Employment Court of New Zealand

Alkazaz v Enterprise IT Limited [2021] NZEmpC 100 (6 July 2021)

Last Updated: 12 July 2021

IN THE EMPLOYMENT COURT OF NEW ZEALAND AUCKLAND

I TE KŌTI TAKE MAHI O AOTEAROA TĀMAKI MAKAURAU

[2021] NZEmpC 100
EMPC 100/2021

IN THE MATTER OF	an application to extend time to file a challenge to a determination of the Employment Relations Authority
AND IN THE MATTER	of an application to exclude or strike out evidence
BETWEEN	AHMED ALKAZAZ Applicant
AND	ENTERPRISE IT LIMITED Respondent

Hearing:	On the papers
Appearances:	A AlKazaz, applicant in person R Bryant, counsel for respondent
Judgment:	6 July 2021

INTERLOCUTORY JUDGMENT (NO 2) OF JUDGE K G SMITH

(Application to exclude or strike out evidence)

[1] In March this year Ahmed AlKazaz applied for leave to extend the time within which he could file a challenge to a determination of the Employment Relations Authority.1 His application is opposed.

[2] The history of litigation between Mr AlKazaz and his former employer, Enterprise IT Ltd, has been summarised recently.2 Mr AlKazaz was successful in the

1 *AlKazaz v Enterprise IT Ltd* [2017] NZERA Auckland 400 (Member Craig).

2 *AlKazaz v Enterprise IT Ltd* [2021] NZEmpC 78 at [2]–[3].

Authority in establishing his personal grievance claims against Enterprise IT.3 The Authority found that he was unjustifiably dismissed. He was awarded lost wages and compensation. The remedies he received, however, were reduced by 20 per cent because the Authority considered his conduct had contributed to the dismissal.4

[3] Mr AlKazaz now seeks to challenge the determination but, because the time to file a challenge as of right expired several years ago, he can only proceed if an extension of time is granted. He applied for an extension of time and supported his application with an extensive affidavit explaining why he considers the application should be granted. It is his affidavit that has given rise to this application, seeking to exclude or strike out one paragraph of it and an associated exhibit.

This application

[4] Enterprise IT took exception to para [26] and exhibit 9 to Mr AlKazaz's affidavit. Paragraph [26] serves two functions. First, it is a link between the text of the affidavit and exhibit 9. Second, it stated Mr AlKazaz's earlier willingness to settle for a sum of money significantly less than he was ultimately awarded.

[5] The exhibit is a collection of correspondence between Mr AlKazaz's then lawyer and Enterprise IT's lawyer. It consists of a letter from his lawyer to Enterprise IT's lawyer and several follow-up emails between them all of which are labelled as being without prejudice save as to costs. The collection is incomplete, because his lawyer's letter is a reply to an earlier letter that is not part of the exhibit.

[6] There are two bases for Enterprise IT seeking to exclude para [26] and exhibit 9 because:

(a) the information in them is irrelevant; and
(b) they contain privileged information.

3 *AlKazaz*, above n 1.

4 At [66].

[7] Mr AlKazaz opposed this application. His notice of opposition is extensive, and not easy to follow, but can be summarised as:

(a) A challenge to the existence of Enterprise IT and therefore its ability to participate in this litigation including being unable to instruct counsel.
(b) Paragraph [26] refers to proceedings that are concluded; its content supports the "extenuating circumstances" in the application and the use of the material will be confined to supporting it and nothing more.
(c) Exhibit 9 is "key" in determining the merits of the application for an extension of time.
(d) While there was a dispute between the parties at the time of the correspondence in exhibit 9, Enterprise IT's action "nullifies" that correspondence and it should not be privileged for the purposes of the narrow scope of his application.
(e) There are "compelling countervailing reasons" for the evidence to be admitted to support the merits of his application and to support his opposition to a further interlocutory application by Enterprise IT.5
(f) The Court should admit the paragraph and exhibit under the equity and good conscience jurisdiction in s 189 of the Employment Relations Act 2000 (the Act).

