

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2022] NZERA 555
3188300

BETWEEN

ROSAMUND VAILAHI
Applicant

AND

MINIMARC CHILDCARE
CENTRE INCORPORATED T/A
MARC EARLY LEARNING
CENTRE
Respondent

Member of Authority: Rachel Larmer

Representatives: Paul Pa'u, counsel for the Applicant
Richard Harrison, counsel for the Respondent

Investigation Meeting: On the papers

Submissions and Further Information Received: 13 September 2022 from Respondent
19 September 2022 from Applicant
21, 22 and 23 September 2022 from the Respondent
10 October 2022 from Applicant
19 October 2022 from the Applicant

Date of Determination: 28 October 2022

PRELIMINARY DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Applicant Mrs Rosamund Vailahi claimed (among other claims) she was unjustifiably dismissed by the Respondent Minimarc Childcare Centre Incorporated t/a Marc Early Learning Centre ("*Marc*"). Mrs Vailahi has applied for interim reinstatement and that

application is being determined by Member Fuiava, who is the Presiding Member in this matter.¹

[2] This preliminary determination applies to admissibility of the disputed evidence only.

[3] Marc objected to Mrs Vailahi's inclusion in her Statement of Problem and affidavit filed on 8 September 2022 about what was allegedly said at a without prejudice facilitated restorative meeting that had occurred on 9 December 2021 (referred to in this determination as "*the disputed material*").

[4] Marc disputed Mrs Vailahi's account of what was said at the 9 December 2021 meeting. Marc said that if that the disputed material was admitted by the Authority it would call witnesses, including the meeting facilitator, to challenge Mrs Vailahi's account of what had allegedly been said.

[5] However, Marc said the content of the without prejudice meeting was privileged and the Respondent and other participants in the meeting had not waived privilege. Marc therefore wanted the privilege upheld, so it sought an order from the Authority that the disputed material was inadmissible.

[6] Mrs Vailahi denied that the disputed material was subject to without prejudice privilege. She said the meeting was "*not in the context of an employment relationship problem*", it was about resolving issues between employees and not a disagreement between an employee and employer.

[7] Alternatively, Mrs Vailahi submitted that the Authority should lift any privilege that may have applied to the 9 December 2021 meeting, to allow her to refer to the content of a without prejudice discussion she claimed had occurred. Mrs Vailahi claimed Marc was "*putting forward a false narrative and hiding behind the without prejudice*".

[8] Mrs Vailahi therefore sought a ruling from the Authority that the disputed material was admissible because either it was not subject to privilege or, if it was privileged, then that equity

¹ The disputed material has been withheld from the Presiding Member, while this Member (as the allocated Duty Member) determined admissibility issues associated with that.

and good conscience required it to be admitted as evidence under s 160(2) of the Employment Relations Act 2000 (the Act).

Authority's investigation

[9] The Authority investigated the admissibility issues 'on the papers'. Both parties had an opportunity to file evidence and submissions, and both did so.

[10] The Authority asked for information (via the Respondent's counsel) from the meeting facilitator about the status of the 9 December 2021 meeting and that was provided along with relevant emails. Both parties had an opportunity to comment on that information.

Issues

[11] The following issues are to be determined:

- (a) Was the 9 December 2021 meeting subject to 'without prejudice' privilege?
- (b) If so, has the privilege been lost or waived?
- (c) If not, should the Authority order that any privileged evidence is to be admissible?
- (d) What if any costs should the successful party be awarded?

Legal principles

[12] The privilege that attaches to settlement negotiations, mediation and without prejudice communications is well established. Recognising and upholding privilege is an important element in encouraging settlement. It is also consistent with the objects stated in s 3 of the Act to promote mediation and reduce the need for judicial intervention in employment disputes.

[13] The Authority has a wide discretion under s 160(2) of the Act to take into account such information as in equity and good conscience it thinks fit, whether strictly legal evidence or not. This means the Authority has the power to consider privileged evidence if the circumstances so require.

[14] The Authority is not covered by the Evidence Act 2006 (“*the EA06*”). However, the Court of Appeal has recognised that the Authority must be guided by settled principles of common law and relevant provisions of the EA06.²

[15] The EA06 has therefore provided the Authority with helpful guidance on matters relating to the admissibility of evidence.

[16] Section 57(1) and (2) of the EA06 recognises the privilege that is associated with mediations and settlement negotiations. Privilege applies to a party to, or mediator in, a dispute engaging in confidential communications that are intended to settle or mediate the dispute. Confidential documents prepared in connection with an attempt to mediate or settle the dispute are also privileged.

[17] However, this privilege is not absolute. Section 57(3)(d) of the EA06 recognises that privilege may be lifted on confidential documents and/or communications if the need for disclosure outweighs the need to maintain privilege.

