

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2022] NZERA 387
3149224

BETWEEN	BRANKA STIPETCH Applicant
AND	SGS NEW ZEALAND LIMITED Respondent

Member of Authority:	Nicola Craig
Representatives:	John Burley, counsel for the applicant Claire Mansell, counsel for the respondent
Investigation Meeting:	8 April 2022
Submissions (and further information) received:	29 April and 11 May 2022 from the applicant 6 May 2022 from the respondent
Date of determination:	12 August 2022

PRELIMINARY DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Bianca Stipetch was a human resource advisor for SGS New Zealand Limited (SGS or the company) for several years. She resigned in early 2020 and claims that she was subjected to bullying and controlling behaviour culminating in a constructive dismissal. SGS disputes that there was any unjust action or breach of good faith, saying that Ms Stipetch resigned of her own accord.

[2] SGS objects to what it says are without prejudice conversations referred to by Ms Stipetch in the statement of problem and without prejudice documents attached to that statement. The company sought an order to have Ms Stipetch amend and re-file her

statement of problem removing that material as it was privileged. That was unable to be achieved by agreement and thus this preliminary determination is issued.

How did the Authority investigate?

[3] Additional time was taken to work through the steps of this process than might otherwise have been the case. Ms Stipetch was living overseas and Auckland was under an extended COVID-19 lockdown.

[4] It appeared that Ms Stipetch and SGS's then General Manager of Human Resources Lisa Wilkinson were likely in dispute about if and when in their discussions reference was made to "without prejudice". In order to ascertain whether this question could be decided on the papers, affidavits were sought. During that process SGS sought to protect its position regarding waiver of privilege and disclosure outside the Authority of material in Ms Wilkinson's affidavit.

[5] Ms Stipetch agreed to restrictions until such time as the Authority finds that the relevant material was not subject to privilege. The Authority directed that Ms Wilkinson's affidavit was provided on the basis that any privilege was not waived and disclosure of it was restricted.

[6] Having received unsworn affidavits from Ms Stipetch and Ms Wilkinson, the parties' views were sought on whether the privilege issue should be determined on the papers or required the hearing of oral evidence. SGS considered an investigation was needed due to significant factual disputes. Ms Stipetch's view was that if the Authority wished to question the parties beyond the affidavit evidence that should occur during an investigation meeting into the substantive matter.

[7] A decision was made that the privilege question should be resolved prior to the substantive investigation and an investigation meeting was needed for that purpose.

[8] By the time of the investigation meeting, the Authority was able to hold in-person investigation meetings and Ms Stipetch had returned to New Zealand. An investigation meeting was held on 8 April 2022 where evidence was heard from Ms Stipetch and Ms Wilkinson including their affidavits sworn with any requested changes. Comprehensive submissions were later lodged.

[9] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has not recorded everything received from the parties but has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter, and specified orders made as a result.

Issues

[10] Prior to the investigation meeting it appeared there were some parts of the discussions and documents which the parties agreed were without prejudice and so privileged. However, at the meeting the position changed with Ms Stipetch seemingly asserting that none of the discussions or correspondence were either explicitly agreed to be without prejudice and/or were legitimately privileged. Written submissions on her behalf further elaborated on that position.

Background facts

[11] Both Ms Stipetch and Ms Wilkinson have extensive human resources experience. In addition Ms Wilkinson was an admitted barrister and solicitor and worked as a barrister for three years in litigation work. Both women unsurprisingly claim to have a good understanding of without prejudice communications and the attaching privilege.

[12] Ms Wilkinson worked for SGS from May 2019. At some point Ms Stipetch gained a sense that Ms Wilkinson was intending to promote her. In December 2019 an SGS human resources advisor resigned and Ms Wilkinson refers to seeing this as a good opportunity to restructure the human resource team.

[13] On 29 January 2020 Ms Wilkinson held a team meeting with Ms Stipetch and a newly appointed HR advisor. Discussion included whether to fill the vacancy or use it as an opportunity to create another structure in future. Ms Wilkinson indicated a new structure may include a (senior) HR business partner role and a more junior advisor role. Ms Wilkinson's sense was that Ms Stipetch seemed to agree with the rationale for that. Both agree that either at this and/or the next meeting Ms Wilkinson mentioned concern about Ms Stipetch's health and wellbeing from any stress due to a restructuring process, given information she already held regarding Ms Stipetch's health.

