WITHOUT PREJUDICE SAVE AS TO COSTS
>
> Dear Paul,
>
> REEGAN LAWTON v STEEL PENCIL HOLDINGS LIMITED & O. B. STOCK
>
> The writer's telephone discussion with you on 19 November 2020 refers.
>
> In relation to the verbal offer made by Mr Stock which the writer relayed to you during our telephone discussion on 19 November 2020, we have now been instructed to record that offer in writing.
>
> Mr Stock's offer was as follows:
>
> [Redacted]
>
> As discussed, the alternative may be that Mr Stock will need to cause Steel Pencil Holdings Limited to be placed into voluntary liquidation which may well result in the May 2020 shareholder agreement being set aside by the liquidator with obvious implications for both Mr Stock and your client.
>
> Meantime, we have been instructed to vigorously defend your client's proceedings against Steel Pencil Holdings Limited and we understand that Mr Stock is in the process of instructing separate counsel in relation to your client's claims against him personally.
>
> As you know, Mr Stock does not accept your argument that your client cannot be held liable for failing to keep true and accurate time and wage records when he was a director of the company at the time when it was your client's responsibility to ensure that the company's records in relation to his own employment, were a true and accurate record. In any event, Mr Stock believes that he has a right to bring a separate civil action against your client for damages on account of your client's breach of statutory duty and/or negligence.
>
> When the writer discussed Mr Stock's offer with you on 19 November 2020, there was no timeframe mentioned in which, if Mr Stock's offer was not accepted, it would lapse. In this regard please note that if Mr Stock's offer has not been accepted in writing on or before 5pm on Tuesday 1 December 2020, the offer will automatically lapse.

We look forward to hearing from you.

[3] In summary, Mr Lawton submits:

(a) The without prejudice conversation of 19 November 2020 was properly of that nature.

(b) It is impermissible for a party to unilaterally change the status of without prejudice communication – partially or fully uncloaking that.

(c) Mr Stock's previous solicitor purported to do that.

(d) As a matter of law, it is not competent to do so. The offer letter (or at least the redacted parts thereof) can only properly be excluded.

[4] Mr Lawton refers to s 57 and s 65(5) of the Evidence Act 2006.

[5] Mr Stock submits, again in summary:

(a) The offer letter met all the elements required for the making of a without prejudice save as to costs (Calderbank) offer. On that basis, the statutory exemption to privileged communications under s 57(3)(c) of the Evidence Act 2006 applies.

(b) The reference in the offer letter to a "without privilege" discussion does not alter the admissibility of the offer letter.

(c) Admitting the offer letter to the Court would not undermine policy considerations attached to protecting the privilege of without prejudice communications.

(d) Admitting the offer letter would uphold the policy reasons for allowing Calderbank offers into evidence.

The starting point is s 189(2) of the Employment Relations Act 2000

[6] While both parties referred to the Evidence Act, the Employment Court is not bound by that Act. The starting point for the Employment Court is s 189(2) of the Employment Relations Act 2000 (the Act), which provides that the Court may accept, admit, and call for such evidence and information as in equity and good conscience it thinks fit, whether strictly legal evidence or not.[2]

[7] The Court's inquiry, therefore, is broader than might be required in other courts by the Evidence Act, although the settled principles of the common law and of the Evidence Act provide some guidance.[3]

The parties had a discussion and then a letter was sent

[8] It is not disputed that counsel had a without prejudice telephone discussion on 19 November 2020, during which Mr Stock's solicitor made a settlement offer on his behalf.

[9] A week later Mr Stock's solicitor sent the offer letter. It included the same financial component as Mr Stock had offered previously but imposed a timeframe for acceptance and, as noted, was described as "without prejudice save as to costs". There was no mention of any offer that Mr Lawton may have made.

