

**NIN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2025] NZERA 747
3353803

BETWEEN WILLIAM PETER JAMES
Applicant

AND CHRISTCHURCH GLASS LIMITED
Respondent

Member of Authority: David G Beck

Representatives: Anna Dao, advocate for the Applicant
Ashley-Jane Lodge, counsel for the Respondent

Investigation Meeting: On the papers

Submissions Received: 3 and 8 November 2025 from the Applicant
10 October and 7 November 2025 from the Respondent

Date of Determination: 19 November 2025

PRELIMINARY DETERMINATION OF THE AUTHORITY

The employment relationship problem

[1] William James is pursuing a personal grievance against Christchurch Glass Limited alleging he was unjustifiably dismissed in a constructive manner after he resigned his position of franchise manager in March 2025.

[2] A preliminary matter the Authority must resolve is whether conversations between William James and his father Michael James, of 22, 23 and 24 January 2025 can be allowed to be referred to in evidence or whether they should be excluded.

The issue

[3] The issue I must resolve is whether any evidence pertaining to the identified conversations, is capable of being viewed as an exception to the well-established rule that such communication normally has the protection of privilege or is otherwise inadmissible.

The Authority's investigation

[4] It was agreed the matter be dealt with by submissions and affidavit evidence and independent of the Authority member tasked with the scheduled investigation meeting for the substantive issues.

[5] Pursuant to s 174E of the Employment Relations Act 2000 (the Act), I make findings of fact and law and outline conclusions on matters to resolve the disputed issues and make an order, but I do not record all evidence and submissions received.

Background to the disputed evidential issue

[6] William James worked for Christchurch Glass Limited for nearly ten years, latterly as a franchise manager of their trading business Novus Glass (Novus Christchurch West). William James' father (Michael James) and uncle (Timothy James) and John Armstrong are directors of Christchurch Glass Limited and another company operating, the automotive glass focused Novus Brand, trading as Novus New Zealand.

[7] In November 2022 Novus New Zealand appointed Kent Krammer as General Manager and identified him as the person William James would report to and be mentored by.

[8] The relationship between William James and Mr Krammer broke down in early 2025. The precursor to this breakdown had been William James' attendance at a 2024 Christmas function involving a bowling social, that he attended while on ACC for a work-related injury. After the function in early January 2025, ACC contacted William James questioning the ongoing validity of his injury-related absence. While the ACC matter was resolved, William James raised a formal complaint with the the directors of Novus New Zealand by letter of 10 January, believing an inappropriate disclosure had been made to ACC by a Novus employee and he sought an investigation to identify the source of the ACC communication. Mr James

also highlighted a wider and generalised bullying approach unnamed managers had adopted with him that he also sought to be resolved.

[9] Mr Armstrong, in a letter of 13 January, advised as it was a Christchurch Glass matter and he had been deputed by Mike and Tim James to handle the company response. He then responded to the 10 January letter by a letter of 14 January, in which he noted any issues related to ACC were between William James and ACC and while suggesting Novus New Zealand took any identified bullying concerns seriously, he asked for details of the “long standing concerns surrounding harassment and bullying” that included a suggestion by Mr James he had been pressured back to work too early and “any pressure to resign from your position”. I observe on the latter comment, that Mr James’ letter of 10 January did not directly reference an allegation he was being pressured to resign.

[10] In a letter of 20 January William James set out his concerns in some detail, identifying Mr Krammer as the source of his bullying and harassment and other concerns related to workload and recruitment issues. Mr Armstrong then agreed to set up an independent investigation of Mr James’ identified concerns.

[11] On 22 January, William James by letter to Mr Armstrong, raised the issue of his proposed early return to work from ACC on Monday 27 January and sought that the issue of him working in the same environment as Mr Krammer while an investigation was being conducted, be addressed. Mr James suggested it was appropriate that either he or Mr Krammer be suspended while the investigation proceeded while implying that Mr Krammer be the party suspended. Mr Armstrong responded promptly indicating he would consider the issue.

