

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON OFFICE**

BETWEEN	Alan Witcombe (applicant)
AND	Office of the Clerk of the House of Representatives (respondent)
REPRESENTATIVES	Geoffrey Davenport for the applicant Peter Gunn for the respondent
MEMBER OF THE AUTHORITY	Denis Asher
INVESTIGATION & SUBMISSIONS	The parties agreed that the application and statement in reply were sufficient by way of submissions and no appearances were required
DATE OF DETERMINATION	5 December 2005

DETERMINATION OF AUTHORITY: Application for Removal

Employment Relationship Problem

1. Mr Alan Witcombe says he was unjustifiably disadvantaged and constructively dismissed by the Office of the Clerk – statement of problem received on 12 August

2005. The remedies sought by Mr Witcombe include compensation for humiliation, etc totalling \$25,000, lost wages and benefits and costs.

2. The Office of the Clerk denies the allegations of bias, predetermination and unfairness and says it was justified in commencing a disciplinary investigation in respect of the applicant. It also denies that any actions it took resulted in the constructive and unjustified dismissal of Mr Witcombe.
3. The parties did not settle their employment relationship problem in mediation.

Preliminary Matters

4. Various preliminary matters emerged at a conference call of the parties convened on 31 October so as to set this matter down for an investigation: counsel for the applicant, Mr Geoff Davenport, raised a discovery issue in respect of two documents sought by his client. The first is a draft report (the report) produced by the Office of the Clerk in the course of the investigation process, the second is an email generated by one of the Office of the Clerk's staff around the same time (the email). Mr Witcombe claims his ability to progress his personal grievance will be materially and significantly undermined to his detriment if these documents are not disclosed. A direction was sought. Written submissions were received from the applicant on 11 November.
5. At the same conference call, counsel for the respondent, Mr Peter Gunn, indicated the likelihood of an application being filed for removal of Mr Witcombe's grievance to the Employment Court. Confirmation of the same was subsequently received in an application received on 10 November.
6. In a submission received on 25 November Mr Gunn opposed the application for discovery on the ground that it would not be appropriate to consider or make such a direction while the issue of removal of these proceedings in the Employment Court was unresolved. The respondent also says that there are compelling legal arguments as to why legal professional privilege applies to the report. The Privacy Commissioner has already rejected the applicant's arguments to the contrary. Release of the report would be prejudicial to the Office of the Clerk because the

report is in draft and does not necessarily represent the final view of the investigator or the Office of the Clerk. It was specifically forwarded for legal advice on its contents and may have been amended following legal advice or at some subsequent point. To produce a draft document in circumstances where the final report may have been different, but where no one can say definitively whether or how that may have occurred, is not only prejudicial to the Office of the Clerk but also unhelpful to the decision-maker. Granting the direction sought would also be contrary to the reliance on privileged communications found in the Employment Relations Act (e.g. clause 3 of Schedule 2 of the Act).

7. However, the Office of the Clerk does not object to producing the email were it reasonably able to be produced. It is not. The respondent's objections are purely practical. Access could cost several thousand dollars. The practical difficulties may have been made worse by the applicant's failure to prosecute these proceedings within a reasonable time frame. The Office of the Clerk will embark on an expensive forensic recovery exercise if Mr Witcombe is prepared to underwrite the costs. A report is being commissioned in the meantime as to the means and cost of by which access to the email could be gained.

Application for Removal

8. As is made clear above, the Office of the Clerk seeks removal of this matter to the Employment Court. The respondent says that important question of law are likely to arise in the matter other than incidentally and they include the following:
 - a. Mr Witcombe's statement of problem turns in substantial part on the contents and effect of various communications made to a Parliamentary select committee. The ability of the Authority or the Employment Court to have regard to such communications by way of a personal grievance raises important questions of law regarding Article IX of the Bill of Rights 1689. This article confers on "*proceedings in Parlyament*" protection from being "*impeached or questioned*" in any "*court or place out of Parlyament.*"

- b. Proceedings in Parliament extend to activity of a select committee. It follows there are important questions of law as to the extent to which the applicant can proceed with his claim.
- c. The importance of these questions is obvious and is confirmed by the House of Lords decision *Pepper v Hart* [1993] 1 AC 593 at 638 which held that Article IX is a provision of the highest constitutional importance which should not be narrowly construed.
- d. There are also important questions of law relating to the circumstances and extent to which the Office of the Clerk of the House can claim legal professional privilege for a draft employment report and the extent and relevance of a Privacy Commissioner report upholding the Office of the Clerk's claim to privilege.

Applicant's Submissions

- 9. The applicant opposes the application for removal for various reasons including his view that the matters currently before the Authority fall squarely within its competence and jurisdiction. Issues of evidence, relevance and admissibility can be readily addressed by the Authority in the course of its investigation. Evidence relating to statements made to the Select Committee is but one portion of the evidence to be tendered overall.
- 10. It is premature to suggest the Mr Witcombe's grievance will raise important questions of law to do with article 9 of the Bill of Rights 1688. The Office of the Clerk is implying that the applicant will be seeking to question or impeach "*proceedings in Parliament*". this is not so. The statement of problem does not question or impeach Parliamentary proceedings. The assertion is without foundation.
- 11. Mr Witcombe's case is not founded on the contents and effect of various communications made to the Select Committee. The statement of problem makes clear that the grievance is founded on the actions of his former employer, which were of an employment nature and occurred outside of any Parliamentary process. Evidence of these actions is to be found in numerous actions taken, and statements made, by the Office of the Clerk outside of the House and its committees.

