

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2019] NZERA 328
3054912

BETWEEN JOHN TAKASHI MATSUOKA
Applicant

A N D GATE GOURMET NEW
ZEALAND LIMITED
Respondent

Member of Authority: Rachel Larmer

Representatives: Ben Nicholson, Advocate for Applicant
Michael Quigg and Nick Logan, Counsel for Respondent

Investigation Meeting: On the papers

Submissions and Other Additional Information: 26 February 2019 from Applicant
13 March 2019 from Respondent
19 March 2019 from Applicant
19 March 2019 from Respondent
27 March 2019 from Applicant
28 March 2019 from Respondent
1 April 2019 from Applicant
1 April 2019 from Respondent
8 April 2019 from Applicant
8 April 2019 from Respondent
9 April 2019 from Respondent
10 April 2019 from Applicant
11 April 2019 from Applicant
15 April 2019 from Applicant
15 April 2019 from Respondent
23 April 2019 from Applicant
26 April 2019 from Respondent
3 May 2019 from Respondent
6 May 2019 from Applicant
8 May 2019 from Respondent
9 May 2019 from Applicant
14 May 2019 from Respondent

Date of Determination: 4 June 2019

Employment relationship problem

[1] The Applicant Mr Matsuoka has filed a Statement of Problem and Amended Statement of Problem that both contain information involving without prejudice communications between counsel.

[2] Gate Gourmet New Zealand Limited (Gate Gourmet) has objected to the admissibility of these without prejudice communications, while Mr Matsuoka's position is that they should be admissible.

[3] Mr Matsuoka wanted to use without prejudice communications between counsel to support claims he (Mr Matsuoka) has made against Gate Gourmet.

[4] This preliminary issue regarding admissibility of these without prejudice communications has been dealt with by me, as the Acting Duty Member, prior to this matter being allocated to a Presiding Member.

Authority's investigation process

[5] By agreement with the parties, the Authority determined the admissibility of the without prejudice communications on the papers.

[6] Both parties filed affidavit evidence, other information and submissions. The Authority has therefore had the benefit of reviewing:

- a. All of the written without prejudice communications;
- b. The broader context within which all of the without prejudice communications occurred;
- c. The parties' evidence regarding their various without prejudice telephone discussions; and
- d. Counsels' subjective views regarding the intention, meaning, and outcomes, of their two telephone conversations on the afternoon of 14 December 2018.

[7] The Authority considered that the affidavit evidence provided by the parties put it in a position where it could objectively determine the content and meaning of the information Mr Lin conveyed to Mr O'Brien during their two 14 December telephone conversations.

Relevant law

[8] The Authority has a wide discretion under s 160(2) of the Employment Relations Act 2000 (the Act) to take into account such evidence and information as in equity and good conscience it thinks fit, whether strictly legal evidence or not.

[9] However that discretion must be exercised on a principled basis, having regard to established common law principles, the relevant provisions of the Evidence Act 2006 (EA06) and to the stated objects of the Act.

[10] Although the EA06 does not govern the admissibility of evidence in Authority investigations, s 57 of the EA06 provides that settlement negotiations/communications that were intended to be confidential, and occurred in an attempt to settle a dispute, are privileged.

[11] Section 3(a)(vi) of the Act expressly recognises that one of the stated objectives of the Act is to reduce the need for judicial intervention. Section 143(b) of the Act recognises that employment relationships are more likely to be successful if the parties resolve their problems promptly themselves.

[12] The Employment Court in *Morgan v Whanganui College Board of Trustees* recognised the importance of parties in employment relationships being able to have privileged communications as a longstanding and important feature of resolving employment disputes.¹

[13] In that case, Mr Morgan sought to admit evidence of statements made by the parties' legal representatives during two without prejudice conversations to support his unjustified dismissal claim.

[14] The Authority and Employment Court both held that the without prejudice communications were inadmissible.

[15] The then Chief Judge of the Employment Court also commented in *Morgan* that there was a broader public interest in preventing a party who has engaged in privileged settlement discussions to later seek to put these communications 'on the record' when settlement is not reached.

