

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2024] NZERA 72
3231619

BETWEEN DAMIAN KING
Applicant

AND ZURU TRAVEL LIMITED
Respondent

Member of Authority: Helen Doyle

Representatives: Amy Keir, counsel for the Applicant
Charlotte Parkhill and Stacey Fletcher counsel for the
Respondent

Investigation Meeting: 5 December 2023 by audio visual

Submissions Received: On the day

Determination: 9 February 2024

PRELIMINARY DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Authority is determining a preliminary issue about the admissibility of evidence. Dates have been set for a substantive investigation which will be undertaken by another Member.

[2] Affidavit evidence about the preliminary issue was received from Damian King who was employed by Zuru Travel Limited (Zuru) as Chief Pilot and Head of Flight Operations and from Michael Wilding who is Zuru's Chief Operations Officer.

[3] The issue for determination is whether what was said at a meeting on 6 October 2022 between Mr King and Mr Wilding and communications immediately thereafter attract privilege.

[4] Mr King says that the evidence of the meeting and the events that immediately followed should be admitted and considered by the Authority in the substantive proceedings because the discussions were not expressed to be and were not “without prejudice” and privilege should not be available.

[5] Zuru say that the discussion on 6 October 2022 was protected by privilege and is inadmissible because it was entered into by the parties on a “without prejudice” basis.

The Authority’s investigation

[6] The preliminary matter was set down for an investigation meeting on 5 December 2023. The meeting proceeded on the basis of the affidavit evidence lodged and submissions with counsel participating by way of audio visual.

[7] As permitted by s 174E of the Employment Relations Act 2000 (the Act) I have not set out all the contents of the affidavit evidence or the submissions received. The findings and the conclusions necessary to dispose of this matter are set out.

The issues

[8] The Authority needs to determine the following:

- (a) What is the legal framework against which the issue of admissibility and privilege should be considered?
- (b) What is the relevant background?
- (c) Applying the legal framework to the relevant background are the following exchanges and correspondence admissible:
 - (i) The content of the discussion between Mr King and Mr Wilding in a meeting on 6 October 2022.
 - (ii) The exchange between Mr King and Matt Mowbray on 6 October 2022.
 - (iii) The content of Mr Wilding’s text message on 6 October 2022
 - (iv) The content of Mr King’s email on 7 October 2022.
 - (v) The content of Mr Wilding’s email on 7 October 2022.

The legal framework

[9] Section 160(2) of the Employment Relations Act 2000 (the Act) provides as follows:

The Authority may take into account such evidence and information as in equity and good conscience it thinks fit, whether strictly legal evidence or not.

[10] The Court of Appeal in *Morgan v Whanganui College Board of Trustees* confirmed the judgment of the Employment Court about whether communications in the employment context were protected by privilege.¹ There was agreement with the Employment Court that the Authority must be “guided by the settled principles of common law and relevant provisions of the Evidence Act 2006, even though it does not govern proceedings in the Authority.”

[11] The privilege relied on by Zuru is that which attaches to communications for settlement negotiations.

[12] Section s 57 of the Evidence Act provides as follows:

57. Privilege for settlement negotiations, mediation, or plea discussions

- (1) A person who is a party to, or a mediator in, a dispute of a kind for which relief may be given in a civil proceeding has a privilege in respect of any communication between that person and any other person if the communication—
- (a) was intended to be confidential; and
 - (b) was made in connection with an attempt to settle or mediate the dispute between the parties.

[13] The parties must intend the communication to be confidential and it has to be a communication in connection with an attempt to settle the dispute between the parties.

[14] The Court of Appeal in *Morgan* did not conclude the words in s 57(1)(b) of the Act warranted a narrow construction of the word dispute in circumstances where something has arisen between the parties needing to be resolved and the parties expressly agree that the communications need to be protected for that purpose.² It was accepted in

¹ *Kenneth Morgan v Whanganui College Board of Trustees* [2014] NZCA 340 at [24] Court of Appeal.

² Above n 1 at [17].

Morgan that the common law protection may include a serious problem in the employment relationship but it must be a problem that could give rise to litigation which may be affected by an admission made during negotiations.³

The background against which to assess whether privilege attaches

Leading up to the meeting

[15] There is no dispute from the affidavit evidence about the arrangement of the meeting. Mr King had been on an overseas assignment from 25 August to 5 October 2022. On his return he was stopping in Auckland via Nelson where he is based. Mr Wilding is based in Auckland and Mr King was to meet with him to talk about operational matters. Mr King had sent some talking points in anticipation of the meeting to Mr Wilding covering the work schedule of the flight crew, management of client expectations and terms of employment for the pilots.

[16] Before the meeting on 6 October 2022 and following enquiries Mr Wilding became concerned with how Mr King was referring to a senior leader to other staff members in what he was told was a disparaging manner. He considered this was serious because of Mr King's role that required a high level of trust and confidence.

