IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2013] NZERA Auckland 522
5405643

	BETWEEN	STEPHEN WILLIAMS Applicant
	A N D	GEA NU CON LIMITED Respondent

Member of Authority:	Anna Fitzgibbon
Representatives:	Garry Pollak, Counsel for Applicant Rebecca Rendle, Counsel for Respondent
Investigation Meeting:	On the papers
Submissions Received:	17 October 2013 from Applicant 23 October 2013 from Respondent
Date of Determination:	14 November 2013

DETERMINATION OF THE AUTHORITY

A. The Authority's direction of 26 April 2013 with regard to "without prejudice" correspondence in this matter is not a "determination" under the Employment Relations Act 2000.

B. The "without prejudice" Agreement referred to in Mr Williams' witness statement is privileged and not admissible in evidence.

Background

[1] The applicant, Mr Stephen Williams, claims to have been unjustifiably dismissed from his employment with the respondent, GEA Nu Con Limited (Nu-Con). Mr Williams filed a statement of problem (SOP) in the Employment Relations Authority on 13 December 2012 attaching correspondence he considered relevant to his claim, some of which was "without prejudice".

[2] Nu-Con denies the claim and on 14 January 2013 filed a statement in reply (SIR) in the Authority which included an objection to the "without prejudice" correspondence attached to the SOP. Clause 3(a) of the statement in reply states:

> *Most of the documents annexed to the applicant's Statement of Problem are marked "without prejudice" and relate to off the record discussions between the parties with a view to resolving issues. The respondent objects to these documents being put before the Authority and requests that they are immediately removed from the record. The documents to be removed are as follows:*
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> *(i) the last paragraph of Stephen William's email of 26 April 2012 (to be redacted as it refers to off the record communications);*
> *(ii) Gary Stannard's email 29 April 2012;*
> *(iii) Garry Pollak's letter of 14 September 2012; and*
> *(iv) Simpson Grierson's letter of 19 September 2012.*

[3] The respondent's objection to the "without prejudice" correspondence was referred to me in my capacity as duty member. I considered the issue and informed my support officer, Mr Stephen Berry by handwritten note that the parts of the correspondence which referred to "without prejudice" discussions should not be shown to the Authority member allocated to handle the file.

[4] On 26 April 2013, Mr Berry emailed Mr Williams and counsel for the respondent at the time, Ms Katherine Burson as follows:

> *To the parties. I referred this file to an Authority member, Anna Fitzgibbon, to consider the without prejudice correspondence issue that was raised by Katherine Burson. The member has directed that some material be removed from the correspondence. The statement of problem with documents is now on file as attached. The file will now be referred to another member for consideration. Stephen Berry.*
>
> ["26 April direction"]

[5] At the Authority's investigation meeting on 14 October, an issue arose concerning paragraph 8(h) of Mr Williams' witness statement and whether the document referred to by him as a *"without prejudice settlement agreement"* (the Agreement) was admissible. The Authority member, Mr James Crichton requested counsel for both parties to address the issue by way of memorandum. As the Authority member who dealt with the original issue of admissibility of documentation on the file, I have been requested to determine the issue of admissibility of the Agreement on the papers.

[6] Mr Pollak, on behalf of Mr Williams, contends the Agreement should be admitted in to evidence by the Authority because the circumstances surrounding the giving of the Agreement to Mr Williams are relevant to the Authority's investigation in to Mr William's employment relationship problem. Mr Pollak submits that there is evidence that Nu-Con applied unfair pressure on Mr Williams to accept the Agreement which means the normal rules which apply to "without prejudice" communications do not apply. Mr Pollak relies on the Employment Court decision in *Van der Sluis v Health Waikato Limited*[1].