[18] The Court of Appeal in *Cedenco Foods Ltd v State Insurance Ltd* held that ‘without prejudice’ privilege could be displaced where the exclusion of the evidence would potentially mislead or deceive the Court about an issue before it.³

[19] The High Court in *Solomons v International View Ltd* has admitted without prejudice communications to ensure it was not misled.⁴

[20] The full Employment Court in *Crummer v Benchmark Building Supplies Ltd* held that a material statement made during statutory mediation was admissible, to ensure it was not misled or deceived by the employer adopting a position before the Court that was contrary to what it had said during mediation.⁵

Was the 9 December 2021 meeting subject to ‘without prejudice’ privilege?

Material background

[21] The Applicant made complaints about her colleagues and those were investigated by an external independent investigator, who provided the Board with a report. The Board

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

³ (1996) 10 PRNZ 142.

⁴ High Court, Auckland, 30/10/1997, Elias J.

⁵ [2000] 2 ERNZ 22.

subsequently undertook further investigations in the issues Mrs Vailahi had raised in her complaint.

[22] The Board's investigation did not result in disciplinary sanctions against anyone, but it did result in other administrative actions (such as the engagement of external human resources assistance and implementation of new policies and procedures) being taken to address the concerns that had come to light as a result of Mrs Vailahi's complaints and the associated investigations.

[23] Mrs Vailahi had been working from home updating policies during Covid. After the various investigations had been concluded Mrs Vailahi informed Marc of her intention to return to the workplace.

[24] In early December 2021 Marc informed all three employees (Mrs Vailahi and the two employees she had made complaints about) of its expectation that they be able to work together in the workplace Marc recognised that involved the three employees working closely together in what was a small workplace.

[25] The three parties involved in the investigations that had occurred all had their own independent counsel. All three employees had raised employment relationship problems with Marc via their respective counsel, with each complaining of an unsafe workplace due to the others actions.

[26] The Board was concerned about safety in the workplace and the mental wellbeing of the three employees involved in the investigations, due to the strong emotions and feelings that had stemmed from the serious allegations Mrs Vailahi had raised.

Was there a dispute?

[27] The Authority finds that as at early December 2021 there was clearly a dispute between each of the three employees and Marc (as their employer), as a result of the employment relationship problems each employee had raised via their respective counsel. There were also unresolved employment relationship problems (disputes) between the three employees themselves that arose from, and affected, their employment.

[28] Marc was concerned to avoid further conflicts between the three employees arising after Mrs Vailahi returned to the workplace, as it recognised she was legally entitled to return.

[29] Marc had advised all of the employees that it “*takes seriously its obligation to all employees to provide a safe and healthy workplace*”. As part of addressing that the various disputes, and consistent with its health and safety obligations, Marc arranged for an external independent facilitator/mediator to meet with the three employees in an attempt to resolve their issues (i.e., the employment relationship problems/dispute).

What terms were agreed for the 9 December 2021 meeting?

[30] The participants agreed to engage former Chief Judge Graeme Colgan to hold a facilitated without prejudice mediation/meeting with the aim of assisting the three employees to come up with an agreed protocol that would apply after Mrs Vailahi’s return to the workplace, that addressed the health and safety concerns that had been raised with Marc.

[31] An email Mr Colgan sent to the parties prior to the 9 December meeting stated:

I propose that these discussions to be held next Thursday be **confidential to the parties** and, to allow everyone to express their views freely and to explore opportunities together a resolution, that they also be held on a “**without prejudice**” basis. Although you should feel free to take your own legal advice about what this means, I can say that I intend it to mean that no-one can bring up and seek to rely in any later litigation, meaning that any written notes that you may take will not be copied and will be destroyed at the meeting’s conclusion. (Emphasis added.)

I look forward to having your, the parties to the facilitation, confirmation by email of these arrangements, or otherwise.

[32] All three employees agreed to these terms, as did the Respondent. No objection was raised about the confidential or without prejudice nature of the meeting either before or after the meeting.

Post meeting communications

[33] The Applicant’s counsel in communications with Marc regarding the 9 December 2021 meeting made a number of references to the meeting being a “*mediation*”. The fact he did so likely indicated that he had viewed the meeting as having had the same confidential qualities that would be associated with a mediation.

[34] In an email dated 9 December 2021 to Marc’s counsel, which was copied to the counsel for the three employees, Mr Colgan referred to the fact that he had “*facilitated a meeting today in an attempt to **resolve the dispute** between [the Applicant, the Respondent and another*

employee]”. Mr Colgan also referred to the fact that “*We met collectively in the afternoon on a without prejudice and confidential basis.*” (Emphasis added.)

[35] This evidence also established that the 9 December 2021 meeting had occurred on a confidential without prejudice basis, as had been agreed at the time of Mr Colgan’s initial engagement.

Response to Authority’s query to the meeting facilitator

[36] On 21 September 2022 Mr Colgan responded the Respondent’s counsel, copied to the Authority and the Applicant’s counsel, with his reply to the Authority’s query which had been put to Mr Colgan by Mr Harrison.