[14] No proposal was put at the meeting. Ms Wilkinson recalls advising that one or both roles may be impacted if there was a restructuring. She describes Ms Stipetch as seeming oddly unconcerned by that. Ms Wilkinson felt Ms Stipetch might see the

restructure as an opportunity for a promotion. By contrast Ms Stipetch's recollection was that she did not get any indication at that meeting that the possible restructuring would affect her role.

[15] Ms Stipetch's statement of problem includes references to a subsequent series of meetings and correspondence in late January and February 2020, detailed below. It is aspects of these which SGS asserts to be privileged.

Notes from meetings

[16] Ms Wilkinson provided a timeline which she says incorporates her notes made at or shortly after the various meetings. Ms Stipetch has concerns about these notes. They are clearly not a precise record of what occurred and some commentary was added later. For example, Ms Wilkinson inserted a description for each meeting such as "*First "without prejudice" meeting*".

[17] A significant example regarding the first meeting is that the first bullet point noted after the attendees is that there was consent and agreement to enter into a discussion on a without prejudice basis. It was clear from Ms Wilkinson's affidavit and from her oral evidence that there other discussion between her and Ms Stipetch before 'without prejudice' was mentioned. Ms Wilkinson accepted that point when asked.

[18] Ms Stipetch says that she took notes in meetings but threw them away when she produced her affidavit.

Submissions

[19] Submissions for Ms Stipetch attempted to explain what appeared to be a change in Ms Stipetch's evidence. This is discussed in more detail below regarding particular meetings.

[20] Ms Stipetch's primary position is that there was no agreement that discussion should be without prejudice and no basis on which to uphold without prejudice status as there was no dispute. Any possible future dispute was said to be insufficient to found that status and even once an "*employment relations matter*" was mentioned none of the communications should attract privilege. There was no formally notified restructuring proposal and associated consultation process in existence at any time.

[21] In the alternative if material is found to be privileged it is submitted that the material should be taken into account in any event on the basis of a common law exception where privilege would “*act as a cloak for perjury, blackmail or other serious impropriety*”.¹ Breach of the duty of good faith is said to be the serious impropriety involved here.

[22] Submissions for SGS emphasise that the parties agreed to label their discussions and written communications as without prejudice. Criticism is made of the changing nature of Ms Stiptech’s evidence. Further, there was a dispute between the parties and the communications were an attempt to resolve the issues between them.

[23] SGS argues that the grounds for privilege are established and there are no legitimate reasons to lift that privilege in this case.

Principles

[24] The Authority has broad powers as regards to evidence. It may take into account such evidence as in equity it thinks fit, whether that is strictly legal evidence or not, under s160(2) of the Act. The discretion must be exercised in a principled way having regard to common law and Evidence Act 2006 principles.²

[25] Settlement discussions and communications which are made in connection with an attempt to settle or mediate a dispute and are intended to be kept confidential are privileged under s 57 of the Evidence Act. This is to motivate parties to negotiate resolution of disputes between them through frank discussion, safe in the knowledge that what they say will remain confidential.

[26] The Evidence Act uses the word “dispute”. In an employment case, the Court of Appeal has recognised that “negotiations” or even “difference” will be sufficient.³ Argument or debate may not be enough. The problem must be one which could “give rise to litigation where the result might be affected by something said” by a party or their representative.⁴

¹ *Sheppard Industries Limited v Specialized Bicycle Components Inc* [2011] NZCA 346.

² *Morgan v Whanganui College Board of Trustees* [2014] NZCA 340 at [24].

³ *Morgan v Whanganui College Board of Trustees*, above at [17] and [21].

⁴ *Morgan v Whanganui College Board of Trustees*, above at [18].

[27] If privilege applies the without prejudice status applies to subsequent correspondence unless and until a sufficient warning is given that dealings are on an open basis.⁵

[28] The use of “without prejudice” label may assist in determining that a communication was intended to be privileged but does not of itself make the communication privileged.

[29] There is a strong public interest in the parties being able to resolve employment relationship problems themselves as well as in any agreement reached to conduct without prejudice discussions being enforced. Only limited exceptions apply.

31 January 2020 meeting

What happened?

[30] After what Ms Wilkinson described as the brainstorming session on 29 January, she invited Ms Stipetch to a meeting between the two of them. Ms Wilkinson was concerned that Ms Stipetch saw the business partner role as hers.

[31] Ms Stipetch notes that she was not expressly given an opportunity to bring a representative to this meeting and was not provided with any documents about the proposed discussion.