[16] However the well-recognised 'without prejudice privilege' is not absolute. The protection of this privilege could be lost if the without prejudice communications consisted of, or included, unambiguous impropriety, bad faith, unconscionable

¹ *Morgan v Whanganui College Board of Trustees* [2013] NZERA 285.

conduct or other egregious conduct. For example, without prejudice communications that sought to cloak perjury would be an example of the type of situation in which the without prejudice privilege could be lifted.

[17] On appeal, the Court of Appeal in *Morgan v Whanganui College Board of Trustees* considered (among other things) whether:²

- a. A more nuanced approach to without prejudice communications was required in the employment law context; and
- b. Any of the without prejudice communications that had occurred in that case were capable of constituting an exception to the protected status of privileged communications.

[18] The Court of Appeal in *Morgan* held that:³

- a. The protection of the without prejudice privilege can be invoked to without prejudice communications that occurred when there was a serious employment relationship problem that could give rise to litigation. It was therefore wide enough to cover attempts to prevent a dispute and not just attempts to compromise an existing dispute;
- b. Contrary to the Employment Court's decision in *Bayliss Sharr v McDonald*, there was no residual discretion to admit without prejudice communications if excluding them would be more prejudicial than admitting them.⁴

[19] The Court of Appeal concluded that the without prejudice material was inadmissible because it was not satisfied that the material in issue supported Mr Morgan's claims.

[20] Whether such egregious conduct has occurred during without prejudice communications is a factual issue for the Authority to determine, based on the particular facts of each individual case.

[21] Likewise, the question of whether the without prejudice material in issue would support the claims being made by the party who wants to admit such evidence is also a factual issue for the Authority to assess.

Relevant facts

² [2014] NZCA 340.

[22] Mr Matsuoka has been employed by the First Respondent, Gate Gourmet as a Senior Ground Steward (driver) since July 2013. At the material time he was represented by his then counsel, Mr Michael O'Brien.

[23] The Second Respondent, Mr James Lin, resides in Singapore. He has been employed by Gate Gourmet Singapore Pte Ltd (Gate Gourmet Singapore) as Senior Corporate Counsel since August 2018.

[24] Gate Gourmet Singapore is an associate company of the First Respondent, Gate Gourmet. Part of Mr Lin's duties as counsel for Gate Gourmet Singapore involved providing legal advice and representation to Gate Gourmet (the New Zealand entity).

[25] Mr Lin, in his capacity as counsel for Gate Gourmet, had various "*without prejudice*" communications with Mr O'Brien about various issues Mr Matsuoka had raised with Gate Gourmet.

[26] Mr Lin said he was acting on instructions from his client, Gate Gourmet, with his specific instructions being given to him by Gate Gourmet's management.

[27] The Authority was satisfied that Mr Lin did not have the power or authority to make final/formal decisions himself about offering, accepting or rejecting a settlement offer regarding Mr Matsuoka's issues with Gate Gourmet.

[28] It was solely Gate Gourmet's responsibility to make the final/formal decision about how it wished to deal with Mr Matsuoka's issues, with Mr Lin as counsel being required to follow his client's instructions.

[29] The same situation applied to Mr O'Brien, in his capacity as then counsel for Mr Matsuoka. Neither counsel could act autonomously, outside of their authorised instructions.

[30] On 11 September 2018 Mr O'Brien, on behalf of Mr Matsuoka, opened without prejudice communications with Gate Gourmet by putting forward a settlement offer. This offer was rejected by Gate Gourmet, for the reasons set out by Mr Lin in his affidavit.

[31] Although the parties attended mediation on 19 November 2018, that did not resolve their issues.

³ Above n2.

⁴ [2006] ERNZ 1058.

[32] Following unsuccessful mediation, the parties continued to have ongoing without prejudice communications. This consisted of letters, emails and telephone discussions between the parties' counsel. It is clear that the purpose of the without prejudice communications was to resolve Mr Matsuoka's issues by agreement, if possible.

