



Employment Court of New Zealand

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Butt v Attorney-General [2021] NZEmpC 156 (20 September 2021)

Last Updated: 26 September 2021

IN THE EMPLOYMENT COURT OF NEW ZEALAND AUCKLAND

I TE KŌTI TAKE MAHI O AOTEAROA TĀMAKI MAKĀURAU

[\[2021\] NZEmpC 156](#)

EMPC 317/2020

IN THE MATTER OF	an application to reopen file EMPC 396/2019
AND IN THE MATTER OF	an application to exclude evidence
BETWEEN	SUSHILA DEVI BUTT First Plaintiff
AND	ARTHUR ROYD WILSON BUTT Second Plaintiff
AND	THE ATTORNEY-GENERAL SUED ON BEHALF OF THE MINISTRY OF HEALTH First Defendant
AND	THE ATTORNEY-GENERAL SUED ON BEHALF OF THE HONOURABLE ANDREW LITTLE IN HIS CAPACITY AS MINISTER OF HEALTH Second Defendant

Hearing: On the papers
Appearances: A Till and J Perrott, counsel for plaintiffs
RM Rendle and T Bremner, counsel for
defendants
Judgment: 15 September 2021
Reasons: 20 September 2021

REASONS FOR JUDGMENT OF JUDGE KATHRYN BECK

SUSHILA DEVI BUTT v THE ATTORNEY-GENERAL SUED ON BEHALF OF THE MINISTRY OF HEALTH [\[2021\] NZEmpC 156](#) [20 September 2021]

[1] This is an application by the Attorney-General on behalf of the Ministry of Health and the Minister of Health to exclude particular affidavit evidence filed in response to his application to strike out or dismiss proceedings filed by Mr and Mrs Butt.

Background

[2] Mr and Mrs Butt discontinued earlier proceedings against the Ministry and Minister of Health after reaching a settlement at a judicial settlement conference on 27 August 2020.¹ That settlement was contained in a Record of Settlement of the same date.

[3] Mr and Mrs Butt have now issued new proceedings against the Attorney-General on behalf of the Ministry and Minister of Health, asking that the Court cancel the Record of Settlement on the basis that they were induced to enter it by

a misrepresentation, declare that the Ministry of Health was their employer and that it has breached minimum code legislation,² make orders in relation to entitlements and penalties and, finally, find that they were disadvantaged by the actions of the Ministry of Health as their employer and award them compensation.

[4] The defendants have applied to dismiss and/or strike out the proceedings on the grounds that all the claims were fully and finally settled by the Record of Settlement entered, that they have fulfilled the terms of that settlement, and that there are no grounds to set it aside.

[5] The plaintiffs oppose that application and have filed affidavits by Mrs Sushila Butt and Ms Paula Wilson, their former counsel, in support of their opposition.

[6] The defendants applied to the Court for an order that the affidavit of Mrs Butt not be read to the extent that it contains evidence which is:

1 EMPC 396/2019.

2 [Minimum Wage Act 1983](#) and [Holidays Act 2003](#).

(a) subject to settlement privilege; and

(b) double hearsay and is contradicted by the affidavit of Ms Paula Wilson.

[7] They do not take issue with the affidavit of Ms Wilson.

[8] I issued a judgment admitting Mrs Butt's affidavit in its entirety and said that reasons for my decision would follow.³ These are my reasons.

Approach to evidence

[9] [Section 189\(2\)](#) of the [Employment Relations Act 2000](#) (the Act) makes it plain that the Employment Court is not bound by the strict rules of evidence and that it may "admit, accept and call for such evidence and information as in equity and good conscience it sees fit." Consideration of whether or not evidence and/or information should be admitted, accepted or called for is informed by a broader inquiry than whether the proposed evidence would be admissible under the [Evidence Act 2006](#). The starting point is the Court's broad discretion in [s 189](#) of the Act; the principles of equity and good conscience guide the exercise of that discretion.⁴

Settlement privilege

[10] The defendants take exception to paras 6, 7, 8, 11 (to the extent that the second and final sentence relies on para 7) and 12 of Mrs Butt's affidavit. They claim these paragraphs are subject to un-waived settlement privilege.

[11] The paragraphs in question briefly talk about what was discussed between the parties in the judicial settlement conference, before settlement was reached, in relation to the provision of backup care for Mrs Butt's children, the training of carers and access to backpay.

[12] The defendants say that unless the Court considers it in the interests of justice, communications in respect of which privilege has not been waived are not disclosable.

³ *Butt v Attorney-General on behalf of the Ministry of Health* [2021] NZEmpC 151.

⁴ *Lyttelton Port Company Ltd v Pender* [2019] NZEmpC 86, [2019] ERNZ 224 at [52]–[53].

