

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI  
ŌTAUTAHI ROHE**

[2024] NZERA 204  
3237179

BETWEEN	MADELINE DOWNER Applicant
AND	LM ARCHITECTURAL BUILDERS LTD Respondent

Member of Authority:	Peter van Keulen
Representatives:	Lynda Matheson, advocate for the Applicant Miles Davis, counsel for the Respondent
Investigation Meeting:	On the papers
Submissions Received:	19 February 2024 from the Applicant 29 January 2024 and 27 February 2024 from the Respondent
Date of Determination:	8 April 2024

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**PRELIMINARY DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1] Madeline Downer has lodged a statement of problem in the Authority setting out an employment relationship problem with LM Architectural Builders Ltd (LMA) based on personal grievances of unjustifiable dismissal and unjustified action causing disadvantage.

[2] LMA has lodged a statement in reply denying liability for Ms Downer's personal grievances.

[3] Ms Downer's statement of problem has attached to it, a copy of a personal grievance letter dated 2 March 2023. That letter referenced two conversations that Ms Downer recorded:

- (a) A conversation between Ms Downer and Leo Meredith, the Managing Director of LMA, on 20 February 2023 (Recording 1).
- (b) Mr Meredith speaking on the telephone to a 3<sup>rd</sup> party on 20 February 2023 (Recording 2).

[4] LMA objects to Recording 1 and Recording 2 being used in connection with Ms Downer's employment relationship problem. LMA says Recording 1 is of a conversation that was a without prejudice discussion and it says Recording 2 was obtained illegally and improperly. For these reasons, LMA asks the Authority to exclude the recordings from being used as evidence and being referenced in the statement of problem.

#### **The Authority's investigation**

[5] In a case management conference held on 8 December 2023 the parties agreed that the issue of the admissibility of Recording 1 and Recording 2 would be resolved by a Member who was not going to undertake the investigation of the substantive problem. And they agreed that the issue could be resolved on the papers by written submissions.

[6] The preliminary issue has been allocated to me to resolve and I have dealt with this preliminary issue by receiving written submissions of the parties' representatives, as had been agreed.

[7] As permitted by s 174E of the Employment Relations Act 2000 (the Act) I have not recorded all the evidence and submissions received, in this determination. I have set out the facts that, based on the statement of problem and statement in reply, are agreed. And I have set out the relevant law. Then based on this I have expressed conclusions as necessary to resolve the preliminary issue, and then I have specified the orders made as a result.

## The admissibility of Recording 1

[8] The starting point with Recording 1 is that it was recording made by Ms Downer without Mr Meredith's knowledge. But as Ms Downer was a party to the conversation which was the subject of the recording it was not an illegal act.<sup>1</sup> As such recordings of this type are generally considered to be admissible as evidence in the investigation of an employment relationship problem.<sup>2</sup>

[9] However, LMA says Recording 1 is a recording of a conversation in which Mr Meredith made an offer to settle matters with Ms Downer, making it a without prejudice communication. And without prejudice communications are privileged and cannot be used in evidence.

[10] LMA also refers to s 121 of the Act; this section provides that statements made in the course of raising a personal grievance or in the course of attempting to resolve a grievance or in the course of any matter relating to a grievance are privileged. LMA says the without prejudice privilege applies because the circumstances set out in s 121 of the Act have been met.

[11] Ms Downer says the conversation that is Recording 1 was not entered into on a without prejudice basis. This is because the conversation was not referenced as being without prejudice nor was it intended to be confidential or private. Rather the conversation was intended to constructively dismiss Ms Downer.

[12] Turning to these respective arguments I note:

- (a) Section 121 of the Act does not apply here as this is accepted as being privilege given to parties against actions for defamation.<sup>3</sup>
- (b) A communication does not need to be labelled or referenced as being without prejudice for it to attract privilege.

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<sup>1</sup> Crimes Act 1961, s 216B.

<sup>2</sup> See discussion by Smith J of the principles attaching to covert recordings and their admissibility, particularly where one party is a participant in the conversation being recorded, in *Henderson Travels Limited v Kaur* [2023] NZEmpC 181 at [27] – [48].

<sup>3</sup> *Tulloch v Hayes Specialist Recruitment (Australia) Pty Limited* [2017] NZEmpC 26 at [33] citing *Cresser v Tourist Hotel Corp of New Zealand* [1989] 2 NZLR 397 (CA) and *Anderson v The Employment Tribunal* [1992] 1 ERNZ 500 (EmpC).

(c) The common law and statutory basis on which a communication is regarded as being without prejudice is based on three parts:<sup>4</sup>

- i. There must be a dispute between the parties in existence;
- ii. The communication was intended to be private; and
- iii. The communication was made in an attempt to settle the dispute.

[13] Therefore, the issue for me to resolve in respect of Recording 1 is, was it a without prejudice communication based on the common law and/or statutory test.

[14] The problem for LMA's position is establishing that there was a dispute between LMA and Ms Downer.

