Determination Number: AA 64/07
File Number: 5075548

Under the Employment Relations Act 2000

BEFORE THE EMPLOYMENT RELATIONS AUTHORITY AUCKLAND OFFICE

BETWEEN	Sarah McKelvie
AND	Spacific Yearbooks Limited
REPRESENTATIVES	James Burt for Applicant Ashley Sharp for Respondent
MEMBER OF AUTHORITY	R A Monaghan
DATE OF DETERMINATION	8 March 2007

DETERMINATION OF THE AUTHORITY ON PRELIMINARY MATTER

[1] On 22 December 2006 Ms McKelvie filed a statement of problem in the Authority, saying her former employer, Spacific Yearbooks Limited ("Spacific"):

(a) breached contractual and statutory duties to take all practicable steps to maintain a safe working environment;
(b) by unjustifiable actions, caused her disadvantage in her employment; and
(c) unjustifiably dismissed her.

[2] Ms McKelvie says she raised her personal grievances in a letter dated 12 October 2006.

[3] Spacific denies that Ms McKelvie raised a personal grievance in relation to any of the matters set out on the statement of problem. It says all communication of 12 October 2006 was 'without prejudice', and was subject to an associated joint privilege of the parties which Spacific declines to waive. If Spacific is correct Ms McKelvie will have to establish by some other means that some or all of her grievances were raised within the 90-day period in s 114 of the Employment Relations Act 2000, or otherwise seek leave under that provision to proceed with the relevant grievances.

[4] The issue referred to me for determination was whether a letter marked 'without prejudice' can raise a personal grievance. I have addressed that issue by seeking a copy of the 12 October letter, and the parties have filed submissions on the issue as identified. Another member will determine the substantive matters and any further preliminary matters that may arise.

The 12 October letter

[5] The letter is 7 pages long. It was prepared by Ms McKelvie's solicitors and addressed to counsel for Spacific. The heading 'without prejudice' appears at the beginning of the letter, before the text of the letter commences.

[6] The opening paragraph of the letter refers to a previous meeting and correspondence, and says the purpose of the letter is to: "provide you with enough information to consider properly the nature of Ms McKelvie's claim against your clients, together (as requested) with a proposal for resolving this matter promptly."

[7] The next paragraph, headed 'nature of grievances' identifies three personal grievances Ms McKelvie had against Spacific and its director.

[8] There follows a section headed 'background facts', which sets out Ms McKelvie's view of those facts in some four pages. Then there is a short section headed 'proposed resolution', which confirms a view that Ms McKelvie is unable to return to work.

[9] The last section is headed 'remedies sought'. It is a little over a page long. After an introductory paragraph its paragraph 24 begins: "However, in the interests of settlement, Ms McKelvie is willing to accept …". The details of what Ms McKelvie would accept are set out in that and the next four paragraphs.

Determination

[10] On any reading of the 12 October letter, it raised Ms McKelvie's personal grievances with Spacific through Spacific's legal representative. The real question is whether, nevertheless, the privilege attached to without prejudice communications means the letter cannot be produced or relied on in evidence so that Ms McKelvie must look elsewhere to establish when and how her grievances were raised.

[11] It is appropriate to begin by considering the basis of the privilege without prejudice communications attract. I refer to the following passage from the judgment of the Court of Appeal in **D F Hammond Land Holdings Limited v Elders Pastoral Limited** [1989] 2 PRNZ 232, 236:

> "The privilege attached to "without prejudice" communications is based to a large degree on considerations of public policy. It is intended to encourage and facilitate the negotiation and settlement of disputes, by preventing any possible admission of liability being raised against the party making it. This being the purpose of the rule, strict adherence to form is not necessary; for example the use of the words "without prejudice" is not necessary if the intention is clear: … On the other hand, the use of the words will not necessarily protect the entire contents of the communication. Statements that have no bearing on the negotiations will not be protected. Protection will be accorded only to statements that are reasonably incidental to the negotiations. …. If they are independent of the negotiations, they are admissible in evidence."

[12] As the Court said, the use of the words 'without prejudice' does not necessarily protect the entire contents of the communication – here the 12 October letter. Statements that have no bearing on the negotiations are not protected. Statements that are reasonably incidental to the negotiations are protected.

