

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Len Kiat Soen (Applicant)

AND Cosmos Hantec Investment (NZ) Limited
(Respondent)

REPRESENTATIVES Francis Sabbineni and Bernard Samuels, for Applicant
Christopher Hogg, for Respondent

MEMBER OF AUTHORITY Marija Urlich

SUBMISSIONS RECEIVED 21, 28 February and 5 March 2007
DATE OF DETERMINATION 10 May 2007

DETERMINATION OF THE AUTHORITY ON PRELIMINARY MATTER

Employment Relationship Problem

[1] Mr Soen filed an a Statement of Problem in the Authority saying his former employer, Cosmos Hantec Investment (NZ) Limited ("Cosmos") had unjustifiably dismissed him and unjustifiably withheld commission payments due and owing to him.

[2] On 26 June 2006 Mr Soen, through his representative, made a request for specific information pursuant to Principle 6 of the Privacy Act 1993. The request was made to the respondent's solicitors and was responded to under cover of letter dated 19 July 2006.

[3] Cosmos says that during this process it inadvertently disclosed to the applicant's representative a privileged document ("17-EMC Meeting 21 December 2005") and seeks an order from the Authority preventing Mr Soen from using or referring to the document.

[4] Mr Soen says the document in question is not privileged, that it is unclear whether the privilege claimed attracts to whole or part of the document and whether a copied document can attract the privilege claimed.

[5] To determine this issue a copy of the document "17-EMC Meeting" has been provided to me and the parties have filed submissions. Another member will determine the substantive matter between the parties and any other preliminary issue which may arise.

17-EMC Meeting minutes

[6] The minutes record a meeting of Cosmos executive members on 21 December 2005. The minutes are marked "Internal & Confidential". The sole agenda item is "Issue of Len Soen". The opening paragraph of the minutes refers to issues concerning Mr Soen's conduct at work and then "...feedback from the lawyers of both Morgan Coakle and Kensingtonswan to Steve and Bill". Bill and Steve attended the meeting. The dialogue between attendees of the meeting as to how to deal with the situation is then set out.

[7] The next paragraph begins "*Referring to lawyer Anna Clark's email, she suggested...*" Following is the dialogue between the attendees about Ms Clark's email and the employment issues concerning Mr Soen. The minutes end with a resolution to seek further advice from Ms Clark.

Determination

[8] The questions for the Authority to determine are whether such a document attracts solicitor/client privilege and if so was that privilege waived when the document was copied to the applicant's representative. The consideration of this question falls within the Authority's wide powers to call for relevant information and evidence¹. Such powers must be exercised with regard to the general rules of privilege.

[9] The 17-EMC meeting minutes record a discussion between members of the respondent's executive as to how they should handle Mr Soen's employment issues in light of legal advice they have received. I am satisfied that the "*feedback*" and "*suggestion[s]*" received from the solicitors are, broadly speaking, terms for advice and do not refer to transactions between the solicitors and client, which would not attract the privilege. The recorded resolution of the meeting is to seek further advice from the solicitor on their agreed view of the issue.

(i) solicitor/client privilege

[10] The rationale behind the solicitor/client privilege rule is "*... to enable clients to confide unreservedly in their legal advisors, and presumably to encourage absolute candour in the exchanges necessary to provide instructions to, and receive advice from, the solicitor: Wheeler v Le Marchant (1881) 17 Ch D 675*".²

[11] I have no hesitation in finding that the 17-EMC meeting minutes in its entirety attracts solicitor/client privilege. Its purpose was to relay advice received and provide further instructions. While the advice received was not set out the minutes record the discussion

¹ Section 160(1) Employment Relations Act 2000

² McGechan on Procedure, HR307.06

about that advice in the context of the employment issues with Mr Soen and a resolution to seek further advice.

(ii) inadvertent disclosure?

[12] The privilege is not the solicitor's to be waived, it belongs to the client. The respondent says it has not waived the privilege and that the disclosure of the document was inadvertent. The applicant has not challenged this assertion.

[13] I am satisfied given the chain of events leading up and subsequent to the disclosure that disclosure of the document in question was inadvertent; the document, or that category of documents, was not listed in the applicant's original Privacy Act request, the document, or that category of documents, was not listed in the respondent's response to that request, the document provided was a copy and the respondent took immediate steps to alert the applicant and the Authority to the inadvertent disclosure.

(iii) fair in all the circumstances?

[14] Given that the document was inadvertently disclosed is it fair in all the circumstances that the claim to privilege should be maintained?

[15] The applicant says that Mr Soen should be able to use and refer to the document now that it has been disclosed because he says it supports his claim against the respondent. Mr Soen may see the inadvertent disclosure as convenient to his claim against the respondent but, given the circumstances of the disclosure, it would not be in the interests of justice to allow that convenience to defeat the claim to privilege. I have considered the document carefully, along with the wider claim, and do not consider that the Authority will be misled if the document is not provided.

[16] For completeness *Stayinfront Inc v Tobin*³ does not support the applicant's position; that case deals with the role of a lay advocate under New Zealand employment law and the status of that role under US law.

[17] The following order is made - Mr Soen may not use or refer to the document 17-EMC Meeting 21 December 2005.

³3 November 2006, US District Court, New Jersey, 05-Civ.-4563

Costs

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

Marija Urlich
Member, Employment Relations Authority