IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE

[2021] NZERA 484
3096512

BETWEEN	SHANE WEST Applicant
AND	KOWHAI INTERMEDIATE SCHOOL BOARD OF TRUSTEES First Respondent

Member of Authority:	Eleanor Robinson
Representatives:	Kalev Crossland and Tony Sung, counsel for the Applicant Simon Mitchell, counsel for the Respondent
Investigation Meeting:	26 – 29 October 2021
Submissions and/or further evidence	26 October 2021 from the Applicant and from Respondent
Determination:	01 November 2021

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] During the course of the investigation meeting into the claim by the Applicant, Mr Shane West, that he had been unjustifiably dismissed and unjustifiably disadvantaged by the Respondent, Kowhai Intermediate Board of Trustees (the Board), an issue arose concerning the existence of legal professional privilege.

Background

[2] During the investigation into allegations made against Mr West, both the Principal Ms Louise Broad, and the Board had been advised by an Advisor of the NZ School Trustees Association (NZSTA).

[3] On 28 October 2021 reference was made in cross examination of a Board witness to evidence provided to counsel by the NZSTA Advisor in respect of advice which he had provided to the Board.

[4] Counsel for the Respondent objected to the evidence being used in cross examination on the basis that the advice provided to the Board by the NZSTA Advisor was subject to professional legal privilege.

[5] Both parties have filed submissions in respect of this issue which is the subject of this determination.

Submissions of the Respondent

[6] Counsel for the Board cites the Evidence Act 2006 which provides for legal professional privilege at s 54(1) and states:

> A person who requests or obtains professional legal services from a legal adviser has a privilege in respect of any communication between the person and the legal adviser if the communication was—
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> (a) intended to be confidential; and
>
> (b) made in the course of and for the purpose of—
>
> (i) the person requesting or obtaining professional legal services from the legal adviser; or
>
> (ii) the legal adviser giving such services to the person

[7] Professional legal privilege is not defined within the Evidence Act 2006 but it is accepted by the Respondent that to be privileged pursuant to the provision, the legal advice must be given by a lawyer pursuant to s 51 of the Evidence Act 2006.

[8] It is submitted that privilege is broader in employment disputes than it is in general litigation. Counsel submits that the extension of legal professional privilege is specifically provided for in the Employment Relations Act 2000 (the Act) and is anticipated in the provisions. Specifically clause 3 of Schedule 2 of the Act provides:

> **Privileged communications**
>
> (1) Where any party to a matter before the Authority is represented by a person other than a barrister or solicitor, any communications between the party and that person in relation to those proceedings are as privileged as they would have been if that person had been a barrister or solicitor.
>
> (2) In subclause (1), party, in relation to any matter before the Authority, includes any person who –
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> (a) appears or is represented before the Authority; or
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> (b) under clause (2)(2) is ordered to appear or be represented before the Authority**.**

[9] It is submitted that these provisions in clause 3 Schedule 2 of the Act should apply despite the acceptance by counsel that the NZSTA Advisor is not now acting for the Board.

[10] Counsel submits that the Employment Court considered the application of the provisions in clause 3 Schedule 2 of the Act in *Dormer v Hangar Company Limited.*[1] In that case the Court considered the position of an advisor to the employer company who was not practising as a solicitor and stated at paragraph [29] of the judgment

> The label 'legal professional privilege' does not mean that it attaches only to communications to and from practising members of the legal profession, at least in the employment relations field in New Zealand. That is because there is a long and established history of practice of employment law advice being taken from lay advocates and advisers (many, but not all of whom are qualified lawyers) as well as practising legal practitioners (barristers and solicitors). The issue does not arise generally, if at all, in other areas of law because the second practitioner tier does not exist in competition with barristers and solicitors.

[11] It is submitted that legal advice was being provided at the time the documents were prepared, or the advice was given.

[12] As regards whether or not the Board waived privilege, it is further submitted that at no time in its evidence did the Respondent assert that its action was consistent with advice provided by the NZSTA Advisor and as such, no issue of waiver applies.