[17] Mr Wilding stated in his affidavit that if what he had been told was true then he believed a full employment investigation would have potential to damage Mr King's relationship with those who would be involved. He said that Mr King had done a good job in other areas of his role and he wanted to explore all options before going down the investigation path and to have that conversation in person. Mr Wilding considered it made sense to discuss the concerns at the 6 October meeting. He sent the following message to Mr King on Whats App:

Hi Damian, hope the flight went well. I have got a bigger issue that I need to go through with you in the morning at 10am. Will need to do that without Glenn. Look forward to seeing you in the office them...

[18] Mr King in his affidavit said that he did not know what was meant by a "bigger issue" but thought the operational issues were very serious so did not think too much

³ Above n1 at [18].

about it. Mr Wilding in his affidavit stated that it would have been obvious that he wanted to discuss something different to what had been planned.

At the meeting

[19] There are some different recollections about aspects of the meeting from the affidavit evidence but also some common ground.

[20] Mr Wilding stated in his affidavit that he told Mr King straight away that a serious issue had been raised about his conduct and asked if he would like to “discuss the issues on a “without prejudice, off the record basis”. He stated he clearly recalled Mr King saying “yes” and the meeting proceeded on that basis. Mr Wilding saw no need to explain the meaning of “without prejudice” as he had also used the words “off the record” and Mr King had confirmed this was how the meeting was to proceed. He described Mr King as a sophisticated and highly skilled person. Mr Wilding said in his affidavit that once they were speaking on a without prejudice basis Mr King admitted the allegations but did not regard them as serious enough to end his employment relationship.

[21] Mr King said in his affidavit that he could not recall Mr Wilding using the words “without prejudice” and, if he did, he did not understand what they meant or referred to. He stated in his affidavit that the meeting did not proceed as he intended. As soon as he arrived he said Mr Wilding told him that although “the work he had done to that point in setting up the operation was exemplary” it may be in his best interest to “offer his resignation.” Mr King said that he was told about the allegations and that if he did not resign a “termination pathway would be created with HR.” He said in his affidavit that he raised where he stood with notice and holidays and such matters and was advised that payment of these would be “highly unlikely.” In his affidavit Mr King said he was shocked and blindsided by what was said at the meeting. He said he told Mr Wilding he needed some time to think, and the meeting was a short one. He did not accept that he resigned but did argue he should be paid notice if he did.

[22] Mr Wilding did not agree in his affidavit that he said we would create a “termination pathway” as he did not know what the outcome would be. Mr Wilding stated that he distinctly remembered that he said we would start a formal process with HR to investigate the allegations that could lead to the termination of Mr King’s employment.

He gave the alternative option to Mr King of an “exit pathway with a good reference and leave.” Mr Wilding said that it was Mr King who wanted to explore resignation in the meeting and there was a discussion about what that would look like. He recalled Mr King specifically asked for two months’ pay together with annual leave. He told Mr King he would need to defer to the business before agreeing to any payment over and above his contractual entitlements. He was clear that Mr King had resigned and there was a discussion about telling the pilots about the resignation.

After the meeting

[23] Some of the exchanges and communications the same day or the next after the meeting are relied on by Mr King to support his view the meeting was not in fact intended to be or was confidential. That is not Mr Wilding’s view.

Was the communication intended to be confidential?

[24] Legal representation is not essential for privilege to attach to a “without prejudice” conversation. It may however be easier to conclude intention that discussions are confidential where representatives are involved. Mr King says that he was “shocked and blindsided” by the nature of the meeting and that can impact recollection.

[25] With this in mind I have considered communications shortly after the meeting. Mr King advised one of the owners about the meeting on the same day. The owner’s written response indicated that they already knew. Mr Wilding says that it was appropriate to keep the owner up to date both before and after the meeting with Mr King.

[26] Mr King said that he also discussed the matter with his pilot colleagues. Mr Wilding said that such discussion was consistent with what had been discussed at the meeting and from a practical standpoint the resignation needed to be communicated. Mr King’s affidavit did not support the communications to the pilots were confined to the resignation aspect of the meeting.

[27] There are communications between Mr Wilding and Mr King dated 6 and 7 October 2022 that followed the meeting. One is a text message from Mr Wilding to Mr King to let him know that the two months’ pay “you requested today” and annual leave payout were agreed to. The message is not headed “without prejudice.” A follow

up email from Mr Wilding to Mr King dated 6 October 2022 formally accepting Mr King's verbal resignation and offering two months pay in lieu of notice is not headed "without prejudice." The Authority understands that Mr King's notice period in his employment agreement was two months.

[28] Mr King responded to that message on 7 October 2002 in an email that provided amongst other matters that Zuru suggested that he should resign and that he did not accept that there were grounds for his resignation referring to the 'slander' being "...neither founded nor grounds for dismissal."

[29] Mr Wilding said that he was extremely surprised to receive this email and responded by email on 7 October 2022. In his email he set out that he had advised at the beginning of the discussion that it would be a "without prejudice" and "off the record" discussion and that Mr King had agreed. Further that the result of the discussion was that Mr King wanted to resign.