Analysis

[8] The starting point is to consider what the litigation involves. A party to a matter before the Authority who is dissatisfied with the determination may elect to have it heard by the Court.6 An election must be made within 28 days after the date of the determination.7 Where a challenge is not filed within that time the Court may grant

5 An application for security for costs being dealt with separately.

6 Employment Relations Act 2000, s 179(1).

7 Employment Relations Act 2000, s 179(2).

an application for an extension of time.8 The overarching consideration when assessing such an application is whether or not granting it is in the interests of justice.9 The factors usually weighed up in that assessment are:

(a) the reasons for the omission to file a challenge within time;

(b) the length of the delay;

(c) any prejudice or hardship to any other person with a legitimate interest in the outcome;

(d) the effect on the rights and liabilities of the parties;

(e) subsequent events; and

(f) the merits of the proposed challenge (although this factor is subject to the observations in *Almond v Read*).10

[9] Mr AlKazaz's application for an extension of time addressed each of the factors in [8](a)–(f). The applicant gave as his reasons for the omission to file a challenge within time that he:

(a) relied on a public statement attributed to Enterprise IT, that it intended to file a challenge but then the company never did;
(b) lacked legal knowledge that he could challenge the parts of the determination he disagreed with;
(c) lacked the psychological, emotional and financial capacity at the relevant time, again attributed to what he considers to have been Enterprise IT's actions;

8 Employment Relations Act 2000, s 221.

9 See for example *An Employee v An Employer* [2007] ERNZ 295 at [9]–[10].

10 *Almond v Read* [2017] NZSC 80, [2017] 1 NZLR 801 at [38].

(d) was attending to counselling at the time he was due to file a challenge;

(e) received wrong advice from the Authority that led him to seek to reopen the Authority's investigation rather than to file a challenge;

(f) was not aware that a challenge could be filed until that possibility was referred to by the Court;

(g) mistakenly applied to the Court of Appeal for leave to appeal thinking that was the option available to him.

[10] As to the length of the delay his application stated that there was no prejudice or hardship to either party because the issues were well documented. Instead, the application stated that he would be prejudiced if the determination was not set aside.

[11] The application went on to state that Mr AlKazaz's rights had been compromised due to the damage he sustained resulting from Enterprise IT's dismissal of him. The merits of his application (and presumably his anticipated challenge) were said to strongly favour him, in part relying on comments by Chief Judge Inglis in the unsuccessful challenge to the Authority's decision not to reopen the investigation.11

[12] With that background Mr Bryant, counsel for Enterprise IT, submitted that para

[26] and exhibit 9 are not relevant to anything in Mr AlKazaz's application. In his submission, that was because the contents of the paragraph and exhibit do not assist in understanding or explaining the grounds relied on by Mr AlKazaz to support his application for an extension of time; they do not tend to prove or disprove anything in it.

[13] Mr AlKazaz accepted that to be admissible evidence must be relevant. His response was that the paragraph and exhibit showed that, in taking action against Enterprise IT, he was driven by a desire to protect his professional reputation, and ability to obtain future work, not by any purely financial motive. It would appear he

11 *AlKazaz v Enterprise IT Ltd* [2020] NZEmpC 171.

argues that this correspondence is also relevant to establish the psychological impact he suffered from alleged damage to his reputation.

[14] I disagree with Mr AlKazaz. Paragraph 26 and exhibit 9 are not relevant. They are not probative or material to any of the grounds relied on in his application. They do not tend to prove (or disprove) anything in it.12 The letter and emails show attempts to settle an employment relationship problem but all of the correspondence predates the Authority's investigation meeting and determination. The present issue is whether Mr AlKazaz can satisfy the Court that he should be granted an extension of time. That involves considering what happened after the determination was issued. The preparedness of the parties to attempt to settle their dispute before it was determined by the Authority has no bearing at all on what happened subsequently.

[15] This finding is enough to conclude that Enterprise IT's application should be granted. However, in the interests of completeness a brief discussion is needed about the second basis of Enterprise IT's application; that the correspondence is privileged from being disclosed and relied on in Mr AlKazaz's application.

Without prejudice save as to costs

[16] Enterprise IT sought to have para [26] and exhibit 9 excluded because the subject matter of them was privileged communication attempting to resolve a dispute between it and Mr AlKazaz.13 The company's case is that the intention for that correspondence to be privileged was self-evident from its content and is clearly signalled by the label "without prejudice save as to costs".

