IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

AA 253/07
5070619

	BETWEEN	CATHY PEREZ Applicant
	AND	FOCUS 2000 LIMITED Respondent

Member of Authority:	R A Monaghan
Representatives:	Anna Fitzgibbon, counsel for Applicant Jim Roberts, counsel for Respondent
Submissions received:	16 August 2007 from Applicant 8 August 2007 from Respondent
Determination:	20 August 2007

DETERMINATION OF THE AUTHORITY ON PRELIMINARY MATTER

Employment Relationship Problem

[1] Cathy Perez has raised a personal grievance with her former employer, Focus 2000 Limited ("Focus 2000").

[2] The parties have not resolved the associated employment relationship problem and it has been set down for an investigation meeting before another Authority member. This determination addresses an objection by Focus 2000 to parts of the brief of evidence filed in respect of one witness in particular, Isaac Itineru. At the material times Mr Itineru was acting in the capacity of advocate for Ms Perez.

[3] Focus 2000 objects to paragraph 34 of that brief, from the third sentence onwards. It says the passage refers to the substance of a without prejudice discussion between Mr Itineru and Eddie Mann on 18 October 2006. Focus 2000 describes Mr Mann as its advocate. Although Mr Mann's brief of evidence also addresses the

discussion, Focus 2000 says it does so by way of response to Mr Itineru's brief. In the event that I decide the passages in Mr Otineru's brief are not to be put before the presiding member, the same should apply to relevant and corresponding passages in Mr Mann's brief.

[4] I understood counsel for Ms Perez to have accepted, or at least nor disputed, that the third to last sentence in Mr Itineru's paragraph 34 should be deleted.

[5] I order accordingly and now address the remaining sentences.

Determination

[6] Counsel for Ms Perez argues for the retention of the remaining sentences on the grounds that:

(a) the relevant evidence is not 'without prejudice' as there was no 'dispute' at the time;
(b) even if the without prejudice rule applies, the interests of justice require it to be overridden;
(c) in any case, privilege was waived by the disclosure by the respondent to the applicant of the email message produced as document 14 in the applicant's bundle of documents.

1. The without prejudice nature of the evidence

[7] Regarding the existence of a dispute, counsel relied on a decision of the Employment Court in **Bayliss Sharr & Hansen v McDonald**[1]. There, the parties were attending a disciplinary meeting when, shortly after the meeting began, the parties' representatives had a private discussion 'off the record'. The parties went away with differing understandings about whether an offer had been made and accepted. The way in which they acted on their understandings led to a further issue

[1] Judge Couch, 7 December 2006, CC 12/06

about whether the employee was refusing to work, or whether there had been a constructive dismissal.

[8] The court reviewed the authorities on the application of the 'without prejudice' rule and adopted the view that the rule could not apply in the absence of an existing dispute between the parties to the communication in question.[2] It acknowledged that the question of the existence of a dispute was not limited to whether litigation had been commenced or threatened, rather it was concerned with whether there was a significant difference between the expressed views of the parties about a matter concerning them both.[3]

[9] The court was hearing the matter as a non de novo challenge. It did not have any material in front of it to enable it to identify what, if any, dispute there was between the parties. It found itself unable to infer there was a dispute, so concluded that the 'without prejudice' rule could not apply to the evidence in question.[4] Because of the way in which the court was forced to address the evidence and argument, the decision is of limited assistance.

[10] The following passage was cited both in submissions for Focus 2000 and in **Bayliss Sharr & Hansen**. It is a particularly apposite indicator of the approach to be taken here:

> "[17] I consider that what was probably meant by the parties in this case was, … an intention that the meeting and its subject matter be 'in confidence' or, colloquially, 'off the record.' That is a long-standing and frequent feature of attempting to resolve employment relationship disputes. Parties, and especially their representatives, hold such meetings and discussions daily and much litigation or potential litigation is resolved or narrowed in scope by frank exchanges that are 'off the record'. It is in the public interest that such practices be allowed to continue in the safe knowledge that the fact of them and particularly their contents will not be disclosed to the Authority or to the Court or any other person subsequently. Such procedures lubricate the machinery of employment dispute resolution. Indeed, the emphasis in the problem resolution provisions in the Employment Relations Act 2000 is supportive of this approach. Despite the importance of the privilege attaching to the content of such a meeting it

[2] At [45]
[3] At [46]
[4] At [48]

> does not mean that, even immediately after the end of an 'off the record' meeting, one or other party cannot then make its position clear on the record by, for example, making a Calderbank offer …"[5]

[11] Here, in the respective written briefs, Mr Mann referred the relevant discussion as 'without prejudice' while Mr Otineru referred to it as 'off the record'. From that and other passages in the briefs I take it as common ground that both men intended the discussion to be kept in confidence. It was entered into against the background of an ongoing disciplinary investigation and amounted to an attempt to resolve the associated problem arising in the employment relationship. It occurred in the course of precisely the kind of meeting being referred to in the comments quoted above.

