

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

**AA 47/09  
5134016**

BETWEEN      MARGARET WHITTEN  
                         Applicant

AND              OGILVY NEW ZEALAND LIMITED  
                         Respondent

Member of Authority:      Leon Robinson

Representatives:          Susan Hornsby-Geluk, Counsel for Applicant  
   Chris Patterson, Counsel for Respondent

Submissions Received:      9 February 2009  
   10 February 2009

Determination:              13 February 2009

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**DETERMINATION OF THE AUTHORITY**

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**The applications**

[1] The applicant Ms Margaret Whitten made application to have correspondence dated 27 January 2009 "ruled admissible". In a Minute of 5 February 2009 I made certain directions in relation to that application. It was appropriate that I revisit those directions. The respondent Ogilvy New Zealand Limited by its counsel has lodged a memorandum in response, together with an application for removal to the Court of the application in relation to the correspondence dated 27 January 2009, and a further item of correspondence dated 30 July 2008. It also asks the Authority to refer a question of law to the Court for its opinion.

**The grounds for removal**

[2] The application for removal dated 11 February 2009 is made pursuant to sections 177 and 178(2)(a) and (b) of the *Employment Relations Act 2000* ("the Act"). It expresses contended questions of law as these:-

- (a) *What are the principles to be applied when determining the privileged nature of a communication which is purported to be on a without prejudice basis?*
- (b) *On applying the principles, is the letter dated 27 January 2009 a privileged communication and therefore admissible; and*
- (c) *On applying the principles, is the Exhibit 68 statement a privileged communication and therefore admissible?*

## The legal principles

[3] Parliament has provided that the Authority has exclusive jurisdiction to make determinations about employment relationship problems generally. Institutions and procedures are established to ensure that investigations by the Authority as a specialist decision-making body are, generally, concluded before any higher court exercises its jurisdiction in relation to the investigations. But there are special cases.

[4] Section 178 of the Act is as follows:-

### *178. Removal to Court*

(1) *Where a matter comes before the Authority, any party may apply to the Authority to have the matter, or part of it, removed to the Court for the Court to hear and determine it without the Authority investigating the matter.*

(2) *The Authority may order the removal of the matter, or any part of it, to the Court if—*

- (a) *an important question of law is likely to arise in the matter other than incidentally; or*
- (b) *the case is of such a nature and of such urgency that it is in the public interest that it be removed immediately to the Court; or*
- (c) *the Court already has before it proceedings which are between the same parties and which involve the same or similar or related issues; or*
- (d) *the Authority is of the opinion that in all the circumstances the Court should determine the matter.*

(3) *Where the Authority declines to remove any matter, or a part of it, to the Court, the party applying for the removal may seek the special leave of the Court for an order of the Court that the matter or part be removed to the Court, and in any such case the Court must apply the criteria set out in paragraphs (a) to (c) of subsection (2).*

(4) *An order for removal to the Court under this section may be made subject to such conditions as the Authority or the Court, as the case may be, thinks fit.*

(5) *Where the Authority, acting under subsection (2), orders the removal of any matter, or a part of it, to the Court, the Court may, if it considers that the matter or part was not properly so removed, order that the Authority investigate the matter.*

(6) *This section does not apply—*

- (a) *to a matter, or part of a matter, about the procedure that the Authority has followed, is following, or is intending to follow; and*
- (b) *without limiting paragraph (a), to a matter, or part of a matter, about whether the Authority may follow or adopt a particular procedure.]*

[5] The Authority has discretion to remove a question of law to the Court for its opinion. Section 177 of the Act provides:-

*177 Referral of question of law*

*(1) The Authority may, where a question of law arises during an investigation,—*

- (a) refer that question of law to the Court for its opinion; and*
- (b) delay the investigation until it receives the Court's opinion on that question.*

*(2) Every reference under subsection (1) must be made in the prescribed manner.*

*(3) The Court must provide the Authority with its opinion on the question of law and the Authority must then continue its investigation in accordance with that opinion.*

*(4) Subsection (1) does not apply—*

- (a) to a question about the procedure that the Authority has followed, is following, or is intending to follow; and*
- (b) without limiting paragraph (a), to a question about whether the Authority may follow or adopt a particular procedure.*

## The merits

[6] With respect to the application under section 177 of the Act, I find no question of law arises. The question of whether a particular document is privileged is determined by the application of now well-settled principles. These principles have been long established. I decline to exercise my discretion to refer a question of law to the Court.

[7] In respect of the application for removal under section 178 of the Act, I determine there is no question of law and certainly, no important question of law.

[8] As well, the contended questions of law arise only incidentally. They arise in a preliminary context. They are peripheral to the substantive issues for investigation by the Authority. Only "important" questions of law that arise other than incidentally may be referred to the Court.

[9] Next, I find the issues in question, i.e. whether items of correspondence ought not be produced to the Authority for public policy reasons, are procedural matters. Procedural matters may not be the subject of an application for removal.

[10] Finally, I determine there is no public interest element involved and the matters at issue are not of a nature or of such urgency that they ought to be removed immediately to the Court.

### The determination

[11] **For the reasons set out above, I decline to refer a question of law to the Court (section 177 of the Act) and I decline to remove the matter to the Court (section 178 of the Act).**

### Other directions

[12] Having declined to remove these matters to the Court, I now re-visit the directions I made in my Minute of 5 February 2009.

[13] In relation to the letter dated 27 January 2009, Mr Patterson makes four principal submissions on "admissibility" summarised at paragraph 9 of counsel's memorandum. I am not persuaded by the submissions to alter the views or the conclusion reached in my Minute of 5 February 2009. For the same reasons I expressed at paragraph [2] of the Minute of 5 February 2009, I conclude the advice of 27 January 2009 is not a "without prejudice" communication. **There is no public policy reason to prevent that document from being produced to the Authority. It is now for the presiding Authority Member to determine the relevance of the advice in the substantive investigation.**

[14] In relation to the letter dated 30 July 2008, that letter is not a mediation. It is not precluded from production in the Authority's investigation by virtue of section 148 of the Act. I can see no good reason why that letter should be withheld from the Authority. I find the letter dated 30 July 2008 is not what lawyers call "without prejudice". **There is no public policy reason to prevent that document from being**

**produced to the Authority. It is now for the presiding Authority Member to determine the relevance of the advice in the substantive investigation.**

[15] I direct that a summons issue in respect of Mr Dickman and the previous direction in that respect remains.

### **Costs**

[16] In the event that costs are sought, I invite the parties to resolve the matter between them, but failing agreement, Ms Hornsby-Geluk is to lodge and serve a memorandum as to costs within 10 days of the date of this Determination. Mr Patterson is to lodge and serve a memorandum in reply thereafter but within 10 days of the date of this Determination. I will not consider any application outside that timeframe without leave.

Leon Robinson  
**Member of Employment Relations Authority**