[17] Mr AlKazaz disagreed. Initially he accepted that the correspondence (and by inference para [26]) was about attempts to resolve a dispute, but he moved away from that position in his submissions arguing instead that there was no dispute when the correspondence was exchanged. In his submissions there was no dispute until 22 May 2017, because of documentation he claims to have found which proved one did not arise before then. The documentation was not disclosed and no more details were

12 Evidence Act 2006, s 7.

13. Relying on *Morgan v Whanganui College Board of Trustees* [2014] NZCA 340, [2014] 3 NZLR 713, [2014] ERNZ 80; and see also Evidence Act 2005, s 57(1).

given about it beyond Mr AlKazaz's bare statement. Nevertheless, his argument was that in the absence of a dispute he was free to refer to the correspondence.

[18] Mr AlKazaz also submitted that the "without prejudice" aspect of the correspondence related only to the unjustified dismissal claim and attempts to settle it. He intended, however, to use the material for a different purpose; to support his reasons for seeking an extension of time. He considered that any privilege attached only to the settlement offers themselves and not to other aspects of the correspondence. Potentially, this submission extended to asserting that the privilege terminated once attempts to settle ended without success.

[19] I do not accept Mr AlKazaz's propositions. Unquestionably, there was a dispute that the correspondence attempted to resolve. Even in the absence of the complete correspondence, what has been disclosed illustrates an employment relationship problem was being addressed. Mr AlKazaz's lawyer's letter dealt with allegations of misrepresentation in Mr AlKazaz's CV and contributory conduct by him raised by Enterprise IT. The letter criticised an attempt to rely on the 90-day trial provision in the employment agreement, which was stated to be invalid. The termination of Mr AlKazaz's employment was criticised as hasty.

[20] Having set out the position, from Mr AlKazaz's point of view, this letter proposed a settlement covering payment for compensation and a contribution towards his costs.

[21] Litigation was underway when the correspondence was exchanged. Mr AlKazaz's lawyer ended his letter by commenting that, if the offer made in it was not accepted within five working days, the company was required to file its reply in the Authority and the matter would continue to a hearing.

[22] What followed was an email exchange between lawyers including a request for, and comments about, draft settlement agreements. In that exchange Enterprise IT proposed its own terms of settlement and made an offer in an email labelled "without prejudice". It expressly reserved the ability to refer to this offer in the Authority in relation to any claim for costs.

[23] Even without the correspondence being complete, there is no way to read the letter and emails as anything other than confirming the existence of an employment relationship problem, coupled with unsuccessful attempts to reach a settlement. It is hard to image a clearer example of a dispute that the parties were attempting to resolve. On this basis the correspondence is privileged.

[24] I do not accept that, in some way, the correspondence can be used by Mr AlKazaz because matters have stepped on from April 2017 when it was exchanged. The correspondence in exhibit 9 did not lose its privileged quality just because an agreement was not reached.14

[25] It is possible that Mr AlKazaz is attempting to argue that he is in a position to waive the privilege attaching to the correspondence. If that is his argument, I do not accept he can do so. The privilege attaching to settlement negotiations is a joint one, held by all of the parties to the communication.15 It can only be waived with the consent of all of those who hold it.16

[26] If necessary, I would conclude that there is a joint privilege in the correspondence held by Mr AlKazaz and Enterprise IT. Mr AlKazaz is not able to use it without Enterprise IT's agreement and that has not been given.

[27] Mr AlKazaz raised two further arguments that can be dealt with briefly. First, he drew attention to s 57 of the Evidence Act 2006 and, in particular, s 57(3)(d) to explain why his affidavit should remain intact. Second, he relied on the Court's equity and good conscience jurisdiction to admit the paragraph and exhibit. It is possible he sees these two as connected but for convenience they will be addressed separately.

[28] Section 57 deals with privileged settlement negotiations. Under s 57(3) the privilege does not apply to the terms of the agreement settling a dispute, or evidence

14 See Evidence Act 2006, s 57 and the discussion in Elisabeth McDonald and Scott Optican

Mahoney on Evidence (4th ed, Thomson Reuters, New Zealand 2018) at 459.