[32] On the basis of the affidavits received by the Authority it appeared that both women accepted that the meeting started on an open basis and then moved to a without prejudice one. The disagreement appeared to be about the timing of that movement.

[33] The initial part of the meeting included Ms Wilkinson informing Ms Stipetch about how she saw the possible new senior HR business partner role. In light of her vision of that role, Ms Wilkinson expressed that she saw Ms Stipetch lacking several of the senior skills and a large amount of the technical experience needed for it. In addition she spoke of her assessment that Ms Stipetch was struggling with deliverables for her current role and needed to raise her performance before attempting to take on board a more senior role. Ms Stipetch describes finding all this completely shocking.

⁵ *Gibbs v Windmeyer* [2021] NZHC 2582 at [13].

[34] Ms Wilkinson described to the Authority there being a high likelihood that the formal restructure would commence fairly soon with the business partner role included although that needed to be approved by the business.

[35] The parties are currently in disagreement as to whether Ms Wilkinson indicated Ms Stipetch's role would or just might be disestablished. Ms Stipetch's evidence was that Ms Wilkinson said her existing role would be disestablished and she would not be redeployed into the new senior role.

[36] Ms Stipetch expressed disappointment that she was not considered a natural fit for the senior role. She asked why she was not being directly appointed into that role which she believed to be similar to her current role. Ms Stipetch did not agree with Ms Wilkinson's assessment of her work.

[37] It is at this point Ms Wilkinson says that she asked Ms Stipetch if they could speak in a without prejudice basis and Ms Stipetch said '*I agree*'.

[38] At the Authority's investigation meeting Ms Wilkinson maintained her evidence on the initial discussion and the move to a without prejudice phase. She described the without prejudice discussion as including being about what a resolution might look like. Later that day Ms Wilkinson also recorded in an email to SGS managing director Peter Hart:

As mentioned briefly, we have spoken on an agreed 'without prejudice' basis.
The terms discussed today are below.

[39] There were significant difficulties with Ms Stiptech's evidence about this meeting:

- (a) In her affidavit, prepared whilst she was represented, she states – "*I accept that a without prejudice conversation took place as part of that meeting*";
- (b) Further, "[t]he without prejudice conversation only took place part way through the meeting and I have specifically not detailed what was discussed under the guise of without prejudice";
- (c) At the investigation meeting when being questioned Ms Stipetch gave important evidence which was not indicated in her reasonably comprehensive affidavit. She said that when Ms Wilkinson asked about having a without

prejudice discussion, Ms Stipetch deliberately chose to ignore her, providing no response, negative or affirmative; and

- (d) Submissions on Ms Stipetch's behalf indicate that her statements referred to at (a) and (b) above should be taken as references to Ms Wilkinson's characterisation of discussions as without prejudice, not as being Ms Stipetch recognising them as such.

[40] I found Ms Stipetch's evidence and position in this regard unsatisfactory. Ms Stipetch was given the opportunity at the start of her evidence to make changes to her unsworn affidavit before confirming its truth. She changed other parts but not those referred to in (a) and (b) above.

[41] Ms Stipetch is an experienced human resources practitioner and it seems unlikely that she would make such a concession if she believed the status was not without prejudice and/or Ms Wilkinson had attempted to seek agreement for that identification which Ms Stipetch deliberately withheld.

[42] Her statements in the affidavit go beyond what would have been expected if she was simply impliedly referring to Ms Wilkinson's assertion rather than what was agreed or she accepted. Rather she said that a without prejudice conversation took place and she made a specific decision not to detail what was said in it. These references fit uncomfortably with the suggestion Ms Stipetch was simply reporting Ms Wilkinson's discussion characterisation. SGS asserts that Ms Stipetch appears to have altered her evidence to fit with a legal argument.

[43] In addition to those difficulties I also consider it unlikely that Ms Wilkinson, as an experienced HR practitioner and lawyer, would have proceeded with a frank discussion, having asked to have a without prejudice discussion, without some indication, albeit minor, of consent by Ms Stipetch.

[44] I therefore prefer Ms Stipetch's earlier evidence which acknowledges agreement on without prejudice label and status and fits with Ms Wilkinson's evidence regarding this meeting.

Was there a dispute?

[45] The question is whether there was a dispute on which to found without prejudice privilege.

[46] The parties agree that there was no formal restructuring proposal on the table and thus no formal consultation process had begun. A proposal and process would give a stronger basis on which to establish a dispute.

