

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI  
TĀMAKI MAKĀURAU ROHE**

[2025] NZERA 153  
3319540

BETWEEN	ROY HENGEVELD Applicant
AND	COHE GROUP LIMITED Respondent

Member of Authority:	Marija Urlich
Representatives:	Erin Burke, counsel for the applicant John Gray-Smith, counsel for the respondent
Investigation Meeting:	On the papers
Submissions received:	28 January 2025 from the applicant 13 February 2025 from the respondent
Determination:	13 March 2025

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**PRELIMINARY DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] Cohe Group Limited (CGL) raises two preliminary issues for determination. The first concerns emails dated 11 and 12 September 2023 between the parties. CGL seeks an order removing them from the information before the Authority. The second concerns a challenge to jurisdiction. CGL says Mr Hengeveld has not raised within the 90-day statutory timeframe an unjustified disadvantage personal grievance in relation to being placed on garden leave.

[2] Mr Hengeveld says the subject emails do not attract privilege. With respect to the 90-day issue, Mr Hengeveld says this personal grievance is raised in his then representative's communication to CGL of 9 October 2023. He has not applied to raise this personal grievance out of time.

## **The Authority's investigation**

[3] By consent this matter is determined on the papers. As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all information received.

## **Relevant law**

### *(i) Without prejudice communications*

[4] The Court of Appeal judgment in *Morgan v Whanganui College Board of Trustees* established the essential requirements for without prejudice communications to be afforded protection as follows<sup>1</sup>:

- (i) The existence of an agreement between the parties that the communication is without prejudice;
- (ii) The existence of at least “negotiations” or a “difference” to warrant the conversation; and
- (iii) That the problem be one “that could give rise to litigation, the result of which might be affected by an admission made during negotiations”.

[5] In addition counsel have referred in submissions to exceptions to privilege including the Authority's broad power to take into account such evidence and information as in equity and good conscience it thinks fit.<sup>2</sup>

### *(ii) 90-day statutory timeframe*

[6] Section 114 of the Act provides that a personal grievance must be raised with the employer within a period of 90 days. The period begins with the date on which the action alleged to amount to a personal grievance occurred or came to the notice of the employee, whichever is the later, unless the employer consents to the personal grievance being raised outside the statutory timeframe.

[7] The grievance is raised with the employer as soon as the employee has made, or has taken reasonable steps to make, the employer or a representative of the employer

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<sup>1</sup> *Morgan v Whanganui College Board of Trustees* [2014] NZCA 340.

<sup>2</sup> Employment Relations Act 2000, s 160(2).

aware that the employee alleges a personal grievance the employee wants the employer to address.<sup>3</sup>

[8] In relation to s 114(2) and how a grievance is raised the Employment Court said in *Creedy v Commissioner of Police*:<sup>4</sup>

It is the notion of the employee wanting the employer to address the grievance that means that it should be specified sufficiently to enable the employer to address it. So it is insufficient, and therefore not a raising of the grievance, for an employee to advise an employer that the employee simply considers that he or she has a personal grievance or even by specifying the statutory type of the personal grievance as, for example, unjustified disadvantage in employment ... As the Court determined in cases under the previous legislation, for an employer to be able to address a grievance as the legislation contemplates, the employer must know what to address. I do not consider that this obligation was lessened in 2000. That is not to find, however, that the raising cannot be oral or that any particular formula of words needs to be used. What is important is that the employer is made aware sufficiently of the grievance to be able to respond as the legislative scheme mandates.”

[9] In *Chief Executive of Manukau Institute of Technology v Zivaljevic* Judge Holden summarised the applicable principles:<sup>5</sup>

The grievance process is designed to be informal and accessible. A personal grievance may be raised orally or in writing. There is no particular formula of words that must be used. Where there had been a series of communications, not only would each be examined as to whether it might constitute raising the grievance, but the totality of those communications might also constitute raising the grievance.

