

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2020] NZERA 359
3107495

BETWEEN ALEXEY MARSHALL
Applicant

AND WORKING FATHERS
LIMITED
Respondent

Member of Authority: Vicki Campbell

Representatives: Kylie Hudson, counsel for Applicant
Michael Smyth, counsel for Respondent

Investigation Meeting: On the papers

Submissions Received: 2 September 2020 from Applicant
2 September 2020 from Respondent

Determination: 4 September 2020

PRELIMINARY DETERMINATION OF THE AUTHORITY

- A. Elements of Mr Hong’s witness statement at paragraphs [30] and [31] are not admissible and he is ordered to re lodge his witness statements in an amended form.**
- B. Costs are reserved.**

Employment relationship problem

[1] Mr Tom Hong, will be a witness for the Respondent in the Authority’s investigation of Mr Marshall’s application against Working Fathers Limited. In preparation for the investigation meeting he has lodged a witness statement.

[2] Mr Marshall has objected to the admissibility of aspects of Mr Hong's witness statement on the grounds that the information is protected by the confidentiality provisions of the Employment Relations Act (the Act) relating to mediation and/or because the information was made on a "without prejudice" basis.

[3] This preliminary issue has been dealt with by me prior to the matter being investigated and determined by the Presiding Member. By agreement with the parties, I have dealt with this matter on the papers.

[4] As permitted by s 174E of 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 as a result. While I have not referred in this determination to all of the information I have before me I have carefully considered everything.

Discretion to admit evidence

[9] The Authority has a statutory discretion in s 160(2) of the Act to take into account such evidence and information as in equity and good conscience it thinks fit, whether strictly legal evidence or not. The Authority must be guided in the exercise of that discretion by the provisions of the Evidence Act 2006, even though it does not govern proceedings in the Authority.¹

Are paragraphs [30] and [31] admissible?

[5] Mr Marshall has objected to statements made by Mr Hong at paragraphs [30] and [31] of his witness statement because Mr Hong refers to an offer made on a "without prejudice" basis.

[6] On 4 May 2020 the parties met to discuss an altercation between co-workers including Mr Marshall.

[7] On 5 May 2020 Mr Marshall emailed Mr Hong setting out a number of concerns he held about his employment and raising a personal grievance. At the end of his email Mr Marshall set out a proposal to resolve matters between them on a "without prejudice" basis. I record here that while I have seen a complete copy of that email for the purposes of this determination, the Authority's file contains only a redacted copy.

¹ *Morgan v Whanganui College Board of Trustees* [2014] NZCA 340; [2014] 3 NZLR 713; [2014] ERNZ 80 at [24].

[8] The without prejudice privilege can be invoked when there is a serious employment relationship problem that could give rise to litigation.² The privilege recognises that parties are to be encouraged to negotiate settlements of disputes, secure in the knowledge that whatever is said openly and honestly for that purpose will remain confidential.³

[9] As noted by the Court in *Martinsen v Target International (NZ) Limited*, sometimes the parties will agree at the outset of a conversation that it is to be on a “without prejudice” basis, but a party also may unilaterally make an offer to settle on a “without prejudice” basis.⁴

[10] In paragraphs [30] and [31] of his witness statement Mr Hong makes reference to elements of the proposal put forward by Mr Marshall on 5 May 2020. I find those references are covered by the privilege and are not admissible.

[11] Mr Hong is ordered to re-lodge his witness statement in an amended form. It must not reference any elements of the proposal set out by Mr Marshall in his email dated 5 May 2020.

[12] For the sake of completeness I have identified the following parts of Mr Hong’s evidence that need to be addressed:

a) Paragraph [30]:

- i. The second sentence should be removed in its entirety;
- ii. In the fifth sentence the words following “...the respondent had not breached any term of the employment agreement...” should be removed;
- iii. The sixth sentence should be removed in its entirety.

b) Paragraph [31] – the first sentence should be removed in its entirety.

² Ibid at [18].

³ *Martinsen v Target International (NZ) Ltd* [2019] NZEmpC 89 at [15].

⁴ Ibid at [11], footnotes excluded.

Is paragraph [37] admissible?

[13] Mr Marshall has objected to the statements made by Mr Hong at paragraph [37] of his witness statement. Mr Marshall says Mr Hong refers to discussions held during a mediation and are protected by s 148 of the Act.

[14] The parties attended mediation and attempted unsuccessfully to resolve Mr Marshall's personal grievance. Paragraph [37] of Mr Hong's witness statement references the attendance at mediation.

[15] Section 148(1) of the Act requires any person to whom mediation services are provided to keep confidential any statement, admission, or any information that, for the purposes of mediation, is disclosed orally in the course of the mediation. This confidential information is not admissible in the Authority.⁵

[16] Mr Hong does not disclose any statement, admission or any information disclosed orally during the course of mediation. What he has done is set out his personal view of why the matter did not resolve and his objective in attending mediation.

[17] Paragraph [37] of Mr Hong's witness statement is admissible.

Costs

[18] Costs are reserved and will be dealt with by the Presiding Member following her investigation and determination of the substantive matters.

Vicki Campbell
Member of the Employment Relations Authority

⁵ Employment Relations Act 2000, s 148(3).