[47] There is no suggestion that a personal grievance was raised before or at this meeting. There is no requirement for that to establish a dispute although it can obviously assist. But from Ms Stipetch's point of view, Ms Wilkinson had decided not to proceed with appointing her to the HR business partner role. Ms Stipetch's statement of problem includes reference to her suffering an unjustified disadvantage as a result of SGS's flawed restructuring process which she was told about at a meeting on 31 January 2020. That is in keeping with what was said at the portion of the meeting before 'without prejudice' was mentioned.

[48] Submissions for Ms Stipetch stress that she did not perceive litigation however, a more objective viewpoint is needed. Even on Ms Stipetch's evidence there was a possible proposal and an indication before the mention of 'without prejudice', that Ms Stipetch lacked at least some of the skills and experience needed for a senior role and was not doing her current job sufficiently well. She may by implication have been left with the relatively junior role.

[49] A sense that Ms Stipetch was concerned or disagreed with SGS's position is reinforced by her obtaining of an employment advocate's advice prior to the next meeting.

[50] I do not see a prompt movement from the dispute arising to the commencement of the without prejudice discussion as necessarily being problematic.

[51] Although no formal announcement of the restructuring had been given, I accept from the time Ms Wilkinson mentioned that Ms Stipetch would or may not get the senior job and was not doing her own job adequately, shocking Ms Stipetch, there was a dispute or difference which could result in litigation. That dispute existed at the time the without prejudice discussion began.

[52] Therefore the remainder of the meeting's discussion is privileged.⁶

3 February 2020 meeting

[53] A meeting was held between Ms Stipetch, Ms Wilkinson and Mr Hart. Similar themes continue here with Ms Stipetch and Ms Wilkinson's affidavits being relatively consistent but Ms Stipetch heading off in a different direction during her oral evidence.

[54] By this time Ms Stipetch had talked to an employment advocate friend, likely on 1 or 2 February. Despite her need to talk to someone about her problem, Ms Stipetch would not concede under cross examination that she had an employment relationship problem at this point. She did accept that she had a life problem however.

[55] I did not find the submission that Ms Stipetch had not appointed the advocate so much as approached her as a friend about a life problem, very compelling. She did tell her employer via Ms Wilkinson that she had an advocate or representative.

[56] Ms Wilkinson asked or commented about whether to proceed without the advocate Ms Stipetch mentioned. Ms Stipetch did not ask for the meeting to be adjourned so her advocate could attend. The meeting proceeded.

[57] Ms Wilkinson's evidence was that one of the SGS representatives confirmed at the start of the meeting with Ms Stipetch that she was happy to speak on a without prejudice basis to which she agreed. Discussion included possible options for resolution.

[58] In her affidavit Ms Stipetch "*recall[s] that the meeting was held on a 'without prejudice' basis...*". However, at the Authority's meeting Ms Stipetch instead argued that she did not agree when Ms Wilkinson proposed the discussion move to being without prejudice. Submissions on her behalf again argued that Ms Stipetch's seeming acceptance in her affidavit that she attended a without prejudice meeting was simply acceptance that Ms Wilkinson used the "without prejudice" label.

[59] As detailed below, two days later Ms Wilkinson emailed Ms Stipetch referring back to their conversation together (on 3 February) and setting out a proposed settlement. Ms Stipetch responded, referring to "*the outcome of our 'Without Prejudice' discussion*" on 3 February.

⁶ From after the bold entry regarding 'without prejudice' near the top of page 2 of Ms Wilkinson's timeline.

[60] Difficulties with Ms Stipetch's evidence and position lead me again to rely on her affidavit evidence. Both affidavits refer to the ongoing dispute, the unlikelihood of Ms Stipetch being directly appointed to the business partner role and the discussion of potential settlement options. I conclude that agreement was reached that this was a without prejudice meeting with a dispute in existence.

[61] The content of the 3 February meeting is privileged.

5 February 2020 emails

[62] On 5 February Ms Wilkinson emailed Ms Stipetch, with the subject heading "*Proposed Settlement Terms 'Without Prejudice' – HIGHLY CONFIDENTIAL*". An offer was made.

[63] Ms Stipetch replied without directly questioning the subject title and also referring to "*our 'Without Prejudice' discussion*". She sets out her understanding of the outcome of the discussion.

[64] Ms Wilkinson responded, making comments and setting a time for acceptance of SGS's offer.

[65] In her affidavit Ms Stipetch notes the reference in the emails to "*without prejudice*" and states "*...so I accept that they may be disregarded by the Authority*". At the Authority's meeting she took a different approach, saying that the reference to without prejudice in quotation marks was intended to be sarcastic. This seems unlikely, both on the basis of the content of the email and her affidavit.