[7] Ms Rendle for the respondent opposes Mr Pollak's application primarily on two grounds. First, Ms Rendle submits that the Authority determined the issue of admissibility by way of its 26 April direction and the Agreement was subject to that determination. Secondly, the Agreement was presented on a "without prejudice" basis in a genuine attempt to resolve the dispute between the parties, no unfair pressure was applied, the normal "without prejudice" rules apply and the Agreement is accordingly inadmissible.

Issues

[8] The Authority must determine the following issues:

(a) Does the 26 April direction constitute a "determination" under the Employment Relations Act 2000("the Act")?

(b) Is the Agreement privileged and inadmissible? Or does it fall within an exception to the normal "without prejudice' rules.

First Issue

Does the 26 April direction constitute a determination under the Employment Relations Act 2000("the Act")?

[9] The Agreement was not attached to the statement of problem and was not one of the documents I considered when making the 26 April direction. The 26 April direction specifically applied to the *"*without prejudice*"* correspondence attached to the statement of problem and could not therefore apply to the Agreement.

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1 [1995] 1 ERNZ 478

[10] In any event, I do not consider the 26 April direction to constitute a "determination" under the Act capable, for example, of being the subject of a challenge to the Employment Court.

[11] The 26 April direction comprised a handwritten note to Mr Berry regarding the applicable procedure to be adopted for the ongoing handling of the file by the Authority. I did not consider I was making a determination. I accept that by labelling the 26 April direction, *"a direction",* this was not determinative of its legal status.[2]

[12] The issue of whether the Authority made a "determination" for the purposes of s179 of the Act and if so *"whether the "determination is immune from challenge having regard to the scope of s179(5)*" was considered by the Employment Court in *McConnell*. In that case, the Court held the Authority had not made a "determination". Judge Inglis confirms the special nature of the Authority and at para.[39] states:

> *... The Authority has broad powers, both in relation to the sorts of evidence and information it may receive during the course of an investigation, and more generally to determine its own processes. It may, in investigating any matter, follow "whatever procedure* [it]*considers appropriate", and it may decide who to hear from (and, by logical extension, who it will not hear from) throughout the course of an investigation. It may take into account such evidence and information as in equity and good conscience it thinks fit, whether strictly legal evidence or not. And it enjoys exclusive jurisdiction "to make determinations about employment relationship problems generally", including personal grievances.*

[13] At paragraph [40], Judge Inglis states:

> *In my view a narrow reading of s179(5), subjecting a broad range of rulings made by the Authority prior to the conclusion of the investigative process to challenge in this Court, is not consistent with the clear legislative intent of the provision and the statutory scheme more generally.*

[14] The 26 April direction was a procedural ruling regarding the material the Member investigating the employment relationship problem was to receive and did not in my view constitute a "determination" under the Act. The answer to the first issue is "No".

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2 *McConnell v. Board of Trustees of Mt Roskill Grammar School* [2013] NZ EmpC 150 ARC 34/13 para.[18]

Second Issue

Is the Agreement privileged and inadmissible? Or does it fall within an exception to the normal "without prejudice' rules?

[15] Mr Williams seeks to have the Agreement admitted into evidence and to be considered by the Authority in its investigation. This application is opposed by Nu-Con on the basis that the Agreement is protected from disclosure by the "without prejudice" rules.

[16] The Employment Court in *Hallwright v Forsyth Barr Ltd*[3] considers the "without prejudice rules" and at para [7] Judge Inglis states:

> *It is well established that written or oral communications made for the purpose of resolving a dispute may generally not be admitted in evidence. The policy underlying the rule is equally well established, namely to encourage parties to settle their disputes without fear of anything said during the course of such negotiations being used to their prejudice in proceedings.*

[17] Judge Inglis refers to a decision of the Chief Judge in which he observed that the underlying policy of the rule is *"particularly apposite in the employment relations sphere…"*.