[12] As for the existence or not of a dispute, it can be implicit in discussions of the kind entered into by Messrs Mann and Itineru, particularly in an employment context, that the purpose is to resolve potential litigation. That is for the most part why, as a matter of practice, such discussions are entered into.

[13] Here there was already potential for litigation and it is most unlikely that such a possibility had not occurred to either of Messrs Mann or Itineru. Ms Perez' conduct was under investigation, she had been suspended some three weeks earlier, and there had been a meeting between the parties at which Mr Mann had presented his 'report into alleged mismanagement and possible serious misconduct by managers at Focus 2000'. Ms Perez was one of the managers concerned. She had provided her responses to some of the passages relating to her, in general denying any wrongdoing. Finally, by letter dated 18 October 2006 - and I infer from Mr Itineru's brief of evidence that the letter was prepared and handed to Focus 2000 before the discussion with Mr Mann - Mr Itineru characterised the investigation as a witchhunt and demanded Ms Perez' immediate reinstatement.

[14] Overall I consider that background sufficient to amount to a dispute for the purposes of the without prejudice rule in an employment context.

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[5] **Jackson v Enterprise Motors (North Shore) Limited** [2004] 2 ERNZ 424

2. Whether the interests of justice override the application of the rule

[15] The Court of Appeal has 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."[6]

[16] The second of these is relevant to the submissions of counsel for Ms Perez.

[17] Counsel says Mr Mann's conduct in seeking the meeting of 18 October, and the statements made during the meeting, are directly relevant to whether Ms Perez was unjustifiably dismissed. In particular Mr Mann's role as 'independent investigator' was said to go to the heart of the question of whether Ms Perez' dismissal was justifiable. It was said that evidence about statements made during the meeting are necessary to establish this.

[18] Arguments in respect of the nature and relevance of Mr Mann's role will be for the presiding member to address, and the following comments should not be taken as any comment on what the ultimate finding might be.

[19] In the context of the present objection, I find there is material in the remainder of the briefs and papers filed capable of opening the issue up for discussion and forming some basis for any finding the Authority might eventually make. Detailing statements Mr Mann made during the 18 October meeting with Mr Itineru might arguably support or reinforce that material, but the nature of the remaining material means I doubt that any restriction on detailing the statements would mislead or deceive the Authority.

[20] On the wider question of the interests of justice, counsel for Ms Perez indicated an intention to refer to the evidence objected to in support of further aspects of the argument that Ms Perez' dismissal was unjustified.

[21] She sought to argue that the fact and purpose of the discussions themselves amounted to unfair treatment because of what was said to be the early stage at which they were embarked upon, and in particular that they were embarked upon before Ms Perez had been provided with details of the allegations against her. The discussions were also said to amount to a threat as to the likely outcome of the disciplinary proceedings. An associated submission was that the contents of the discussion indicated that Mr Mann had pre-determined the outcome of his investigation.

[22] The first of those arguments is about the fairness of the entry into the discussions themselves. It is not relevant to whether the discussions ought to be detailed in evidence before the Authority despite their without prejudice status.

[23] As for the second, there was no allegation that an express threat of dismissal was made. Allowing the scrutiny of comments that were made would fly in the face of the public interest in promoting free and frank discussion in such circumstances, and defeat a primary reason for protecting without prejudice conversations.

[24] For these reasons I do not accept that any exception to the without prejudice rules should apply here.

3. Waiver of privilege

[25] The email message in question is part of an exchange between Mr Mann and the CEO of Focus 2000 regarding the response to a letter from Mr Itineru. I assume the letter in question is Mr Itineru's letter of 18 October. The relevant passage reads:

> "I met with Isaac yesterday and we talked off the record about where things could proceed to from here."

[26] Counsel for Focus 2000 says the exchange was clearly privileged and it was provided in error. Presumably the basis of the alleged privilege is that Mr Mann was acting as the representative of Focus 2000.

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[6] **Cedenco Foods Limited v State Insurance Limited** (1996) 10 PRNZ 142, 143

[27] I was not addressed in any detail on the waiver, other than in the form of some unhelpful exchanges between counsel regarding the provision of the document containing the email exchange, and the approach to the provision of documents in general in this matter. However I do not accept the submission of counsel for Ms Perez to the effect that the message discloses a significant part of the privileged information, or that it has the effect of waiving any privilege attached to the content of the discussion.

4. Conclusion

[28] For all of the above reasons I find in favour of Focus 2000. Paragraph 34 of Mr Itineru's brief of evidence, commencing at the third sentence, is not to be put before the presiding member in this matter. Correspondingly, paragraph 56 of Mr Mann's brief of evidence, commencing at the 9th sentence (which commences at the end of the 8th line) is not to be put before the presiding member.

R A Monaghan
Member of the Employment Relations Authority