[12] On Friday 24 January, Mr James by email pressed Mr Armstrong for a response on a return to work by the end of the day. Mr Armstrong replied by letter of the same day reiterating an investigation was proceeding and noted he understood from ACC documentation that Mr James was not cleared to return to work until 9 February. Mr Armstrong suggested the concerns regarding working alongside Mr Krammer were thus “not applicable” (implying that Mr James should remain on ACC) and that he would seek to expediate the investigation and advise of its progress in due course.

Admissibility of 22 and 23 January telephone conversations and 24 January meeting

[13] In the interim, the preliminary issue under dispute arose involving exchanges between William James and his father, Michael James. Both parties provided sworn affidavits and submissions.

[14] William James says he was of the firm belief that the above correspondence from John Armstrong confirmed his father, who he says he had a close relationship with, had recused himself from dealing with his complaint. Objectively, I observe that seemed a sensible and logical step and could be implied from Mr Armstrong's letter of 13 January, that specifically said the other two directors "have agreed that this matter is best handled by myself, on their behalf".

[15] However, William James' affidavit says his father subsequently rang him on 22 January and when he asked are you speaking as my: "Dad or my boss?" he replied: "Both". William says his father then angrily asked him: "What is your end game here?" William says his father, after he had advised he just wanted an independent investigation of his concerns, proceeded to say this would not happen and Mr Krammer would face no repercussions. William then says his father suggested he should take three months pay and leave and he needed to drop his complaint or face having no future with the company. William James gave a brief outline of the conversation and did not describe how it ended.

[16] In contrast, Michel James' affidavit initially conceded that during January 2025 he had several conversations with William "perhaps more than in a normal employment dispute, in an attempt to find a way forward – some over the phone: some in person". Without giving specific dates or times or content of such conversations, Michael James says:

To be clear, my view and understanding was, and remains, that all of these conversations were without prejudice, or "off the record." They were open and frank discussions entered into in a genuine attempt to resolve the employment relationship problem and avoid both the litigation that has transpired, and, as importantly, to try and avoid a breakdown in my relationship with my son.

[17] Michael James says he had originally thought the dispute was confined to a specific discussion had on 24 January 2025 but now understood he had to address the 22 and 23 January phone conversations. Turning to these, Michael James in summary says he:

- *The 22 January call*

Confirmed from contemporaneous texts, there being a conversation on 22 January but says William's version is not accurate. Michael says the context for the conversation, although avowedly to resolve matters, was that William had, since starting a diving course, suggested he leave Novus to travel in South America after the diving course was completed. In this context, Michael says he did suggest that William take three months' pay and fulfil his wish to travel. Michael says it was not a proposal that he leave and never come back, and he says he "categorically refutes" telling him he must drop his complaint or have no future with Novus. Michael noted they were getting legal advice at the time and thereafter arranged for an investigation of the complaint.

(I note it was not until 24 January that Mr Armstrong specifically identified that he would conduct the investigation despite his lack of neutrality)

- *The 23 January call*

Has records that show the call was brief (three minutes) but has no recall of detail other than a discussion about William returning to work and him suggesting Mr Krammer be suspended. While denying William's version that he said no investigation would proceed (claiming he disclosed that Mr Armstrong would conduct it), Michael recalled he may have expressed concern about William pressing him for a response by the end of the next day.

9 March meeting

[18] Neither party addressed any meeting between William and his father on 24 January, and it is evident they are referring to a meeting that took place on 9 March adjacent to a local park. Micheal James says he now better recalls this meeting prompted by him discovering a 9 March text. Michael disputes William's recollection of the meeting and says prior to the discussion that Anna Dao also attended, he sought and gained an assurance they were talking "off the record-without prejudice". William James did not address the latter assertion but his

recollection of what was discussed at the meeting is reasonably consistent with his father's recollection.

[19] On 10 March 2025 William James was provided with a copy of Mr Armstrong's investigation report and this led to his resignation in disputed circumstances after the party's attended mediation on 11 March.

Submissions

[20] Ms Dao broadly suggested evidence should be allowed to be given pertaining to the content of the 22 and 23 January 2025 telephone conversations as they establish crucial contextual elements to allow the Authority to determine William James' constructive dismissal claim.