[30] Ms Keir was instructed by Mr King and raised a personal grievance with Zuru in a letter dated 11 October 2022 to Mr Wilding.

[31] An employment investigation was then undertaken. The statement of problem lodged for the substantive matter alleges unjustified dismissal (actual) together with unjustified disadvantage claims.

[32] Ms Parkhill submits that there was no need to explain to Mr King what such a "without prejudice" conversation may mean because he was highly skilled and in addition the words "off the record" had been used and no issue of concern was raised by Mr King. Mr King stated in his affidavit that he did not think he had ever heard the term "without prejudice" before it was later explained to him by Ms Keir.

[33] I have considered the exchanges immediately after the meeting. Viewed objectively they do not support Mr King understood the discussion was intended to be confidential. I have considered that the nature of the discussion was a surprise to Mr King. I cannot safely conclude in all the circumstances a mutual intention that the discussion was confidential. I will go onto consider in the circumstances of this case whether the parties were in dispute.

Settling a dispute?

[34] Ms Parkhill submits that the allegations were regarded by Zuru as extremely serious because of Mr King's trusted position in the company. The purpose of the meeting she submits was to discuss a potential resolution of the allegations as an alternative to an employment investigation with a possible outcome of termination.

[35] Ms Parkhill is correct in her submission that the Court of Appeal in *Morgan* disagreed with a submission that privilege protection could not apply unless and until the parties had undertaken a natural justice process of a hearing with a finding of serious misconduct. The submission had been made with reference to the inequality inherent in the employment relationship.⁴ The Court of Appeal in *Morgan* referred to the objects in Part 9 and Part 10 of the Employment Relations Act 2000 supporting prompt resolution by the parties themselves and the importance of "without prejudice" discussions in attempting to resolve employment relationship disputes.⁵

[36] The raising of allegations with Mr King for the first time at the meeting on 6 October 2022 can be contrasted with the situation considered by the Court of Appeal in *Morgan*.⁶ In *Morgan* the issues of concerns had been raised by the employer with the employee who was accompanied by his legal representative before the first conversation to which privilege was found to attach. The Court of Appeal concluded that the employee must have appreciated by that time [before the "without prejudice" discussion] the seriousness of the incident and that the Board's decision might adversely affect his legal position.⁷ This included the need to report the incident to a professional body if the Board made findings of serious misconduct.

[37] In contrast Mr King had only limited opportunity to process what the allegations may mean in terms of their seriousness and the impact of an investigation and outcome. The possibility of a disciplinary investigation was raised with the allegations. I accept Ms Keir's submission that the raising of the allegations and a subsequent disciplinary investigation are unlikely in the circumstances of this matter to satisfy the identification

⁴ Above n 1 at [25].

⁵ Above n 1 at 27.

⁶ Above n 1.

⁷ Above n 1 at [6], [7] and [19]. There was no suggestion in *Morgan* that the meeting on 5 April 2012 was inadmissible.

of a difference or dispute such as to justify the attachment of privilege. Mr Wilding in his affidavit said he advised Mr King a possible outcome of the investigation could be termination. Even if there could be said to be a difference between the parties at that point it was not readily identifiable at the meeting on 6 October 2022 as a serious problem that may give rise to litigation and be affected by an admission made during negotiations.

[38] The main aspects of any negotiations appeared to be about contractual or statutory entitlements in the event Mr King resigned. Mr King referred in his affidavit to a discussion about notice and annual leave. There was mention of a reference by Mr Wilding in his affidavit although I am less clear from subsequent correspondence about that matter. It was not an aspect Mr King mentioned in his affidavit.

[39] I am not satisfied that the content of the meeting on 6 October 2022 attracts “without prejudice” privilege. I cannot safely conclude that both Mr King and Mr Wilding understood and intended that the content of the meeting on 6 October 2022 was to be confidential. I am not satisfied that there was an attempt to settle a difference or dispute between the parties of the type that may give rise to litigation at the meeting. Privilege does not attach as a result to the communications immediately after the meeting.

[40] I do not need to go on to consider whether there are exceptions to the without prejudice rule in the circumstances of this matter given the above finding.

[41] For completeness I accept that the nature of the discussion on 6 October 2022 and the communications that followed could be relevant evidence for the substantive investigation of this matter.

Summary of findings

[42] The following exchanges and communications can be admitted in evidence for the substantive investigation of the employment relationship problem:

- (i) The content of the meeting between Mr King and Mr Wilding on 6 October 2022.
- (ii) The exchange between Mr King and Mr Mowbray on 6 October 2022.

- (iii) The content of Mr Wilding's text message on 6 October 2022 and follow up email of 7 October 2022.
- (iv) The content of Mr King's email on 7 October 2022.
- (v) The content of Mr Wilding's email on 7 October 2022.

Costs

[43] Costs are reserved and are to be dealt with after the substantive investigation.

Helen Doyle
Member of the Employment Relations Authority