

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2018] NZERA Auckland 325
3037472

BETWEEN ROBERT MAY
 Applicant

A N D SOLIDBUILT CONSTRUCTION
 2017 LIMITED
 Respondent

Member of Authority: James Crichton

Representatives: Erin Burke, Counsel for Applicant
 Andrea Twaddle with Cassie Death, Counsel for
 Respondent

Investigation Meeting: On the papers

Submissions Received: 17 September 2018 and 15 October 2018 from Applicant
 14 September 2018, 5 October 2018(with affidavit in
 support) and 12 October 2018 from Respondent

Date of Determination: 17 October 2018

**FIRST DETERMINATION OF THE
EMPLOYMENT RELATIONS AUTHORITY
ON A PRELIMINARY MATTER**

Employment relationship problem

[1] A statement of problem in this matter was filed on behalf of the applicant (Mr May) on 27 August 2018. The respondent alleges that the statement of problem contains without prejudice communications.

[2] I have been able to satisfy both counsel in this proceeding that I have not read the statement of problem and therefore not been influenced by any material that ought potentially not to be part of the filing.

[3] This determination deals only with the question whether the without prejudice material is properly included in the statement of problem, or not.

The basis for inclusion

[4] Counsel for the applicant maintains that the material is properly included in the statement of problem and relies on the decision of Chief Judge Colgan in *Rose v Order of St John*¹ and following on from that decision, the redacting of some of the details in the subject material.

[5] I am directed to a number of observations by the learned Judge, but two in particular are worth repeating. The first is His Honour's observation that "*there is nothing objectionable about a court subsequently knowing that attempts to settle have been made and about the subject matter of the attempt*".

[6] The second observation from the Judgment that I think is particularly relevant is this observation: "*What is important to remain confidential is the fact and detail of concessions which may have been made in an attempt to reach a settlement ...*".

[7] Counsel for Mr May maintains that she has diligently redacted the portions of the without prejudice documents which would apprise me of what the parties have been negotiating around, and/or the parameters in which those negotiations have actually taken place.

[8] Counsel says that the only information that is visible from the redacted documentation is the applicant's continued request for wage records pertaining to himself and the respondent's ongoing refusal to provide that information. Moreover, there is a statutory right to wage records when those records are sought by the employee affected, and in consequence, material traversing that subject matter could not ground without prejudice communications because there could not be any proper negotiation around the fulfilling of a statutory right.

¹ [2010] NZEmpC 163

The argument for exclusion

[9] Counsel for the respondent maintains that the material in question is imbued with a confidence by reason of the fact that it is plainly marked as “without prejudice save as to costs”.

[10] On this basis then, counsel submits that there is no proper basis on which any of that material can be put before the Authority save where there is agreement from the respondent to waive rights, and no such agreement is forthcoming.

Determination

[11] I have not been persuaded that the inclusion of the subject material in the statement of problem and its attachment is in breach of the legal rules that apply to without prejudice communications. This is essentially because of the redacting of material which would offend against that rule and the retention in the subject documents only of material relating to disputed claims about the provision of wage records.

[12] As counsel for the applicant correctly observes in her submissions, it cannot be right that a request by an employee for wage records pertaining to his employment is somehow the subject of a negotiation or a privileged communication; to the converse, such a request from such an employee is no more and no less than the pursuit of a statutory right and the argument, if any, around the provision of those wage records cannot and ought not to be the subject of negotiation.

[13] To put that point another way, it cannot be right that parties may legally negotiate away a statutory entitlement, and that is all that the applicant is pursuing and all that is visible to the Authority in the subject correspondence.

[14] The fact that the correspondence is marked “without prejudice save as to costs” is neither here nor there; that label does not have the force of holy writ where it is wrongly applied or, as in the present case, where the offending material has been redacted. As Randerson J observed in *Westgate Transport Ltd v Methanex New Zealand Ltd*², the label “without prejudice” is not “..... a label which can be used

² [2000] 14PRNZ 81

indiscriminately so as to immunise an act from its normal legal consequences, where there is no genuine dispute or negotiation”.

[15] I am satisfied the matter can proceed with the present state of the pleadings, but of course I understand that the respondent has a right to challenge this determination if they wish.

[16] On the basis that this decision stands, there will be a further telephone conference which I will convene with counsel from 23 October 2018 in order to progress this matter appropriately.

Costs

[17] Costs are reserved.

James Crichton
Chief of the Employment Relations Authority