[21] In contrast Ms Lodge, in summary, contended that the conversations in dispute were without prejudice and inadmissible as privileged, because:

- By 22 January 2025, an unresolved employment relationship problem had been identified, and Michael James had initiated a request that his concerns be investigated.
- The employment relationship "problem" could give rise to litigation, and such was threatened by Ms Dao.
- Michael James is adamant that William James agreed to the conversations being without prejudice.
- Michael James approached the matter believing they had protection to advance a solution during the conversations and the suggestion of settlement may be viewed prejudicially by the Authority as admission of some wrongdoing.
- At the 9 March meeting, William James was represented by an employment advocate, and it is asserted Ms Dao would understand and

appreciate what the terms “off the record” and “without prejudice” entailed.

The relevant legal principles

[22] The *Morgan v Whanganui College Board of Trustees* a Court of Appeal decision held the requirements for protecting without prejudice communication are, in summary:

- (i) The existence of an agreement between the parties that the communication is without prejudice.
- (ii) The existence of at least a ‘difference’ to warrant the conversation in the sense the parties are “in dispute” with such a premise not warranting a “narrow construction” including the existence of a communicated settlement offer not being required; and
- (ii) That the problem be one “that could give rise to litigation, the result of which might be affected by an admission made during negotiations.”¹

[23] While the Authority has a broad power to consider such evidence and information as in equity and good conscience it thinks fit whether strictly legal or not,² such as arguably, suggested by the Employment Court in *Bayliss Sharr v McDonald*,³ where the effect of excluding it will be more prejudicial than admitting it, the court held the Authority is guided by the relevant provisions of the Evidence Act 2006 and settled common law principles. On the latter, the court in *Morgan* noted the law has never recognised there was a residual discretion “of this nature” suggested by the Employment Court in *Bayliss Sharr*⁴ to admit without prejudice communications.⁵

[24] Notwithstanding, the Court of Appeal in *Morgan* recognised that “the law allows exceptions to the without prejudice rule” but as a guide “the Court should be very slow to lift the umbrella [of protection] unless the case for doing so is absolutely plain.”⁶

[25] The Court of Appeal, although not required to specifically deal with it in *Morgan*, initially put the question in granting leave to appeal, as: “Is a more nuanced approach required

¹ *Morgan v Whanganui College Board of Trustees* [2014] NZCA 340, ERNZ 80 at [18].

² Section 160(2) Employment Relations Act 2000.

³ *Bayliss Sharr v McDonald* [2006] ERNZ 1058.

⁴ At [49].

⁵ *Morgan* above n 1 at [22] – [24].

⁶ *Ibid* at [32].

in the employment law context where statements made in privileged communication may constitute evidence of constructive dismissal?”.⁷ This is a relevant question to the problem now before the Authority.

[26] Each case is assessed on a ‘fact specific’ basis and here some distinct features existed in both the lead up to, and purpose of the 22 and 23 January conversations, and the 9 March meeting. These included that William James had been told his father would quite appropriately be standing aside from dealing with his complaints. His father initiated the telephone conversations and the power imbalance between the parties was evident. It was also evident from Michael James’ perspective that he was using knowledge gained in the familial context to potentially resolve matters by using this relationship rather than a traditional employer-employee nexus.

[27] The 9 March meeting although ironically not involving any consideration of offers to settle was arguably a without prejudice discussion by agreement and William James was represented at the meeting which he had sought.

Discussion

[28] Applying the *Morgan* framework, the following factors are assessed and balanced.

Was there agreement that the meeting be conducted on a without prejudice basis?

[29] Even if I accept the 22 January call was sought as a genuine without prejudice discussion, the evidence did not convince that Michael James adequately explained the purpose of making his discussion on a ‘without prejudice’ basis at the outset of the 22 January call. Consequently, there was no evidence (as in *Morgan*) of any mutual intention that the discussion was intended to be privileged from the outset.

[30] In *DF Hammond v Elders Pastoral Ltd*, the Court of Appeal did make it clear the use of the words without prejudice or any form of other words to that effect may not be necessary to make the intention of the offeror clear.⁸ That was in the context of written communication

⁷ Ibid at [3].