[15] The relevant agreed facts from the documents lodged with the Authority are:

- (a) Ms Downer was employed by LMA as an Administrator.
- (b) On Friday 17 February 2023 Ms Downer and Mr Meredith had a meeting in which they discussed Ms Downer's work. The end result of the meeting was Ms Downer advising Mr Meredith that she was going to start looking for new employment but until she had a new job, she would continue working for LMA.
- (c) On Monday 20 February 2023 shortly after Ms Downer arrived at work Mr Meredith engaged her in conversation; Mr Meredith asked her if she had thought about what she wanted to do.
- (d) What followed from this was the conversation that is recorded in Recording 1.

[16] Whilst there is some conflict between the parties' positions on what was said in the discussion on 17 February 2023 it is clear from both sides that there was not a dispute raised by either Ms Downer or Mr Meredith. There was probably some expression of dissatisfaction from both about how Ms Downer's role was progressing

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<sup>4</sup> *Kenneth Morgan v Whanganui College Board of Trustees* [2014] NZCA 340; and Evidence Act 2006, s 57.

but this was not at the level of being an employment relationship problem that might give rise to litigation such that any admission in the conversation might be significant.<sup>5</sup>

[17] The point at which matters were raised that might give rise to a conflict, or an employment relationship problem, is in the conversation on 20 February 2023.

[18] In the conversation on 20 February 2023 Mr Meredith told Ms Downer that he had become aware that she had been working on her CV in work time and he suggested this might be serious misconduct. He then offered to pay Ms Downer for two weeks work if she wanted to finish (presumably straight away), otherwise he would deal with this in a different way.

[19] In response to this Ms Downer accepted that she had been working on her CV as she thought in the circumstances that was okay. And she said she was still happy to keep working at LMA until she found a new job.

[20] The conversation ended with Ms Downer saying she would think about the offer and Mr Meredith saying that he would take disciplinary action if she did not accept the offer.

[21] Assessing this conversation, I conclude there is no dispute of the type required to attract the without prejudice privilege. There is simply an allegation of misuse of LMA time by Ms Downer, which she accepts occurred, and a threat to take disciplinary action.

[22] For this reason, the conversation in Recording 1 cannot be a without prejudice communication based on the common law and/or statutory test. And therefore Recording 1 is admissible as evidence in the investigation of Ms Downer's employment relationship problem.

### **The admissibility of Recording 2**

[23] Recording 2 is a recording of Mr Meredith speaking to a third party later in the day on 20 February 2023; that is, after the conversation in Recording 1.

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<sup>5</sup> *Kenneth Morgan v Whanganui College Board of Trustees* [2014] NZCA 340 at [18].

[24] In terms of this telephone conversation, I know it was Mr Meredith speaking to a third party and this conversation occurred whilst he was near Ms Downer's desk but she was not there and it appears no one else was around.

[25] Ms Downer had left her mobile phone on her desk with the record function operating; she says she did this to protect herself given the earlier accusations from Mr Meredith about the misuse of her computer during work time. Ms Downer says she was concerned to know if Mr Meredith or someone else from LMA was tampering with her computer when she was not there in order to provide evidence of the alleged misuse by her.

[26] I have read the transcript from Recording 2 and assume from the nature of the conversation and because no one else was around at the time, that Mr Meredith was talking privately. Mr Meredith did not know that Ms Downer's mobile phone was recording his conversation and he did not consent to the recording being made.

[27] I am not aware of the other circumstances of Mr Meredith's telephone conversation as there is no evidence explaining who he was speaking to nor is there a record of the other party's side of the conversation.

[28] LMA says that in these circumstances Recording 2 is an illegal recording as Ms Downer was not a party to the conversation nor did she have consent from Mr Meredith to record his telephone conversation.

[29] LMA says further that by analogy with s 30 of the Crimes Act 2006 the evidence was improperly obtained because of the surreptitious recording and the clear breach of good faith by Ms Downer. LMA does not take this submission further but the logical conclusion of a finding that evidence has been improperly obtained is that the Judge in the criminal matter, to which s 60 of the Evidence Act applies, must determine if excluding the evidence is proportionate to the impropriety. So, the submission seems to be that I should exclude Recording 2 from being used as evidence because Ms Downer's impropriety in obtaining the evidence is sufficiently serious that exclusion is appropriate or proportionate.

[30] In contrast Ms Downer says Recording 2 was not recorded illegally as there was no intent by Ms Downer to record Mr Meredith's telephone conversation but rather she intended to protect herself against LMA setting her up by tampering with her computer.

[31] Ms Downer also says Recording 2 provides significant and accurate evidence in support of her claim. And she says the Authority is not bound by the Evidence Act but its powers in respect of evidence is set out in s 160(2) of the Act – this provides that the Authority may take into account such evidence that in equity and good conscience it thinks fit, whether strictly legal or not.

[32] Ms Downer concludes her submissions by referring to *Firman v Insyn Ltd t/a Synergy Hair Riccarton*.<sup>6</sup> In *Firman* the Authority determined that a recording made of employees without their knowledge and therefore without their consent was admissible. The admissibility of that recording turned on the particular circumstances including that it had probative value in terms of the employment relationship problem and the recording had been circulated by the employer to ascertain the employees' response with those responses being used in evidence by the employer.