It does not matter what an employee intended his or her complaint to be, or his or her preferred process for dealing with it in the first instance. It also does not matter whether the employer recognised the complaint as a personal grievance. The issues are whether the nature of the complaint was a personal grievance within the meaning of s 103 of the Act and, if so, whether the employee’s communications complied with s 114(2) of the Act by conveying the substance of the complaint to the employer.

It is insufficient for an employee simply to advise an employer that the employee considers that he or she has a personal grievance, or even specifying the statutory type of personal grievance. The employer must know what it is responding to; it must be given sufficient information to address the grievance, that it is to respond to it on its merits with a view to resolving it soon and informally, at least in the first instance.

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<sup>3</sup> Section 114(2) of the Act.

<sup>4</sup> *Creedy v Commissioner of Police* [2006] ERNZ 517 at [36].

<sup>5</sup> [2019] NZEmpC 132, at [36]–[38].

## Discussion

(i) *Without prejudice communication?*

[10] In circumstances where the parties' intention as to admissibility is clear on the face of the document(s) at issue there will need to be compelling grounds to dislodge the presumption of privilege.

[11] CGL says it is clear on the face of the 11 September email that it is without prejudice because the contents include an attempt to settle a dispute between the parties by way of exit strategy, request Mr Hengeveld's view on the proposed and includes the subject line "Re: Without Prejudice: Proposed exit strategy". CGL also relies on Mr Hengeveld's use of the same subject line in his response email.

[12] The 11 September email does not record any agreement between the parties that the communication regarding the exit strategy would be without prejudice or propose discussions on that basis. It appears to assert the communication is of that type.

[13] Mr Hengeveld's response of 12 September includes he is "unsure what to do with the proposed strategy you offered me. I'm going to ask for advice." Although his reply has not altered CGL's subject line, given its equivocal nature it is evidence of the kind of informed agreement anticipated in *Morgan* is not apparent on the face of that document.

[14] Two days later, on 14 September Mr Hengeveld's then representative writes to CGL, subject line "Without Prejudice: Roy Hengeveld". The email is in apparent response to the 11 September exit strategy and Mr Hengeveld's communication of 12 September which includes "We have been instructed by our client to act on his behalf in negotiating a settlement package for his exit from the company".

[15] In summary, on 11 September CGL proposed an exit strategy on a without prejudice basis, Mr Hengeveld replied the following day he needed to get advice, apparently preserving the without prejudice nature of the discussion, or at least the possibility of such, and then instructed a representative who responded to the exit strategy on a without prejudice basis. The arc of these communications indicates the parties have agreed they are on a without prejudice basis. I have considered the

submission made on behalf of Mr Hengeveld that given the technical nature of the 11 September proposal and that English is not his first language he could not consent to the communications being without prejudice.

[16] It is not accepted because Mr Hengeveld has preserved his position, taken advice and his representative has then confirmed the without prejudice nature of the parties' communications with respect to the exit strategy. The other elements of *Morgan* are met – an employment relationship problem existed between the parties capable of being litigated.

(ii) *90-day timeframe?*

[17] On 9 October 2023 Mr Hengeveld's then representative wrote to counsel for CGL raising a personal grievance for unjustified dismissal. Included in the narration of supporting information is a reference to his being placed on garden leave about a week before his dismissal and includes "Our client was not consulted regarding this action and did not consent to being placed on garden leave". Mr Hengeveld says this is sufficient to have raised a personal grievance for unjustified action in relation to his being placed on garden leave.

[18] The 9 October letter raises one personal grievance for unjustified dismissal. The letter carefully narrates the factual basis for that personal grievance, which includes CGL's decision to place Mr Hengeveld on garden leave and sets out the resolution sought for that grievance. No different resolution is sought in relation to the claimed unjustified action. CGL could not reasonably understand from reading the 9 October letter that Mr Hengeveld communicated the substance of a complaint regarding the garden leave decision distinct from that of unjustified dismissal.

## **Outcome**

[19] The emails between the parties 11 - 13 September 2023 attract privilege.

[20] Mr Hengeveld has not raised a personal grievance for unjustified disadvantage relating to being placed on garden leave.

## **Costs**

[21] Costs are reserved.

Marija Urlich  
Member of the Employment Relations Authority