15 Matthew Downs (ed) *Cross on Evidence* (11th ed, LexisNexis, Wellington, 2019) at [EVA57.8].

16. *Idea Services Ltd (In Statutory Management) v Barker* [2012] NZEmpC 112, [2012] ERNZ 454 at [28]–[33].

necessary to prove the existence of an agreement, in a proceeding where the conclusion of it is in issue.17 That is not the case here.

[29] Under s 57(3)(d) a Court may, if it considers the interests of justice warrant, override the claim of privilege so that the communication or document that would otherwise be the subject of the privilege is disclosed in a proceeding. Such an outcome is possible where the need for disclosure outweighs the need for the privilege.

[30] Mr AlKazaz's submissions were directed towards inviting the Court to exercise the discretion under s 57(3)(d), because of "the particular nature and benefit of the settlement negotiations". That submission was not explained any further but is probably connected to Mr AlKazaz's attempts to show that Enterprise IT intended to damage his future career when the company refused to agree that any settlement would be confidential.

[31] There is no guidance in s 57(3)(d) of the Evidence Act about what is meant by the interests of justice. Before that section was enacted, however, there were common law exceptions to privilege that may provide some assistance. Those exceptions covered matters such as where disclosure was necessary to show that a settlement should be set aside for misrepresentation, or prove the existence of fraud or undue influence. There may be other circumstances justifying that outcome such as, perhaps, if rectification was sought.18

[32] There is nothing of that sort in this case. Mr AlKazaz's reason for referring to the correspondence seems to be an attempt to attribute a poor-quality motive to Enterprise IT. To reach such a conclusion would require an unreasonable, and unsupported, assumption being made about why the company refused to include a confidentiality clause in the draft agreement. Aside from those shortcomings, the circumstances fall well short of the situations in which common law made exceptions to privileged communication. I am not satisfied that Mr AlKazaz has shown there is anything in or surrounding the correspondence in exhibit 9 that could be said to warrant the privilege being overridden under s 57(3)(d).

17 Evidence Act 2006, s 57(3)(a)–(b).

18 See the general discussion in McDonald and Optican, above n 14, at 454–456 inclusive.

[33] As to the Court's equity and good conscience jurisdiction, I do not accept that it can be used in this case to allow the evidence to be admitted. Such an outcome would mean putting aside both the privilege in the correspondence in exhibit 9 and overlooking the fact that the information is not relevant. While s 189 of the Act makes it plain that the Court is not bound by the strict rules of evidence the breadth of the section cannot be used to overcome those problems Mr AlKazaz faces. The Court has previously said that this section involves a broader inquiry than simply whether the proposed evidence or information would be admissible in the High Court, but that does not mean the parties to litigation are free to attempt to rely on anything at all.19

[34] Two other parts of Mr AlKazaz's notice of opposition need to be dealt with. One of them was his unsupported claim disputing the continued existence of Enterprise IT. The other was a claim that some unspecified action by Enterprise IT nullified the correspondence in exhibit 9 having some effect on the privileged status attaching to the correspondence itself.

[35] No submissions were made about either of these subjects. Mr AlKazaz previously made submissions about the existence of Enterprise IT and his arguments were commented on briefly in a judgment earlier this year.20 The claim does not need to be given any weight in this assessment.

[36] As to the second matter, Mr AlKazaz did not explain what was meant by his notice of opposition referring to Enterprise IT's conduct nullifying the correspondence. It is possible this submission is part of his argument about s 57 of the Evidence Act or the Court's equity and good conscience jurisdiction and, if it is, those subjects have been addressed. Otherwise, there was no indication in the submissions (or elsewhere) to demonstrate that something said or done by Enterprise IT somehow removed or negated the privilege attaching to the correspondence in exhibit 9 so that it can be used.

19. See the discussion in *Lyttelton Port Company Ltd v Pender* [2019] NZEmpC 86, [2019] ERNZ 224 at [48]–[55].

20 *AlKazaz*, above n 2, at [16].

Conclusion

[37] Paragraph [26] and exhibit 9 cannot be referred to or relied on by Mr AlKazaz in his application for an extension of time. He must file a redacted version of the affidavit removing them before his application will be considered.

[38] Costs are reserved.

K G Smith Judge

Judgment signed at 9.15 am on 6 July 2021