IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

[2016] NZERA Christchurch 65
5559188
5572094

	BETWEEN	CHRISTOPHER BROWN and NICHOLAS JAMES WALKER Applicants 5559188
	A N D	LEE DAVID PADMORE Applicant 5572094
	A N D	THE PARTNERS OF THE PARTNERSHIP OF INTERNATIONAL FOOTBALL ACADEMY OF NEW ZEALAND BEING, PIRI REIRI, PHIL WALKER, GRAHAM McMANN Respondent

Member of Authority:	Helen Doyle
Representatives:	John Horan, Advocate for Applicants Greg Martin, Counsel for Respondent
On the papers:	Respondent's information 22 April and 10 May 2016 Applicants' information 27 April, 8 May and 13 May 2016
Date of Determination:	17 May 2016

DETERMINATION OF THE AUTHORITY ON PRELIMINARY MATTERS

A **Emails containing advice from Mr Horan about employment status and work visas to the applicants and respondents before proceedings were lodged are admissible.**

B **Mr Horan may continue to represent the applicants at this stage notwithstanding the respondent has raised issues of potential**

conflict. Issues about whether he should be permitted to give evidence as an advocate will be addressed at the start of the investigation meeting.

C The request for an adjournment of the investigation meeting set down for 2 and 3 June 2016 in Christchurch on behalf of the applicants is not granted. The investigation meeting will proceed on those dates. All relevant documents are to be provided by close of business 30 May 2016.

D Costs are reserved.

[1] These matters are set down for an investigation meeting on 2 and 3 June 2016 in Christchurch. By agreement both employment relationship problems are to be heard together over two investigation days.

[2] There are three preliminary issues that the Authority needs to determine as follows:

(a) The admissibility of email advice provided by Mr Horan in his capacity as licensed immigration adviser about employment status and work visas before proceedings were lodged;

(b) Whether Mr Horan should continue to act for the applicants and/or whether it is appropriate for him to be advocate and give evidence; and

(c) Whether the Authority should grant an adjournment of the investigation meeting?

Admissibility of emails

[3] As part of its investigation the Authority needs to determine whether the applicants were employees of the respondent (the partnership). The partnership says that it had a contracting relationship with the three applicants. The Authority only has jurisdiction to determine the applicants' personal grievances if they are employees.

[4] Section 6(2) of the Employment Relations Act 2000 (the Act) provides that in order to determine whether a person is employed by another person under a contract of service the Authority must determine the real nature of the relationship between them. For that purpose the Authority is required under s 6(3) to consider all relevant matters, including any matters that indicate the intention of the persons and is not to treat as a determining matter any statements by the persons that describes the nature of their relationship.

[5] The Authority under s 160(2) of the Act may take into account such evidence and information as in equity and good conscience it thinks fit, whether strictly legal evidence or not. It should be relevant evidence or information to the issues before the Authority. The issue of whether evidence is admissible should be approached in a principled way and with regard to the Evidence Act 2006.

[6] Mr Horan in an email dated 3 November 2015 to Mr Martin said amongst other matters that his primary role at the material times was to his clients who were the three applicants and any advice to other parties was secondary in nature. That may be so. The emails that the Authority has been provided with do indicate that one of the partners in the partnership was copied into the exchanges with the three applicants and Mr Martin says that there are other emails in which the partnership sought answers to questions from Mr Horan and he responded to those emails. This was before litigation was contemplated.

[7] I am not satisfied that the email communications by Mr Horan with the applicants and the partnership at the material time about employment status and work visa applications attracts privilege. Mr Horan is not a legal adviser as defined in s 51 of the Evidence Act 2006.

[8] I am satisfied that the emails may contain information that the Authority could find relevant in indicating the intention of the parties. In being satisfied of that I record that the Authority is not to treat as a determining factor any statements that describe the relationship.

[9] In conclusion the emails between Mr Horan, the applicants and the partnership about employment status and work visa applications of the applicants are relevant, are not protected by privilege and are admissible. Copies of the emails and/or other

correspondence should be provided to the Authority for its investigation as soon as possible by Mr Martin.

Should Mr Horan continue to act as advocate for the applicants and is it appropriate for him to act as an advocate and give evidence?

[10] The partnership consider there is some conflict with Mr Horan acting as advocate for the applicants because of the view that he gave advice to the partnership about the applicants' employment status. There is some dispute whether Mr Horan gave advice to the respondents as part of a client relationship.

[11] Mr Horan is not a legal adviser. I am not satisfied he should be prevented from continuing to represent the applicants at this stage.