[33] Various settlement proposals were put forward and timelines were imposed and/or agreed to for responding to the proposals. Mr Matsuoka repeatedly expressed his intention to file proceedings if settlement was not reached by the deadline(s) he had imposed.

[34] There was a dispute over whether a settlement agreement (consisting of the settlement proposal Mr Matsuoka had put forward) had been agreed to by Gate Gourmet or not.

[35] Mr O'Brien believed that Mr Lin, on Gate Gourmet's behalf, had agreed to Mr Matsuoka's settlement proposal during their first without prejudice telephone conversation on the afternoon of 14 December 2018.

[36] Mr Lin disputed that a formal settlement had occurred.

[37] Mr Lin said that although a settlement was "*agreed in principle*", the specific settlement proposal Mr Matsuoka had put forward had to be formally approved and authorised by APAC President before it could be accepted.

[38] The APAC President's formal approval had still not been obtained before the deadline for accepting Mr Matsuoka's settlement proposal elapsed.

Gate Gourmet's settlement authorisation process

[39] Mr Lim set out in his affidavit the specific authorisation process that would have been required for any settlement proposal to have been formally offered, accepted or agreed to by Gate Gourmet.

[40] This process required a proposed settlement to be approved by all of the following individuals, namely Gate Gourmet's:

- a. General Counsel Asia Pacific, Syma Zainab;
- b. Chief Administration Officer, Mei Foong Chong; and
- c. General Manager New Zealand, Peter Rhodes.

[41] If these three named individuals all approved a settlement proposal then the proposed settlement terms still had to go to the APAC President, Jann Fisch to approve and authorise for sign off before an actual settlement could occur.

[42] The Authority notes that this process meant that Mr Fisch could decide not to settle a matter, even if all three of the other managers had already agreed to settle it.

[43] Unless/until approval was given by the APAC President, Gate Gourmet could not:

- a. Formally accept a settlement offer/proposal/agreement made by Mr Matsuoka;
- b. Make a formal settlement proposal that was capable of being accepted by Mr Matsuoka;
- c. Enter into, or sign, a settlement agreement.

[44] These restrictions did not prevent counsel from discussing various settlement options, or from taking instructions from their clients about whether any particular settlement proposal would be acceptable in principle, subject of course to authorisation (sign off) by the APAC President.

[45] Mr Lin specifically advised Mr O'Brien of the caveats on their counsel to counsel without prejudice settlement discussions in an email dated 12 December 2018 that stated:

To be clear, what we have spoken about is on a without prejudice basis and does not constitute a formal settlement offer to your client until formal approval is obtained from our APAC President.

Authority's factual findings

[46] For the reasons explained below, the Authority has concluded that Mr Matsuoka failed to establish on the balance of probabilities that Mr Lin's without prejudice comments to Mr O'Brien on 14 December 2018 disclosed any impropriety, much less unambiguous impropriety.

[47] Nor did the comments Mr Lin admitted to making on 14 December establish that he had engaged in egregious conduct or unconscionable conduct. The Authority further finds that the without prejudice communications it reviewed did not demonstrate bad faith either by Mr Lin personally or by his client, Gate Gourmet.

[48] It was material in reaching that conclusion that the Authority was satisfied on the balance of probabilities that no formal acceptance of Mr Matsuoka's settlement proposal occurred on 14 December 2018.

[49] Mr O'Brien's subjective view about that was contradicted by the fact that the APAC President had not formally authorised acceptance of Mr Matsuoka's settlement proposal.

[50] That meant that, despite what Mr O'Brien may have believed, Gate Gourmet was not in fact ever in the position of being able to have formally accepted Mr Matsuoka's settlement proposal.

[51] Mr Lin was not authorised or instructed to accept Mr Matsuoka's settlement proposal, because Gate Gourmet's necessary internal authorities, that were a prerequisite to a formal settlement occurring, had not been obtained.

[52] Formal settlement simply could not occur unless Gate Gourmet's settlement authorisation process had occurred, and it had not. The APAC President had not approved or authorised Mr Lin to accept Mr Matsuoka's settlement proposal.