⁸ *D F Hammond Land Holdings Ltd v Elders Pastoral Ltd* (1989) 2 PRNZ 232 (CA) at [9].

containing a settlement offer and here Michael James' intentions were not clear at the relevant time – his evidence was the conversation was a continuation of a familial based discussion that pre-dated the identified employment relationship problem. It was also not abundantly clear that Michael James was acting on behalf of the company rather than merely providing 'fatherly' advice as he suggests. An equally credible alternative explanation is undue familial pressure was inappropriately placed on William James.

Was there an identified dispute prior to the calls and the 9 March meeting?

[31] In *Morgan*, an expansive view of what is a dispute was taken, and the broader term "difference" was seen as sufficient or merely something that has arisen between the parties which must be resolved and "they have expressly agreed their communications should be protected for that purpose."⁹

[32] On the facts, it was evident that William James was unhappy about certain aspects of his employment situation and was seeking to have this situation resolved and options explored before he returned to work. How concerns were later addressed by the company became central to the subsequent matter in dispute (whether William James was constructively dismissed).

[33] In contrast, Michael James an experienced business owner, knew of his son's concerns and had knowledge gained in a familial relationship prior to the 22 January phone call. Objectively from his evidence, Michael James sought to advance a potential solution that he says contemplated should be addressed in a without prejudice context. This suggests a calculated approach to the meeting.

[34] While the parties were certainly not at an advanced stage of negotiations by 9 March, they were engaging at a low level, consistent with one of the objects of part 9 of the Act that suggests "employment relationships are more likely to be resolved quickly and successfully if they are first raised and discussed directly between the parties"¹⁰. In *Morgan*, the Court of Appeal affirmed earlier comment made by the Employment Court that without prejudice discussions are a "long standing, important and frequent feature of attempting to resolve

⁹ *Morgan* above n1 at [17]

¹⁰ Section 101(ab) Employment Relations Act 2000.

employment relationship disputes” – “with the parties safe in the knowledge that what they say is protected from admission before the Authority or the Employment Court”.¹¹

[35] I find there was an identified dispute by the 9 March meeting that was initiated by William James and his father was broadly aware that when he was due to return to work the short-term environment was becoming problematic.

Could the dispute or problem give rise to litigation?

[36] This question is easily answered in the affirmative, as the matters discussed at the 9 March meeting did give rise to litigation and objectively both parties could have anticipated that situation.

Should the context of William James’ constructive dismissal claim be assessed?

[37] In assessing this question, I am conscious that the relevance of all the discussions between William James and his father may not objectively have any bearing on the constructive dismissal claims as the discussion could reasonably be construed as familial as having no status other than Michael James proffering fatherly advice. Having said this, it was not entirely clear why Michael James is now seeking to portray the discussions as being on a without prejudice basis unless he was potentially acting consciously or unconsciously as an agent of the company. That is however, considering my finding below, a factual and/or credibility issue to be assessed at the substantive investigation meeting.

Outcome

[38] Overall, while I am convinced that the pre-conditions for privilege to protect the parties’ communication of 22 and 22 January existed (as do public policy reasons for taking great care to preserve without prejudice protection), I am not sufficiently convinced as a threshold issue in this context, that William James agreed to participate in without prejudice negotiations or was aware of his father’s view of why their discussions should proceed on that basis. I am not convinced that the cases cited assist as they are set against contexts where

¹¹ *Morgan* above n 1 at [27].

negotiations had reached a more advanced state. Here at the time of the telephone call of 22 January, for a variety of reasons, the employment relationship was not in immediate jeopardy.

[39] Further, given this is a constructive dismissal claim, I do consider that the differing recollections of the 22 and 23 January telephone exchanges, may assist the Authority investigation to determine William James' constructive dismissal claim and the circumstances of the employment relationship ending. I however stress it is not up to me to express any view on the strength or otherwise of the personal grievance claims.

[40] I do not consider a credible argument has been made out to admit evidence of the 9 March 2025 meeting given the circumstances, timing, and participants.

Finding

[41] I find that the content of the 22 and 23 January 2025 telephone exchanges between Michael James and William James is admissible and any evidence (from both parties) pertaining to the exchanges can be led. I, however, find that any evidence pertaining to the 9 March 2025 meeting is inadmissible.

Costs

[42] Costs are reserved until conclusion of the substantive matter.

David G Beck
Member of the Employment Relations Authority