[13] I am about to consider the contents of the letter with reference to their bearing on any settlement negotiations. Because the consideration affects a single letter, which is clearly and logically structured, I do not accept that such an approach would offend against the judicial disapproval of 'dissecting out' admissions from the rest of the content of a without prejudice discussion.[1]

[14] I would accept that most, if not all, of the 'remedies sought' section of the letter bear on or are reasonably incidental to the attempt to negotiate a

[1] **Covington Group Holdings Ltd v Zhong** (2004) 17 PRNZ 819

settlement of Ms McKelvie's grievances. The without prejudice privilege may be properly invoked in respect of them.

[15] However I have difficulty in accepting that the four pages of recitation of Ms McKelvie's view of the background facts have that kind of relevance to any negotiations. They have no bearing on possible admissions of liability. If they did have such relevance - so attracted the privilege - the outcome would run counter to decades of employment relations practice in which people seeking to raise personal grievances did so in letters using the same broad format as was used here. In turn those letters were routinely produced if the grievances proceeded to litigation, as they also tend to be produced to the Authority under the Employment Relations Act.

[16] Indeed the presentation of such letters was required as part of an obligatory procedure under the Employment Contracts Act 1991, and a standard clause in relation to the settlement of personal grievances under the Labour Relations Act 1987. Aside from differences in detail and complexity the difference between the kind of letter required and usually provided under those procedures, and a letter like the 12 October letter, lies in the extent to which the remedies sought are discussed and negotiating positions identified.

[17] Further, and except to the extent that all or part of such a letter did bear on or was reasonably incidental to negotiations, it would impede the proper investigation and determination of a personal grievance if the correspondence was withheld in its entirety because the author had written 'without prejudice' at the start of it. There are many examples of grievance proceedings in which so-called 'grievance letters' formed a pivotal part of the evidence. That the Authority, for example, could in the course of an investigation be unaware even of the existence of such a letter merely because it was labelled 'without prejudice' is a matter of considerable concern.

[18] Similar comments apply to the 'nature of grievances' section in the 12 October letter – being the section which expressly raises the grievances but otherwise has nothing to do with the settlement negotiations themselves.

[19] Invoking the privilege in respect of matters covered in that section raises a further aspect of the extent of the privilege. In **Cedenco Foods Limited v State Insurance Limited** (1996) 10 PRNZ 142, the Court of Appeal framed some tests of admissibility in relation to without prejudice documents as follows:

> "First, whether the particular content of the document is such that it is properly classed as being without prejudice, and secondly whether the purpose of production is to avoid the court from otherwise being misled or deceived on an issue before it." (p 143)

[20] The parties addressed the second of these. I do not believe the Authority could be anything but misled if there was nothing in the evidence to show that grievances were raised by letter dated 12 October 2006, yet that was exactly what happened and both parties knew it.

[21] If Ms McKelvie were then forced to apply under s 114 of the Employment Relations Act for leave to raise a grievance out of time, the process involved in determining such an application would compound the misleading of the Authority.

[22] Finally:

"The rule is not absolute and there are exceptions where the justice of the case requires."[2]

[23] In the context of the resolution or determination of personal grievances it would not be in the interests of justice to permit the withholding in its entirety of a letter raising a personal grievance, particularly if the withholding resulted in an absence of evidence that grievances were raised at the relevant time. The injustice would be exacerbated by forcing a grievant into further litigation over whether leave to raise a grievance out of time should be granted.

[24] I therefore answer the question put to me by saying a without prejudice letter can raise a personal grievance as between the parties, but if the matter proceeds to litigation and the admissibility of the letter is in issue, the question is whether the legal tests for attracting the without prejudice privilege are met. I do not believe they were met in respect of the part of the letter which raised Ms McKelvie's grievances.

Costs

[25] Costs are reserved pending a final determination of this employment relationship problem.

R A Monaghan
Member of Employment Relations Authority

[2] **Westgate Transport Ltd v Methanex New Zealand Limited** (2000) 14 PRNZ 81, citing the House of Lords in **Rush & Tompkins Ltd v GLC** [1988] 3 All ER 737, [1989] AC 1280