[10] As Mr McBride says, the offer letter refers to the earlier discussion and Mr Stock's offer then made:

> In relation to the verbal offer … relayed to you … we have now been instructed to record that offer in writing.
>
> Mr Stock's offer was as follows:
>
> …
>
> As discussed…
>
> When the writer discussed Mr Stock's offer with you on 19 November 2020, there was no timeframe mentioned… In this regard please note that if

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2 *Elisara v Allianz New Zealand Ltd* [2018] NZEmpC 100, [2018] ERNZ 298 at [29].
3 *Martinsen v Target International (NZ) Ltd* [2019] NZEmpC 89 at [14].

> Mr Stock's offer has not been accepted in writing … the offer will automatically lapse.

[11] The parties agree there is no other relevant communication.

Two competing considerations

[12] There are two considerations that are in competition. First, 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.[4] Second, a party, in fairness, must have the means of gaining some protection from costs by making offers to settle by, in some way, meeting the claim. This speaks in favour of Calderbank offers being able to be made and received by the Court in the context of cost applications.[5]

[13] The protection against disclosure of without prejudice communications is at least as important in the context of employment relationships as in other areas. The Act emphasises the importance of parties endeavouring to resolve employment relationship problems quickly and directly between them.[6] The objective of reducing the need for judicial intervention is made explicit by s 3(a)(vi) of the Act and the Court recognises that without prejudice discussions are a longstanding, important and frequent feature of attempting to resolve employment relationship problems.[7]

[14] Here, and as identified by Mr McBride, as well as referring to the without prejudice discussion on 19 November 2020, the offer letter is said to record the without prejudice offer, rather than saying that Mr Stock is making a separate offer.

[15] Notwithstanding that language, however, the offer in the offer letter is not identical to that made on 19 November 2020. It had the two additional elements of being made without prejudice save as to costs and having a timeframe for acceptance. It otherwise meets all the usual requirements of a Calderbank offer and of reg 68(2)(a) of the Employment Court Regulations 2000. While the financial component was the

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4 *Morgan v Whanganui College Board of Trustees* [2014] NZCA 340, [2014] 3 NZLR 713, [2014] ERNZ 80 at [11].
5 *Moore v McNabb* (2005) 18 PRNZ 127 at [56].
6 Employment Relations Act 2000, ss 101(ab), 143(b).
7 *Martinsen*, above n 3, at [16].

same, a Calderbank offer can be (and often is) made with a financial component that is identical to a previous without prejudice offer.[8]

[16] The new elements mean the offer letter contained a new offer that is admissible on the basis it identifies – in respect of costs.

[17] It also is apparent that the technical point now made was not made at the time so there was no cause for Mr Stock to send a further communication that was clearly a standalone Calderbank offer. I agree with Ms Dalziel that admitting the offer into evidence in the context of the application for costs would be consistent with the policy reasons for allowing Calderbank offers into evidence and does not undermine the policy reasons for allowing without prejudice negotiations to remain confidential.

[18] Accordingly, I find that, even if the offer made in the offer letter is technically not a Calderbank offer, equity and good conscience requires the offer to be before the Court in the context of the application for costs.

[19] Having said that, I agree with Mr McBride that the reference to the without prejudice conversation on 19 November 2020 ought not be before the Court.[9] As identified by Ms Dalziel, that can be rectified by striking out the first two paragraphs of the offer letter and the first sentence of the penultimate paragraph, commencing "When the writer...". For completeness, "was" in the opening words of the third paragraph ought to be redacted and read as "is", and the words "As discussed" should also be redacted.

[20] The memorandum of the second defendant dated 9 December 2021 is to be refiled with the attachment redacted in this way. The objection is otherwise not upheld.

Costs may be sought

[21] If Mr Stock seeks costs on this judgment, he is to file and serve an additional memorandum within 14 days of the date of this judgment. Mr Lawton then has 21 days within which to file and serve a memorandum in response to any such

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8 *Jackson v Enterprise Motor Group (North Shore) Ltd* [2004] 2 ERNZ 424 at [17].
9 Above n 8.

memorandum filed by Mr Stock as well as to Mr Stock's memorandum in respect of costs on the substantive matter, dated 9 December 2021. Any reply from Mr Stock is to be filed and served within a further seven days. Costs then will be determined on the papers.

J C Holden
Judge

Judgment signed at 10.30 am on 3 May 2022