[12] There is a suggestion from Mr Martin that Mr Horan may wish to act as advocate for the applicants and also appear as a witness to give evidence about any interactions he may have had with the respondent.

[13] The Employment Court in *McDonald v. Mason Services Ltd*[1], confirmed its comments in an earlier judgment in *James & Co Ltd v. Hughes*[2] that the [Employment Tribunal] had discretion to decide whether a person can act as both advocate and witness in the same proceedings, although it may be undesirable. It is clear from statements in *McDonald* that it was considered the Tribunal had discretion to decide whether a particular person may act as advocate and witness. The Court set out some factors that it took into account when making its decision that the Tribunal had properly exercised its discretion in that case[3]:

(a) Whether there will be the necessary objectivity in giving evidence;

(b) Whether there are merits to an adjournment;

(c) Whether there will be additional costs or delay caused by the decision not to allow the person to act in both roles;

(d) Whether the person has been allowed to act in both roles before; and

(e) What the overall interests of justice are.

[1] [1998] 2 ERNZ 346 at p 350
[2] [1995] 2 ERNZ 432
[3] n 1 above at p 351

[14] These cases were decided under the Employment Contracts Act 1991 but the relevant section 59 is essentially identical to s 236 of the Act.

[15] There has been a failure by the applicants to comply with the timetabling directions set out in my notice of direction dated 21 October 2015. It was directed that statements of evidence and any documents from the applicants not already before the Authority be lodged and served by 28 April 2016.

[16] I am unclear therefore whether Mr Horan wants to give evidence and if he does whether it would be useful for the purposes of my investigation. If evidence was to be about the contents of emails referred to above in all likelihood they speak for themselves. I do not have enough information as to Mr Horan wanting to give evidence and if so whether that evidence is relevant to my investigation. If it is Mr Horan's intention to give evidence then I shall consider the matter at the start of the investigation meeting.

[17] In conclusion Mr Horan can continue to act for the applicants. If he intends to give evidence then the Authority will hear from him and Mr Martin at the start of the investigation meeting and conclude whether that evidence is necessary for my investigation of the employment relationship problem.

Adjournment

[18] Mr Horan sent emails to the Authority about the timetabling directions made in October 2015. I was unclear from his email of 8 May whether he was seeking an adjournment. Mr Horan subsequently clarified in an email of 13 May that he would like an adjournment to be considered. Mr Martin opposes that application.

[19] The investigation meeting date was set at a telephone conference on 21 October 2015. Mr Horan attended on behalf of the applicants. Timetabling orders for an exchange of statements of evidence were made and with the agreement of Mr Horan and Mr Martin a date was set for an investigation meeting for both matters for 2 and 3 June 2016. The Authority was busy at that time and the allocation of a date some six months out reflected that.

[20] I'll start by considering the three emails from Mr Horan about why the timetabling matters have not been attended to and why an adjournment should be considered.

[21] The first is an email of 27 April 2016. The email from Mr Horan to the Authority is a response to a request from the Senior Authority Officer that Mr Horan advise on what basis the emails referred to above attract privilege. In the email Mr Horan explained that he is busy and that he thought he could respond within 10 working days from the date of that email which would be 12 May 2016.

[22] There was a further email dated 8 May from Mr Horan to the Senior Authority Officer in which Mr Horan apologised for the failure to comply with the directions and said that the passage of time and his busy schedule has placed him in that position. He explained that he has other responsibilities that need his attention and would be in Auckland until at least 23 May after which time he will have to process documentation for those clients. There were some issues raised about one of the partners in the partnership but if that is an issue then I imagine Mr Martin will advise the Authority about that.

[23] The Authority then asked Mr Horan if the email of 8 May 2016 was in fact an application for an adjournment and in a further email dated 13 May 2016 Mr Horan asked that an adjournment be considered in the interest of fairness and justice.

[24] I accept that Mr Horan is busy and has prioritised other work in the immigration area. The Authority expects advocates who represent parties before it to be in a position to adhere to its directions and attend investigation meetings on dates agreed to on behalf of their clients. I do not find that the ground for an adjournment that other work has taken priority is a strong one particularly where the investigation meeting about employment matters has been set some six months in advance.

[25] I am not prepared to grant an adjournment and the investigation meeting will proceed on 2 and 3 June 2016 in Christchurch.

[26] The Authority is unlikely it seems to be provided with statements of evidence from the applicants. In those circumstances I do not require statements of evidence from the respondent.

[27] I would like all relevant documentation in the possession of the applicants and the partnership to be provided by close of business 30 May 2016.

Costs

[28] I reserve the issue of costs.

Helen Doyle
Member of the Employment Relations Authority