[13] In order to waive privilege it is submitted that more is needed that a mere statement that a party has received advice, they need to assert that they have acted consistently with it, or disclose that advice, even in part.

[14] In this case the Principal confirmed that the School had sought advice from the NZSTA Advisor but she did not disclose the nature of that advice. She did not say that "we took advice and followed it", or that the advice supported its position.

[15] It is submitted that on that basis the Authority cannot require the NZSTA Advisor to give evidence or allow questions on his advice to the Board. It is not a requirement to be a barrister or solicitor to provide employment advice. Those who provide the advice and are not barristers or solicitors are still covered by professional privilege and this includes the NZSTA Advisor.

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[1] *Dormer v Hangar Company Limited* [2003] 2 ERNZ 89.

Submissions of the Applicant

[16] Counsel for the Applicant submits that clause 3 of Schedule 2 of the Act provides a limited extension to the application of privilege within the employment jurisdiction to representatives who are not lawyers.

[17] It is submitted that it is important to note that the right to protection under clause 3 of Schedule 2 of the Act is towards communications between a party and another individual who is not a barrister or solicitor but: "who is engaged in representing the party in proceedings before the Authority".

[18] It is submitted that the NZSTA Advisor was not in that role. He is not a lawyer and not an employment consultant but was a contractor of NZSTA. During his involvement there were no proceedings on foot in that no personal grievance had been initiated nor could have been contemplated since the Board was obliged not to predetermine the outcome of its investigation.

[19] It is submitted that Colgan J's (as he was then) view in *Dormer* predated two major developments in 2005 and 2006, being the enactments of the Lawyers and Conveyancers Act 2006 and of the Evidence Act 2006, the effect of which has been to effectively overrule any common law legal professional privilege.

[20] It is submitted that this comports with Colgan CJ's (as he was in 2014) subsequent observation in *Fox v Hereworth School Trust Board* in which he stated in respect of legal professional privilege:

> [35] Although, as has been noted repeatedly, the Evidence Act 2006 does not apply to proceedings before this Court, its provisions guide the Court's practice in appropriate cases. That is particularly so when dealing with a common law ground of privilege incorporated statutorily in the Regulations.
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> [36] A "legal adviser" is defined in s 51(1) of the Evidence Act as a lawyer, a registered patent attorney or an overseas practitioner. A "lawyer" has the meaning given to it by s 6 of the Lawyers and Conveyancers Act 2006 being "a person who holds a current practising certificate as a barrister or as a barrister and solicitor". Privilege applies to a communication (including a document) between a person and a legal adviser if the communication was intended to be confidential and was made "in the course of and for the purposes of … professional legal services".
>
> [37] As the commentary to High Court r 8.25 in *McGechan on Procedure* notes, salaried legal advisers communicating internally with other employees or their employer come within the scope of the privilege provided they have a current practising certificate and the communications relate to the provision of professional legal services.

> [38] It follows that claims to legal professional privilege in respect of documents to or from persons who were not lawyers holding then current practising certificates as barristers, or barristers and solicitors, would probably fail on that ground.[2]

[21] It is further submitted that, even if the Respondent is correct in claiming that its discussion with the NZSTA Advisor is privileged, it has submitted that it had waived any privilege. The Applicant cites the 2018 case of *Attorney-General v Institute of Professional Engineers NZ Inc & Anor* at [52] in which the High Court stated that the principles associated with implied waiver of privileges are straightforward citing the following comments from McGechan J:

> A party cannot expect to put forward the existence of legal opinion, with an inference invited as to favourable content, or part of a legal opinion which is favourable, and refuse to disclose the opinion document, or the remainder of it, so enabling the position to be checked. If a party positively advances it, the party must disclose it. Mere passing mention in pleadings may not suffice to call the doctrine into place. I agree immediately that the assertion of the existence of legal opinion by a plaintiff and the simple admission or denial of its existence by a defendant ordinarily would not require the defendant to disclose. There are questions of degree. I do not accept there is some inexorable standard which arises from perceived need for invariable certainty.