[33] Turning to my assessment of the parties' submissions I start with the question of the legality of Recording 2. It is clear that Mr Meredith did not consent to the recording of his telephone conversation and Ms Downer was not a party to the conversation, so, on the face of it Recording 2 is an illegal recording.<sup>7</sup>

[34] I have some reservations about the submission that Ms Downer did not intend to record Mr Meredith's telephone conversation. It seems to me from the circumstances that Ms Downer intended to record all the events that took place around her desk when she was not there. And, this would logically include any conversations by others taking place within the region of her desk. However, establishing intent for the purposes of ascertaining if the recording was illegal is not required in this case. This is not a criminal matter.

[35] Whether Recording 2 is illegal as a crime is not the question, rather what I believe to be relevant is if the recording was improperly obtained. And s 216B of the Crimes Act 1969 informs that. In this case given the surreptitious nature of the recording including that it was in circumstances that Mr Meredith would have thought he was speaking privately I conclude it was improperly obtained.

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<sup>6</sup> *Firman v Insyn Ltd t/a Synergy Hair Riccarton* [2016] NZERA Christchurch 156.

<sup>7</sup> Crimes Act 1961, s 216B.

[36] What follows from this however is not straightforward. There is no presumption that an improperly obtained recording is inadmissible in the Authority. Section 160(2) of the Act and *Firman* make that clear.

[37] It is also the case that the Evidence Act 2006 does not apply to the Authority.<sup>8</sup> So whilst the Evidence Act is both useful and persuasive as a guide for evidential matters, there is no presumption about improperly obtained evidence being inadmissible because of the level of impropriety.<sup>9</sup>

[38] The starting point for evidential matters in the Authority is an assessment of sections 157 and 160 of the Act – the role and powers of the Authority. In my view the key aspects are:

- (a) The Authority is an investigative body, Members must establish the facts in order to make a determination on the case and should do so on the substantial merits of the case without regard to technicalities. In doing this, Members must comply with the principles of natural justice, promote good faith behaviour and generally further the object of the Act.
- (b) A Member's investigatory powers mean they may call for evidence and information from the parties or any other person. And a Member may take into account such evidence and information, which in equity and good conscience they believe is fit for them to do so even if the evidence is not strictly legal.

[39] So, this issue of admissibility is not about simply ruling out evidence because it was illegally or improperly obtained. This is about balancing the investigatory obligation that brings broad powers in terms of evidence that can be considered, such as evidence that was illegally or improperly obtained, against ensuring the rules of natural justice are met, that good faith behaviour is promoted and the principles of equity and good conscience are met.

[40] Looking at this, it is my view that the following points are relevant:

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<sup>8</sup> This is an issue I have previously considered in relation to privilege – see *New Zealand Tramways & Public Passenger Transport Employees Union Wellington Inc v Tranzurban Hutt Valley Limited and Anor* [2019] NZERA 159 at [18] citing *New Zealand Meat Workers Union Inc v South Pacific meats Ltd* [2015] NZEmpC 138.

<sup>9</sup> Noting here also that s 60 of the Crimes Act 2006 applies to criminal matters.

- (a) Allowing improperly obtained recordings to be admitted as evidence does not promote good faith behaviour in the workplace. The Authority should not encourage this behaviour.
- (b) Using improper means to obtain evidence does not sit well with seeking the Authority to admit that evidence in equity and good conscience.
- (c) Recording 2 has been obtained in circumstances where Mr Meredith expected his conversation to be private and confidential. Evidence obtained in breach of a person's right to privacy or expectation that they are speaking confidentially does not sit well with equity and good conscience.
- (d) If Recording 2 is admissible it would most likely compel Mr Meredith to give evidence about the telephone conversation including who he was speaking to and what was said by that person. If Mr Meredith chose to do that rather than object to the admissibility of the evidence then the situation would reflect the circumstances in *Firman* where the Authority allowed the evidence to be used. This is not the case here and *Firmin* is not instructive on the admissibility of Recording 2.
- (e) Recording 2 does not appear to have any significant probative value in terms of the employment relationship problem that would weigh in favour of admitting it as evidence. In contrast the prejudicial impact is significant and weighs against admitting it as evidence.

[41] Given all of these points my conclusion is Recording 2 is not admissible. All references to Recording 2 in the attachments to the statement of problem should be redacted and no further use of Recording 2 is to be made in terms of the employment relationship problem and the Authority's investigation.

### **Summary**

[42] Recording 1 is not a without prejudice conversation between Ms Downer and Mr Meredith. It can therefore be referenced in the investigation and resolution of this employment relationship problem including being used as evidence.

[43] Recording 2 is an illegally and improperly obtained recording and there is no reason for the Authority to allow it to be referenced in this employment relationship problem. All references to Recording 2 are to be removed or redacted from the material already lodged with the Authority and no further references are to be made to Recording 2.

### **Costs**

[44] Costs are reserved.

Peter van Keulen  
Member of the Employment Relations Authority