[18] The Agreement in this case is between the parties and its recital states:

> *C.* *The Employee has raised an employment relationship problem in relation to his position and therefore salary not being clearly defined*
>
> *D.* *The Employee and the Employer have agreed to settle all issues between them and wish to record the terms of their agreement (the "agreement").*

[19] The Agreement then refers to terms on which the parties agree Mr Williams' employment would terminate. Paragraphs 6, 7 and 8 are relevant and state:

> *6.* *The employer makes the payment of the settlement moneys and takes the action provided for in this agreement without any admission of liability.*
>
> *7.* *The parties agree that the existence and terms of this agreement, including the payment of any sums hereunder, shall be confidential to the parties and shall not be disclosed, copied or transmitted to any other person in any circumstances whatsoever, except as required by law.*

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3 [2013] NZEmpC134, ARC 20/13

> *8.* *This agreement is in full and final settlement of all claims either party has or may have against the other arising out of the employee's employment with the employer and the termination thereof, or otherwise howsoever arising.*

[20] The Agreement has annexed to it a statement that a mediator from the Department of Labour is to be requested to sign the terms and that the Agreement would be final, binding and enforceable under s.149 of the Employment Relations Act 2000.

[21] Mr Williams in his witness statement gives evidence regarding the circumstances leading up to the issuing to him of the Agreement by Nu-Con. Mr Williams attended a meeting with representatives from Nu-Con on 30 September at which time the termination of his employment on the basis of redundancy was confirmed. Mr Williams' evidence regarding discussions held at the meeting is as follows:

> *(g)* *I was offered a without prejudice settlement agreement which I did not accept, and made a counter-offer which was rejected. I stated that I would have to get further legal advice regarding this.*
>
> *(h)* *Ms Smith stated that I would not receive the outstanding loyalty payment (refer Exhibit 26) unless I sign the proposed without prejudice settlement. I stated that this did not seem legal to me. Ms Smith contacted the company's lawyer and stated that she had confirmed that they were not obliged to pay this without my signing the proposed settlement, but would do so anyway as a gesture of goodwill.*

[22] The "without prejudice settlement agreement" is the Agreement which Mr Williams is seeking to have admitted into evidence.

[23] Mr Williams' own evidence is that he was presented with the Agreement on a without prejudice basis and that following a negotiation with Nu-Con, he informed the representatives of Nu-Con that he would have to get *"further legal advice"*. Mr Pollak, for Mr Williams, claims that the statement by Ms Smith to Mr Williams that he would not receive his outstanding loyalty payment unless he signed the proposed without prejudice agreement, constituted a threat which meant the Agreement was excluded from the normal "without prejudice" rule. I do not accept this was the case. The contents of the Agreement, the way in which it was presented to Mr Williams on a "without prejudice" basis and the fact that Ms Smith for Nu-Con said that they would be paying the loyalty payment anyway as a gesture of goodwill

all seem clear to me to be part of a without prejudice discussion between the parties. Ms Smith was not exerting unfair pressure on Mr Williams to sign and Mr Williams did not sign the Agreement.

[24] Mr Williams disputed his selection for redundancy and challenged the process Nu-Con was following. The parties sought to resolve the dispute but unfortunately were unable to do so. The circumstances are quite different from those in *Van Der Sluis*[4] referred to above and relied upon by Mr Pollak . In that case, Mr Van Der Sluis *" was being invited to abandon his claim in its entirety under threat of new disciplinary proceedings which were expressed to be likely to end in a dismissal. There were no bona fide settlement negotiations being conducted at that time"*. Judge Travis decided that in the circumstances *"it would be in accordance with common law principles to admit* [the document] *notwithstanding that it is expressed to be without prejudice"*.

[25] I find that the Agreement was part of a "without prejudice" discussion entered into genuinely between Mr Williams and Nu- Con to settle their dispute. There was no threat or unfair pressure placed on Mr Williams which would allow for an exception to the rule that without prejudice communications and negotiations are generally inadmissible. I find the Agreement to be privileged and inadmissible.

Anna Fitzgibbon
Member of the Employment Relations Authority

4 Ibid p.484