[22] It is submitted that the Respondent disclosed the allegedly privileged communications with the NZSTA during the Authority's investigation on a number of occasions. As such the Respondent cannot claim to disclosing of privileged advice to bolster its case, but then seek to assert privilege to prevent disclosure of other aspects of the alleged advice concerned with the same transaction, being the investigation and discipline of Mr West.

[23] It is submitted that is particularly so where recourse to the advice was hearsay as the witness, despite being available, was not called by the party laying claim to the prudence of their behaviour by reason of apparently taking advice before acting – the implication being that the conduct which followed accorded with that advice.

[24] Counsel for the Applicant submits that the respondent's application be denied and that the Applicant be permitted to continue cross-examination of the Respondent's witnesses and a summons be issued for the attendance at the investigation meeting of the NZSTA to offer witness evidence.

Was the advice provided to the Respondent by the NZSTA Advisor subject to professional legal privilege?

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[2] *Fox v Hereworth School Trust Board* [2014] NZEmpC 154 at [35] – [38].

[25] As set out in clause 3 of Schedule 2 of the Act privilege attaches to legal advice. Advice can either be written or oral. Where the advice is provided by someone holding a practicing certificate the advice indisputably attracts legal professional privilege.

[26] Privilege attaches if the advice is provided when litigation is taking place, or contemplated as reasonably probable, the privilege applies. If there is any doubt as to the purpose of a document or communication, the 'dominant purpose' test is applied to decide if the privilege will apply, This is set out in *Guardian Royal Exchange Assurance v Stuart* [1985] 1 NZLR 596 in which Cooke j (CA) stated:

> … when litigation is in progress or reasonably apprehended a report or other document obtained by a party or his legal adviser should be privileged from inspection or production in evidence, if the dominant purpose of its preparation is to enable the legal adviser to conduct or advise regarding the litigation.[3]

[27] In this case the NZSTA Advisor was a lay advocate. Clause 3 of Schedule 2 of the Act specifically addresses the position of lay advocates and states that: "any communications between that party and that person in relation to those proceedings are as privileged as they would have been as if that person had been a barrister or solicitor".

[28] In the case of lay advocates it has been observed by the Employment Court that the privilege appears to be limited to litigation privilege, and does not apply to the situation where no litigation is either contemplated or pending.[4]

[29] In this case I find that at the time the NZSTA provided advice to the Board, litigation was not pending. The advice was provided prior to Mr West raising a personal grievance on 13 April 2017 following his dismissal on 11 April 2017. All the advice provided by the NZSTA Advisor was prior to both those dates. As such I find that at the date provided litigation was not pending.

[30] I have considered whether or not litigation was contemplated such that the dominant purpose of the advice provided by the NZSTA Advisor to the Board was for that purpose.

[31] I find that at the relevant time of the advice being provided no personal grievance had been raised, nor mooted. In *Kauponkonui Co-Operative Dairy Co v Trengrouse* a distinction was drawn between a 'definite prospect' of litigation and a mere 'vague anticipation' of it.[5]

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[3] *Guardian Royal Exchange Assurance v Stuart* [1985] 1 NZLR 596 at [602].
[4] *NZ Seafarers Union Inc v Silver Fern Shipping Ltd (No 3)* [1998] 3 ERNZ 1027 at [1033].
[5] *Kauponkonui Co-Operative Dairy Co v Trengrouse* 25 NZLR 241.

[32] In the circumstances at the time the advice was provided to the Board it was conducting a disciplinary process. At that time there may have been a 'vague anticipation' of litigation, but nothing more. Certainly there was no definite prospect of litigation because no personal grievance had been raised.

[33] Having carefully considered the issue, I find that the advice provided to the Board by the NZSTA Advisor was analogous to that provided as human resources advice. In *Broughton v Microsoft New Zealand (No 2)* it was held that:

> … material prepared for human resources advice (and that advice based on that material) cannot attract privilege. Nor can strategy documents prepared or varied after receipt of legal advice support and claim privilege.

[34] I determine that the advice provided to the Respondent does not attract legal professional privilege and can be admitted into evidence.

[35] In light of this decision, I find it unnecessary to address the issue of waiver.

Costs

[36] Costs are reserved.

Eleanor Robinson
Member of the Employment Relations Authority