

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

**I TE KŌTI TAKE MAHI O AOTEAROA
ŌTAUTAHI**

**[2025] NZEmpC 210
EMPC 79/2024**

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
AND IN THE MATTER OF	an objection to admissibility of documents
BETWEEN	JACQUELINE SARAH HARTE Plaintiff
AND	MIDWIFERY EMPLOYEE REPRESENTATION AND ADVISORY SERVICE INCORPORATED Defendant

Hearing: On the papers

Appearances: L Acland, counsel for plaintiff
S Mitchell KC, counsel for defendant

Judgment: 18 September 2025

**INTERLOCUTORY JUDGMENT (NO 4)
OF CHIEF JUDGE CHRISTINA INGLIS
(Objection to admissibility of documents)**

[1] The plaintiff is pursuing a de novo challenge against a determination of the Employment Relations Authority (the Authority).¹ While the Authority awarded compensation in the plaintiff's favour, it declined to order a penalty.

[2] The statement of claim pleads two employment relationship problems, both of which are founded on alleged breaches of good faith. The first is directed at an alleged

¹ *Harte v Midwifery Employee Representation and Advisory Service Inc* [2024] NZERA 65.

undermining of the employment relationship for which a remedy of compensation and the imposition of a penalty are sought; the second is directed at a letter and alleged oral statements made by the defendant, which are said to be false and to the plaintiff's discredit.

[3] The challenge was set down for a hearing in Nelson. During the course of the hearing, issues were raised about the admissibility of email correspondence from one of the defendant's witnesses to a non-party. The document was said to be privileged on the basis of the common law privilege against self-incrimination. Counsel sought leave to file submissions on the point. They have now done so.

[4] The defendant, who raised the admissibility point, now takes the position that, having reflected on the pleadings, it does not intend to challenge the inclusion of the document in the bundle for the hearing. In this regard it is said that it does not appear from the first amended statement of claim that the impugned document is relevant, or relied on by the plaintiff, to support a penalty; rather the document is relevant to the second employment problem identified in the claim. In these circumstances, the defendant says that the common law privilege against self-incrimination would not apply and the document is not inadmissible.

[5] The plaintiff has made it clear that they intend to rely on the document in support of a submission as to penalties. It is submitted that even if the document was privileged, privilege has been waived. Reference is made to the fact that the document was before the Authority in its investigation during 2023, and it was included in the bundle of documents under standard directions that all documents contained in the bundle were admissible in evidence in the proceedings.

[6] The Employment Court Regulations 2000 provide for the mutual disclosure and inspection of documents. Relevant documents (namely those that directly or indirectly support or may support a case, or prove or disprove any fact) are disclosable by each party on notice. Regulation 39(2) expressly provides that the regulations relating to the disclosure of documents do not apply to any action for the recovery of a penalty. The Regulations do not go on to provide a mechanism for dealing with the

disclosure of documents in the context of an action that *is* for the recovery of a penalty. In such instances the Court is to be guided by its equity and good conscience jurisdiction under s 189(2) of the Employment Relations Act 2000, and in doing so may consider whether the document at issue is privileged, including on the basis that disclosure would be self-incriminatory.²

[7] However, and as explained by Judge Doyle recently in *Faitala*:³

[16] ... Importantly, reg 39(2) cannot be interpreted to preclude disclosure procedures in other causes of action simply because they are accompanied by claims to penalties for breach in the same proceeding. It was stated in *Radius Residential Care Ltd* that this interpretation allows the Court to ensure that there is no self-incrimination in penalty proceedings at the same time as permitting appropriate disclosure where other remedies are sought.

[8] There is some uncertainty as to where the document at issue came from. In the end it makes no material difference. The document was before the Authority in its investigation, apparently without objection, and was placed in the common bundle for trial in this Court, subject to the usual directions as to deemed admissibility. Applying, by useful analogy, the sort of approach to waiver contained in s 65(4) of the Evidence Act 2006, leads to the conclusion that the document was not disclosed to the plaintiff “...involuntarily or mistakenly or otherwise without the consent of the person who has the privilege.”

[9] The document is admissible in these proceedings, privilege having been waived.

[10] An outline of closing submissions is to be filed and served by the plaintiff no later than 4 pm Monday, 29 September 2025; the defendant no later than 4 pm Monday, 6 October 2025. The Registrar is to schedule a submissions only hearing via AVL, reflective of counsels’ request that they have the opportunity to address the Court orally on their closing submissions.

² *Faitala v The Pacific Island Business Development Trust* [2025] NZEmpC 113.

³ Above n 2.

[11] Costs are reserved.

Christina Inglis
Chief Judge

Judgment signed at 10.15 am on 18 September 2025