They say that while it may be in the interests of justice for materials to be disclosed where doing so is necessary to establish a claim of misrepresentation, Mrs Butt's affidavit goes further than necessary, and that essentially the Court already has what it needs in the form of a comment in the draft settlement agreement and in Ms Wilson's affidavit.⁵

[13] The plaintiffs say that it is in the interests of justice to admit the material and that in equity and good conscience the Court should do so. They rely on *Miller v Fonterra Co-Operative Group Ltd*.⁶ They say the paragraphs directly support the plaintiffs' misrepresentation claim, a circumstance which justifies privilege being set aside.⁷

[14] It is common ground between the parties that a claim of misrepresentation is a recognised exception to privilege that attaches to settlement negotiations.

[15] The factors to be considered in determining whether a claim of misrepresentation has been made out are summarised by Gendall J in *Dodds v Southern Response Earthquake Services Ltd*.⁸ The defendants submit that in order to be admissible, disclosure of the material must be necessary to establish one of these factors. For the present purposes, the relevant factor is whether “the representation would induce a reasonable person in the same circumstances to enter into the contract at issue, ...”.⁹ The defendants accept that some material can be put before the Court but are essentially saying that these particular paragraphs go too far and do not directly support the claim. They say they do not speak to the plaintiffs being induced to enter into the settlement agreement. I do not agree.

[16] Ms Wilson’s affidavit, including the tracked change settlement document with the comment, does not provide the full context for the settlement. Mrs Butt’s brief paragraphs go some way towards doing so. They assist the Court to gain a fuller

5. The amended (tracked) Record of Settlement which was sent back to Ms Wilson included a “comment” by Ms McKechnie next to a deleted clause.

6 *Miller v Fonterra Co-Operative Group Ltd* [2012] NZEmpC 49, [2012] ERNZ 100.

7. *Sheppard Industries Ltd v Specialized Bicycle Components Inc* [2011] NZCA 346, [2011] 3 NZLR 620; *AlKazaz v Enterprise IT Ltd* [2021] NZEmpC 100 at [14]–[15].

8. *Dodds v Southern Response Earthquake Services Ltd* [2019] NZHC 2016, [2019] 3 NZLR 826 at [78].

9 At [78(d)].

picture of the circumstances at the time she says she was induced to enter into the agreement.

[17] That evidence is relevant to the question of whether the representation would induce a reasonable person in the same circumstances to enter into the settlement.

[18] The defendants say the discussions cannot be relevant as they took place prior to the representation(s). That is a matter for submission in the next stage of the proceedings.

[19] It is in the interests of justice that it be before the Court.

Double hearsay and inconsistent evidence

[20] The defendants take exception to para 15 of Mrs Butt’s affidavit which records that Ms Wilson explained to her that “Sally had stated the two weeks training costs for me to train a replacement carer will be covered by Access instead of [the Ministry].”

[21] They say that this statement is double hearsay and that it was not only made by a person other than Mrs Butt, it was not made by that other person to her either. The defendants say that Mrs Butt’s statement is inconsistent with Ms Wilson’s account. They do not object to the admissibility of Ms Wilson’s affidavit which also contains hearsay or take issue with her statements.

[22] They submit that Mrs Butt’s evidence is so unreliable that it should be excluded, even under equity and good conscience.

[23] The plaintiffs acknowledge that the statement is hearsay but say it is directly relevant to the question of what representation was made by the Ministry of Health to Mr and Mrs Butt. They say it is open to the Court to give it the weight it sees fit. They further say that if the defendants have concerns about the accuracy or veracity of the statement, they can submit an affidavit from Ms McKechnie.

[24] I agree it is problematic for the plaintiffs that Mrs Butt’s evidence is different from Ms Wilson’s. However, it is important, given the nature of these proceedings

and the parties, that the Court is able to hear from Mrs Butt what she says induced her to accept the deletion of the original clause and sign the Record of Settlement.

[25] The evidence will assist the Court to gain a full picture of the circumstances at the time of the discussion in question. The parties will be able to make submissions as to the appropriate weight to be placed on Mrs Butt’s evidence as opposed to that of Ms Wilson. If the defendants wish to submit an affidavit from Ms McKechnie they may do so.

[26] It is in the interests of justice that the evidence be before the Court.

Conclusion

[27] As already noted above, [s 189\(2\)](#) of the Act makes it plain that the Employment Court is not bound by the strict rules of evidence and that it may “admit, accept and call for such evidence and information as in equity and good conscience it sees fit.” It is in the interests of justice that Mrs Butt’s full affidavit is before the Court.

[28] I accordingly dismiss the defendants’ application. Costs are reserved.

Kathryn Beck Judge

Judgment signed at 9.30 am on 20 September 2021

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