

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2022] NZERA 277
3153203

BETWEEN	BRENDHA VIEIRA Applicant
AND	PAPAMOA COMMUNITY PROJECT LIMITED Respondent

Member of Authority:	Marija Urlich
Representatives:	Rachel Rolston, representative for the applicant Olivia Hyslop, representative for the respondent
Investigation Meeting:	On the papers
Submissions and information received:	30 March and 15 June 2022 from the applicant 12 May and 15 June 2022 from the respondent
Determination:	28 June 2022

**DETERMINATION OF THE AUTHORITY ON A PRELIMINARY
MATTER**

Employment Relationship Problem

[1] Ms Vieira included in her statement of problem emails and text messages between the parties some of which are marked 'without prejudice' and which relate or refer to discussions between the parties about her employment ending in the span 13 to 25 August 2021. She says the material is properly before the Authority because it is relevant to the Authority's investigation of her claim of unjustified dismissal and does not attract privilege or, if it does, that it is in the interests of justice to set aside any privilege.

[2] Papamoa Community Project Limited (PCPL) objects to the emails, text messages and discussions between the parties in that timespan and any reference to such

being before the Authority. It says it is entitled to rely on the cloak of privilege for the documents at issue because the parties were in dispute which they were trying to resolve, and the material is either marked ‘without prejudice’ or falls within that chain of correspondence or related discussions and so is protected by that privilege. It says further that public policy considerations mean correspondence of this type is properly shielded by privilege.

The Authority’s investigation

[3] By consent, this matter is determined on the papers. In determining this matter affidavit evidence of Ms Vieira dated 29 March 2022 and Paul Antoni Ryan dated 12 May 2022 have been considered as have the parties’ statements of problem and reply, the documents attached thereto and their submissions.

[4] As permitted by s 174E of the Employment Relations Act 2000 (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. It has not recorded all evidence and submissions received.

Relevant law

[5] The Court of Appeal in *Morgan v Whanganui College Board of Trustees* established the essential requirements for without prejudice communications to be afforded protection as follows¹:

- (i) The existence of an agreement between the parties that the communication is without prejudice;
- (ii) The existence of at least “negotiations” or a “difference” to warrant the conversation; and
- (iii) That the problem be one “that could give rise to litigation, the result of which might be affected by an admission made during negotiations”.

¹ *Morgan v Whanganui College Board of Trustees* [2014] NZCA 340.

[6] In addition the exceptions to privilege include the Authority's broad power to take into account such evidence and information as in equity and good conscience it thinks fit.²

Background

[7] On 11 August 2021 Ms Vieira attended a performance meeting with her manager who was supported by a human resource professional (the HR professional). Ms Vieira was supported by a friend. A transcript of the meeting has been provided which has a subject heading 'Private and confidential'. The transcript records performance matters were raised with Ms Vieira and discussed and that the meeting ended with apparent agreement that a two-week performance improvement plan to be put in place. PCPL, properly, does not assert privilege over this document.

[8] At 4pm on Friday 13 August the HR professional sent Ms Vieira a text message which included "Please check your emails for an updated, without prejudice proposal...Please feel free to text, email, or call me with any questions."

[9] Ms Vieira duly checked her emails which included an email from the HR professional with the subject heading "WITHOUT PREJUDICE – Offer of Settlement". The body of the letter advised PCPL had decided "it is in the best interests of both parties to end the employment relationship". The letter also set out terms on which Ms Vieira's employment would end, attached a section 149 record of settlement document which included those terms, that if the terms of settlement were acceptable Ms Vieira should sign the record of settlement and return it by 10am Monday 16 August otherwise "...we would consider our options from there", encouraged her to seek legal advice and that any questions should be directed to the writer of the email.

[10] Ms Vieira then sent a text message to the HR professional including "can you please explain to me why I'm losing my job? And if this is legal. This is not what we talked about in the meeting. I am confused." They exchanged further text messages which I have reviewed. The text messages do not establish Ms Vieira expressly or impliedly agreed that the discussions were on a without prejudice basis. There is no suggestion this was agreed to in the telephone conversation.

² Employment Relations Act 2000, s 160(2).

[11] On Monday 16 August Ms Vieira contacted an employment advocate. On 17 August she wrote to the HR professional including unequivocally that she had not agreed and did not agree to enter without prejudice discussions and wished her employment with PCPL to continue.

[12] On Thursday 19 August the HR professional emailed Ms Vieira again with the subject line “WITHOUT PREJUDICE – Offer of Settlement” attaching a further s 149 record of settlement document with an increased offer. The email did not dispute Ms Vieira’s position she had not agreed to enter without prejudice discussions and stated she (the HR professional) would call her the following day. The call was made during which Ms Vieira avers the HR professional told her she had until 5pm the following Monday to accept the offer and if she did not sign the record of settlement she would be dismissed. The email sent to Ms Vieira the following day reflects in broad terms the conversation as described. Again, the email had the subject heading “WITHOUT PREJUDICE – Offer of Settlement” and does not address this issue in the body of the email.

[13] On Monday 23 August Ms Vieira replied by email carrying over the same subject banner. The email includes she had not agreed to and did not agree to any discussions being held on a without prejudice basis.

[14] The next communication between the parties was a telephone call to Ms Vieira on 25 August advising her she was dismissed with immediate effect which was confirmed in an email with subject heading “WITHOUT PREJUDICE – Offer of Settlement + Termination of Employment”. Attached to the email was a letter dated 25 August titled “Termination of Employment” under the name of a PCPL manager and a third section 149 record of settlement document.

Discussion

[15] In circumstances where the parties’ intention as to admissibility is clear on the face of the documents at issue there will need to be compelling grounds to dislodge the presumption of privilege. Having considered the relevant information and submissions

the Authority is satisfied the communications at issue do not fall in that category because it was not their shared intention that discussions were to be held on a without prejudice basis.

[16] It is clear from the background narration PCPL asserted without prejudice status to the discussions and the evidence is equally clear Ms Vieira did not agree to the discussions being held on that basis. The repeated assertion of privilege by PCPL in the subject heading of emails does not make it so particularly given Ms Vieira's unequivocal disagreement.

[17] The error PCPL made was not first seeking and securing Ms Vieira's agreement to enter off the record discussions. Having failed to do so it cannot assert the shield of privilege over discussions that likely could have met two of the three essential elements set out in *Morgan*.

Outcome

[18] PCPL initiated a discussion with Ms Vieira on 13 August 2021 with an apparent intention to bring the employment relationship to an end. All information regarding those discussions including all information attached to and referred to in Ms Vieira's statement of problem dated 12 October 2021 is properly before the Authority.

Costs

[19] Costs are reserved.

Marija Urlich
Member of the Employment Relations Authority