[66] Labelling documents as "*without prejudice*" does not of itself entirely answer to whether they are actually privileged. However, as identified above there was a dispute between the parties and the contents of the emails clearly set out attempts to resolve that dispute.

[67] The emails are privileged and may not be relied upon in the substantive investigation.

7 February 2022 emails

[68] Ms Stipetch's advocate emailed Ms Wilkinson on 7 February, with the subject line "*Branka Stipetch, Confidential and Without Prejudice*". The email includes

reference to “*raising an employment relations matter*” and refers to the “*current w/o prejudice settlement negotiations*”.

[69] Ms Wilkinson responds noting the email and a phone discussion (with the advocate) on “*a ‘without prejudice’ basis*”. Proposed terms are mentioned.

[70] Ms Stipetch’s affidavit notes the labelling of the chain but states that she does not consider the emails were without prejudice. The only reason offered for this is that this was open correspondence designed to set up a meeting for the purposes of resolution.

[71] Submissions for Ms Stipetch suggest that this was the first time when privilege might attach as a possible employment relationship problem only existed from this time. It is however not accepted that privilege actually applied.

[72] However, the communications here are part of the privileged discussions that commenced earlier and are made in connection with an attempt to settle the dispute. There was no indication of time being called on those discussions on Ms Stipetch’s behalf.

[73] In closing submissions for Ms Stipetch there is mention of the concept that privilege could not apply to parts of the advocate’s email as they relate to whether a grievance was raised. There has been no challenge raised by SGS that the grievances were not raised in time. I leave this question to be considered later if need be.

[74] Subject to that point, the 7 February 2022 emails are privileged and may not be relied upon in the substantive investigation.

10 February 2020 meeting

[75] Ms Stipetch was called to a meeting with Ms Wilkinson and Mr Hart, reportedly without reference to a purpose.

[76] Ms Wilkinson regards this as a without prejudice meeting and is sure that she would not have allowed the discussion to commence without that being confirmed. Ms Stipetch’s affidavit refers to the absence of a discussion about holding the meeting on a without prejudice basis. However, at the Authority’s meeting she accepted under questioning that ‘without prejudice’ was mentioned but says she did not say anything to that.

[77] Ms Stipetch does not accept that this meeting was privileged as although there was a possible employment relationship problem which could give rise to litigation, the contents of the meeting did not relate to that.

[78] This meeting took place in the context of on-going settlement discussions. An offer remained outstanding without a response from Ms Stipetch. An answer was sought. Discussion at the meeting included possible resolutions.

[79] The content of the meeting is privileged.

12 February 2020 discussion

[80] A relatively brief informal conversation occurred between Ms Stipetch and Ms Wilkinson in the workplace. This included discussion about possible resolution.

[81] This was a continuation of the previous conversations about resolution which were without prejudice. There was no indication on Ms Stipetch's behalf that she was bringing the without prejudice discussion to an end.

[82] I conclude that the content of the discussion is privileged.

Good faith claim

[83] I have found that conversations and emails are privileged. For Ms Stipetch it is claimed that SGS so clearly breached its good faith obligations that that justifies the lifting of privilege on public policy grounds.

[84] Public policy may exclude the privilege in situations of threats, blackmail or other serious impropriety.⁷ I do not accept that Ms Stipetch has put up a compelling reason to justify the lifting of privilege in this case.

Orders

[85] The statement of problem contains and attaches material which is without prejudice and subject to privilege. Without prejudice material will be redacted and no such material given in evidence, subject to possible further consideration regarding the 7 February 2022 email personal grievance point outlined above.

⁷ *Morgan v Whanganui College Board of Trustees* [2014] NZCA 340 at [35].

[86] Ms Stipetch will lodge an amended statement of problem not attaching documents containing privileged material. The parties may revert to the Authority if there are difficulties with that process.

[87] The parties are to inform the Authority whether they consider further mediation may assist at this point.

[88] Unless the parties agree otherwise this file will be allocated to another Member for investigation of the remaining issues.

[89] The order that Ms Wilkinson's affidavit is not to be disclosed other than to the Authority, counsel and the parties remains in place. It may be further considered later in this proceeding.

Costs

[90] Costs are reserved and will be dealt with, if necessary, along with the determination of costs for the substantive investigation.

Nicola Craig

Member of the Employment Relations Authority