

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2025] NZERA 225
3325540

BETWEEN	KENDALL FRASER HENDERSON Applicant
AND	SG BLONDELL LIMITED Respondent

Member of Authority:	Philip Cheyne
Representatives:	Jim Takas, counsel for the Applicant Charles McGuiness, counsel for the Respondent
Submissions and Information received:	13 February 2025 and 6 March 2025 from the Applicant 10 October 2024, 29 January 2025, 28 February 2025 and 14 March 2025 from the Respondent
Date of Determination:	22 April 2025

PRELIMINARY DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Kendall Henderson was employed by SG Blondell Limited but his employment ended when he was given notice on or about 6 March 2024.

[2] Mr Henderson's statement of problem based on a personal grievance claim of unjustified dismissal was lodged in the Authority. SG Blondell Limited lodged a statement in reply.

[3] The company soon after instructed counsel and a memorandum was lodged seeking a preliminary determination. The company says that the correspondence

marked “Without Prejudice Save as to Costs” is not admissible in evidence before the Authority. Mr Henderson did not raise his personal grievance within time.¹

[4] This determination resolves whether the personal grievance was raised within time and whether correspondence marked “without prejudice save as to costs ” or with similar words is admissible.

Investigation process

[5] Neither party requested an in-person investigation meeting. The Authority was satisfied that the matter could fairly be dealt with on the papers.

[6] There are submissions and replies from each party.

Mr Henderson raised his personal grievance within time

[7] The company objects to the admissibility of correspondence dated 23 April 2024 to it from Mr Henderson’s lawyer. I deal with that below and need not set out the content of the correspondence at this point.

[8] That letter drew a response from Mr Blondell for the company dated 7 May 2024. No issue is raised about the admissibility of the 7 May 2024 letter.

[9] Mr Blondell wrote:

1. You have raised a personal grievance under the claim that the termination of Mr Henderson’s employment is an unjustified dismissal, but you have failed to substantiate how the redundancy was neither genuine nor properly undertaken.

[10] Mr Blondell then set out in detail what the company said had happened. He finished by saying that they had acted in good faith, the redundancy was genuine and no remedies would be offered to Mr Henderson.

[11] The company’s response establishes that it knew from the 23 April 2024 correspondence and earlier exchanges what it was responding to. The company was able to address the grievance on its merits.

¹ Employment Relations Act 2000 s 114.

[12] Mr Henderson had met the requirement to raise his personal grievance with his employer within 90 days of the dismissal, even without the 23 April 2024 letter and earlier correspondence being admissible.²

All the correspondence is admissible

[13] Mr Henderson through his lawyer wrote to the company on 23 April 2024. The letter is headed “Without Prejudice Save as to Costs”. To paraphrase, the letter referred to earlier correspondence and said that Mr Henderson’s dismissal was unjustified and was a personal grievance as the redundancy was neither genuine nor properly undertaken. The company was invited to forward a proposal for remedy, failing which Mr Henderson would take further steps under the Employment Relations Act 2000. A response within 14 days was requested.

[14] I am referred to the Employment Court judgment in *Morgan v Whanganui College Board of Trustees*.³ The Court of Appeal later confirmed that “dispute” was not a term of art, and that “negotiations” or the broader term “difference” will suffice.⁴ There was a “difference” between the parties at the time of the 23 April 2024 letter, sufficient to support inadmissibility of without prejudice correspondence.

[15] However, the difficulty in the present case is that the labels “Without Prejudice Save as to Costs” and “Without Prejudice” are not determinative of admissibility. Use of those words will not necessarily protect the entire contents of the communication. Protection is accorded only to statements that are reasonably incidental to the negotiations. If independent of the negotiations, statements in the correspondence are admissible.⁵

[16] The letter was written by a lawyer who would have understood the legal effect of the heading and it invited “proposal(s) for remedy” from the employer. However, it did not include anything that could amount to a negotiation. The letter is admissible in evidence because it did not include any content that was “without prejudice”.

[17] The letter referred to earlier correspondence. Letters of 29 February 2024 and 5 March 2024 for Mr Henderson are marked “Without Prejudice Save as to Costs”, but

² *Chief Executive of Manukau Institute of Technology v Zivaljevic* [2019] NZEmpC 132.

³ *Morgan v Whanganui College Board of Trustees* [2013] NZEmpC 117.

⁴ *Morgan v Whanganui College Board of Trustees* [2014] NZCA 340 at [17].

⁵ *DF Hammond Land Holdings Limited v Elders Pastoral Limited* (1989) 2 PRNZ 232 (CA) at 236.

included nothing that could be regarded as negotiations to resolve a personal grievance with respect to a personal grievance about a possible dismissal (or any other disagreement capable of litigation). The content of the 29 February 2024 letter was Mr Henderson's feedback to the proposal to disestablish his position conveyed by the company's 26 February 2024 letter.

[18] Equally, the company sent correspondence to Mr Henderson's lawyer dated 4 March 2024 and 6 March 2024 labelled "Without Prejudice". Despite the label, the letters did not include any content that was "without prejudice". Indeed, if the correspondence was treated as inadmissible just because of the label, the company would be impeded in its case to prove justification for the dismissal under s 103A of the Employment Relations Act 2000.

[19] In support of its position, the company says that it would go against the Authority's equity and good conscience jurisdiction for someone to raise a personal grievance in without prejudice communications.

[20] The Authority's role is to resolve employment relationship problems according to the substantial merits of the case, without regard to technicalities. Here, the "substantial merits" are that the company knew that Mr Henderson had a personal grievance claim and in May 2024 responded to it in detail.

[21] Both parties labelled correspondence "Without Prejudice", but the content did not contain "frank exchanges that are "off the record" ... [to] lubricate the machinery of employment dispute resolution".⁶ It would be inconsistent with equity and good conscience not to take into account the content of the letters, both as to Mr Henderson's grievance and the company's answer.

Summary

[22] Mr Henderson raised his personal grievance within time.

[23] All the correspondence is admissible.

[24] Costs are reserved.

⁶ *Morgan v Whanganui College Board of Trustees* [2013] NZEmpC 117 at [47].

[25] A case management conference will be convened shortly.

Philip Cheyne
Member of the Employment Relations Authority