

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

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

[2021] NZERA 18

3097832

BETWEEN JAMES BALDWIN  
Applicant

AND TEAK CONSTRUCTION  
GROUP LIMITED  
Respondent

3114613

BETWEEN TCL MANAGEMENT  
LIMITED  
Applicant

AND JAMES BALDWIN  
Respondent

Member of Authority: Marija Urlich

Representatives: John Rooney, counsel for James Baldwin  
John Burley, counsel for Teak Construction Group  
Limited and TCL Management Limited

Investigation Meeting: On the papers

Submissions received: 3 December 2020

Determination: 19 January 2021

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**DETERMINATION OF THE AUTHORITY ON A PRELIMINARY  
MATTER**

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**Employment Relationship Problem**

[1] This determination concerns a dispute between the parties as to the admissibility of email correspondence dated 27 and 28 February 2020 (the emails). Mr Baldwin says the emails are privileged communication which should not be included in information before the Authority. Teak Construction Group Limited and TCL Management Limited (TCL) accepts the emails are prima facie privileged but says they should be before the

Authority because they are evidence of and provide context for the actions of the parties and in particular Mr Baldwin and they will be helpful to the Authority to assist in the investigation and determination of the substantive issues. In the alternative, TCL says the emails should be appropriately redacted.

### **Relevant law**

[2] Counsel have both referred the Authority to a judgment of the Employment Court in *Morgan v Whanganui College Board of Trustees* which established the essential requirements for without prejudice communications to be afforded protection as follows<sup>1</sup>:

- (i) The existence of an agreement between the parties that the communication is without prejudice;
- (ii) The existence of at least “negotiations” or a “difference” to warrant the conversation; and
- (iii) That the problem be one “that could give rise to litigation, the result of which might be affected by an admission made during “negotiations”.

[3] In addition counsel have referred in submissions to the Authority’s broad power to take into account such evidence and information as in equity and good conscience it thinks fit<sup>2</sup>.

### **Discussion**

[4] In circumstances where the parties’ intention as to admissibility is clear on the face of the document at issue there will need to be compelling grounds to dislodge the presumption of privilege. Having considered the relevant information and submissions the Authority is satisfied such grounds do not exist.

[5] In this matter both emails are clearly marked without prejudice and the contents of the emails are, the Authority is satisfied, the type which could properly be protected by privilege - they are ‘negotiations’ between the parties made in the context of personal grievances raised by Mr Baldwin.

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<sup>1</sup> *Morgan v Whanganui College Board of Trustees* [2014] NZCA 340.

<sup>2</sup> Section 160(2) Employment Relations Act 2000.

[6] With respect to the 28 February email the first two paragraphs directly respond to issues raised in the 27 February email. Those are properly afforded privilege. The balance of the email repeats positions expressed between the parties in an earlier exchange of emails which, it is understood, will be before the Authority in the substantive consideration of this matter. The redaction suggested is therefore unnecessary and unwarranted. There is no disadvantage to TCL because it has restated matters raised in earlier correspondence within the correspondence it elected to clearly mark as without prejudice.

### **Outcome**

[7] The emails dated 27 and 28 February 2020 are privileged and are not to be placed before or otherwise referred to the Authority Member investigating and determining the substantive application.

### **Costs**

[8] Mr Baldwin is entitled to a consideration of costs. The parties are encouraged to resolve the issue of costs between them. If this is not possible Mr Baldwin should file and serve a costs memorandum within ten working days of the date of determination. TCL should file any reply memorandum within a further five working days.

Marija Urlich  
Member of the Employment Relations Authority