[53] Mr Matsuoka should have been aware of that because Mr Lin in his 12 December email to Mr O'Brien had explained that no formal offer or acceptance could occur without the APAC President's "*formal approval.*"

[54] The Authority was not satisfied on the balance of probabilities that Mr Lin's without prejudice comment to Mr O'Brien during their second telephone call on 14 December 2018 was evidence of unlawful discrimination, as Mr Matsuoka claimed.

[55] It was more likely than not that Mr Lin's comment was an attempt to explain to Mr O'Brien why Gate Gourmet would not have a final response to Mr Matsuoka's settlement offer by the end of that day, contrary to Mr Lin's previous promise to Mr O'Brien that it would.

[56] Because of new developments that had occurred on the afternoon of 14 December, Gate Gourmet wanted some further advice and information from Mr Lin on a new matter that involved Mr Matsuoka.

[57] Mr Lin needed time to obtain information from Human Resources in Australia and to work through the questions that Gate Gourmet managers had about the new developments. He was therefore no longer in a position to be able to meet the 14 December deadline that he had previously assured Mr O'Brien would be met.

[58] The Authority on the balance of probabilities accepted Mr Lin's evidence that the purpose of his second telephone discussion with Mr O'Brien was to keep the settlement discussions going.

[59] The context of Mr Lin's comment was that Gate Gourmet had already missed Mr Matsuoka's previous 12 December deadline. It was now also going to miss the 14 December deadline that it had previously assured Mr Matsuoka would be met, because it would not have a final response to him about his settlement proposal by the end of that day.

[60] The Authority considers it more likely than not that Mr O'Brien took Mr Lin's comment out of context.

[61] The Authority was not satisfied that the comment Mr Lin admitted making to Mr O'Brien during their second telephone conversation on 14 December 2018 was evidence of any wrongdoing, namely revoking settlement or ending settlement discussions, as Mr O'Brien believed it was.

[62] The context of Mr Lin's comment was that Gate Gourmet wanted Mr Matsuoka to hold off filing proceedings to give it more time to formally respond to his settlement proposal. Mr Lin was explaining to Mr O'Brien why more time was required.

[63] If Gate Gourmet had wanted to reject Mr Matsuoka's settlement proposal then it could have simply done so. Also if Gate Gourmet had not provided any response to Mr Matsuoka's settlement proposal by the end of the day on 14 December that omission was likely to have resulted in Mr Matsuoka following through on his threat to file proceedings.

[64] Mr Lin's evidence that Gate Gourmet was seeking more time to formally respond to Mr Matsuoka's settlement proposal makes logical sense in all of the circumstances, because it did not close the door to settlement, as the other options set out above would have done.

Outcome

[65] After having reviewed and assessed the without prejudice communications in issue, the Authority did not identify any content that should result in the without prejudice privilege being lifted.

[66] In the absence of evidence of any reprehensible, improper or unconscionable conduct, there is an overall public interest in ensuring that the privilege of the parties' settlement communications should be maintained.

[67] Accordingly, Mr Matsuoka's request that the Authority exercise its discretion to admit without prejudice communications does not succeed. Gate Gourmet's objection to the admissibility of all without prejudice communications in this matter is therefore successful.

Authority's directions

[68] Mr Matsuoka is directed to file a Second Amended Statement of Problem that does not contain any without prejudice references, documents and/or communications.

[69] Because Mr Matsuoka's original Statement of Problem and his Amended Statement of Problem both contain inadmissible without prejudice material these may not be disclosed to the Presiding Member.

[70] All of the evidence, submissions and communications between the parties and Authority relating to the admissibility of without prejudice evidence should be kept by the Authority Officer in a sealed envelope on the Authority file to ensure they are not seen by the Presiding Member.

Costs

[71] Gate Gourmet as the successful party is entitled to a contribution towards its actual costs. The parties are encouraged to resolve costs by agreement.

[72] However if that is not possible then costs on this application will be determined by the Authority once the substantive matter has been concluded.

[73] Costs on this preliminary matter are therefore adjourned sine die.

Rachel Larmer
Member of the Employment Relations Authority