12. Mr Witcombe may make reference to “*proceedings in Parlyament*”, namely statements made by the Office of the Clerk to a Select Committee on 13 June 2002, as part of the Authority’s investigation. The law is clear in this regard. Proceedings in Parliament may be referred to without article 9 providing any impediment where they may be used to establish what was said or done in Parliament on a particular day as a matter of fact: refer to the Privy Council decision in *Prebble v Television New Zealand* [1994] 3 NZLR at 10 -11.
13. In *Buchanan v Jennings* [2004] UKPC 36, the Privy Council confirmed at par 16:

Thus it cannot now be said that, as it once perhaps could, that mere reference to or production of a record of what was said in Parliament infringes article 9.
14. In any case the applicant has written evidence that the Office of the Clerk affirmed statements he made to the select committee, in effect repeating outside the House what he had said inside. The Privy Council confirmed at par 13 of *Buchanan* (above) that it is common ground that statements made outside Parliament are not protected by absolute privilege even if they repeat what said therein.
15. *Pepper v Hart* (the decision relied on by the Office of the Clerk) is not material to considerations of Mr Witcombe’s claims in this case. Its substantive finding was that if primary legislation is ambiguous or obscure the courts may take account of statements made in Parliament in construing that legislation. A majority dismissed the argument that the use of Hansard for the purpose of construing an Act would constitute ‘questioning’ of the freedom of speech or debate in breach of article 9.
16. Whereas the applicant does not intend to call any current staff members, it is noted that a number of employees of the Office of the Clerk gave evidence to the Authority in *Kevin List v The Office of the Office of the Clerk*, WA 136/03, G J Wood, 22 September 2003, without the present issue being raised.
17. The key issues to be resolved concern the employment relationship between Mr Witcombe and the Office of the Clerk. This grievance is relatively simple and straightforward. The nature of the workplace means that Parliamentary traditions and practices form a normal and everyday part of the work of employees. Removing this

matter to the Employment Court would set an unwarranted precedent and deny the applicant his statutory right to have this matter determined by the Authority at first instance. The involvement of “*proceedings in Parlyament*” is peripheral to Mr Witcombe’s core grievance: reference will be made to proceedings only to establish historical facts. Parliamentary proceedings will not be impeached or questioned. The email, the report and the amendments of the Office of the Clerk are not Parliamentary proceedings and are not covered by privilege.

18. During the investigation it will be within the competence of the Authority to decide whether a privilege exists.
19. The Authority has competence to determine which material it can consider as evidence.

Discussion and Findings

20. I find against the respondent’s application to remove this matter to the Court for the following reasons.
21. In *Prebble* (above) the Privy Council held that,

The basic concept underlying art 9 was the need to ensure so far as possible that a member of the legislature and witnesses before Committees of the House could speak freely without fear that what they say will later be held against them in the Courts.

(page 2 [1994] 3 NZLR 1)

To allow it to be suggested in cross-examination or submission that a ... witness was lying to the House could lead to exactly that conflict between the Courts and Parliament which the wider principle of non-intervention was designed to avoid

(page 3, above)

There were three issues in play ... : first, the need to ensure that the legislature could exercise its powers freely on behalf of the electors, with access to all relevant information; second, the need to protect freedom of speech generally; third, the

interests of justice in ensuring that all relevant evidence was available to the Courts. The law has long been settled that, of those public interests, the first must prevail but the other two could not be ignored. Parties to litigation ... could not bring into question anything said or done in the House by suggesting ... that the actions or words were inspired by improper motives or were untrue or misleading

(above)

There is no objection to the use of Hansard to prove what was done and said in Parliament as a matter of history. The fact that a statute had been passed is admissible in Court proceedings, but the trial Judge must ensure that proof of historical facts is not used to suggest that the words were improperly spoken ... to achieve an improper purpose.

(page 4, above)

22. Bearing the above in mind and having close regard to the pleadings, I do not accept that this is an instance in which an important question of law is likely to arise in the matter other than incidentally. This is because I do not accept the Office of the Clerk's claim that Mr Witcombe's pleadings turn in substantial part on the contents and effect of various communications made to a Parliamentary select committee. In this case, a close inspection of the statement of problem and the documents attached to it support Mr Davenport's argument that his client's case is largely if not entirely founded on the actions of his former employer. Those actions appear to have been of an employment nature and to have occurred outside of any Parliamentary process. They cannot be said to be privileged.

23. While the applicant may wish to make reference to "*proceedings in Parlyament*", he cannot impeach or questioning those proceedings. Mr Witcombe is bound to refer to those proceedings only as historical records. He can not challenge what is said or done within the walls of Parliament in performance of its legislative functions and protection of its established privileges. He can, however, challenge the actions of his employer whose task it is – often within the walls of Parliament – to service that body. Mr Witcombe must accept, however, that statements made to a select committee by his employer can not, in the Authority, be held against them.

24. In the event Mr Witcombe attempts to step outside of these restraints, it falls to the Authority to ensure that these historical facts are not used to suggest that words used in Parliament were improperly spoken so as to achieve an improper purpose.
25. I am satisfied that the important question of law in this matter is likely to arise but only incidentally. The test provided for in s. 178 of the Act has not been met and I decline the Office of the Clerk's application for removal. In reaching this decision I have had regard to the decision of the Chief Judge in *Auckland District Health Board v X*, AC 33/05, GL Colgan, 29 June 2005.
26. Both parties may wish to make further submissions in respect of the application for direction regarding the report. The applicant's submission should address the strong *prima facie* argument advanced by the respondent that – as I understand it – in the absence of a final report, it would be prejudiced by the release of the report, i.e. it is a draft, does not necessarily reflect the Office of the Clerk's final view and was forwarded for legal advice on its contents and may have been amended following legal advice.

Determination

27. For the reasons set out above, I find against the application by the respondent, the Office of the Clerk of the House of Representatives, to remove these proceedings to the Employment Court.
13. Costs are reserved.

Denis Asher
Member of Employment Relations Authority