[37] Mr Colgan stated that:

I have reviewed my file. I do not think it can be denied that **there was, in December 2021, a dispute between the parties that required resolution** and I was approached by MARC’s lawyer, [...], to attempt to assist the parties to reach a solution to this dispute. The emailed letter sent before and after the facilitation/mediation that you have attached both confirm that **this exercise was conducted on a confidential and without prejudice basis consistent with the mediatory nature of this exercise.** Both parties were represented by experienced employment lawyers or advocates with whom I corresponded and I am confident that they (the parties) would have participated in this exercise on a fully informed basis. (Emphasis added.)

While I cannot recall specifically also advising orally those I met with in person of these constraints, it is my practice to do so and I know of no reason for departing from this practice on that occasion. The proximity of these two emails to the session held on 9 December also confirms for me that my understanding was shared by the participants to the exercise. Had it not been, I would have expected to have been told that and, in turn, I would have addressed the issue on the day, recorded it in my subsequent email, and recalled it even now.⁶

Was the meeting held on a “without prejudice” basis?

[38] The Authority finds that the facilitated/mediated meeting held on 9 December 2021 proceeded on the basis that Mr Colgan had proposed, namely that was a confidential, without prejudice meeting.

[39] The meeting was clearly stated to be confidential and was held on a without prejudice basis so the parties could speak freely. The meeting was intended to resolve the dispute

⁶ The emails referred to are those of 9 and 19 December 2021 from Mr Colgan to the Respondent and the representatives of the employees involved in the 9 December 2021 meeting.

(meaning the various employment relationship problems) that had arisen regarding Mrs Vailahi's complaints, the investigations that had occurred and her imminent return to the workplace.

[40] There were clearly significant and serious problems in the employment relationship. That is very obvious from the exhibits Mrs Vailahi the appended to the reply affidavit she filed on 10 October 2022, in support of her interim reinstatement claim.

[41] The situation was complex, challenging and highly emotional for the employees involved in the dispute. Considerable time and cost had been expended by all involved and based on the position communicated by each employee's own counsel, as at December 2021 proceedings seemed likely.

[42] The 9 December 2021 meeting was a legitimate and genuine attempt to resolve the dispute between these parties and the other employees involved in the situation. It gave those involved a chance to discuss their respective concerns and explore if those could be alleviated by an agreed outcome.

[43] Mr Colgan's email of 6 December 2021 set out the basis on which he was to be involved. The communications provided by Mr Colgan as the facilitator indicated the participants in the meeting knew it was confidential from the outset, because none of their representatives disputed or sought to vary any of the terms (including the without prejudice basis of the meeting) that Mr Colgan had put forward as a condition of his involvement.

[44] No issue was taken by the Applicant's representative after the 9 December meeting to suggest it had been conducted 'on the record'. To the contrary, the Applicant's representative made numerous references to the meeting being a "*mediation*", indicating he must have believed it had the necessary quality of confidence that was associated mediation.

[45] All three employees had engaged their own counsel and had raised employment relationship problems with the Respondent. The meeting was an attempt to resolve those issues (the dispute) by agreement, so that the concerns that each of the employees (who attended the meeting) had raised via their counsel could be addressed/alleviated/resolved without the need for litigation.

[46] Mr Pa'u's submission that there was no dispute because the issues were between the employees was not accepted. Each employee had raised employment relationship problems with Marc as their employer.

[47] The fact the problem raised related to other employees did not mean there was no employment relationship problem as defined by s 5 of the Employment Relations Act 2000 (the Act), which covers "*any other problem to or arising out of an employment relationship*".

[48] That definition is wide enough to include problems that arise in the employment context between employees. The Authority was satisfied there was an employment relationship problem involving the three employees who attended the meeting and Marc as their employer.

[49] The Authority concluded that the meeting was clearly conducted on a without prejudice basis, so the content of the meeting is subject to without prejudice privilege.

Has privilege has been waived or lost?

[50] Mrs Vailahi cannot unilaterally lift the without prejudice privilege that applied to the 9 December 2021 meeting.

[51] Marc informed the Authority that it and the two other employees who attended the meeting still wanted to rely on the privilege that had been agreed prior to the 9 December 2021 meeting. Privilege has therefore not been waived.

[52] The evidence produced to the Authority did not establish that the Respondent had acted "*so as to put the privileged communication, information, opinion, or document in issue in a proceeding*", as is required by s 65(3)(a) of the EAO6 for the privilege to be lifted.

[53] There was no evidence of any unambiguous impropriety or abuse of the privilege having occurred that would have resulted in the privilege being lost.

[54] The Authority therefore finds that the privilege has not been waived or lost.

Should the Authority order that privileged evidence is to be admissible?

[55] The Employment Court has recognised the importance of allowing parties in employment disputes to protect the confidentiality of "*off the record*", "*in confidence*" and "*confidential*" communications that are intended to resolve the parties' dispute without the intervention of the employment institutions.

[56] The s 3(a)(vi) object of the Act is to reduce the need for judicial intervention. Respecting without prejudice privilege is consistent with that objective.

Is the disputed material relevant to the substantive claims?

[57] The Authority did not accept Mr Pa'u's submission that Marc was "*putting forward a false narrative*" or "*hiding behind the without prejudice*". The reasons for the disciplinary investigation and subsequent dismissal are set out clearly, and the (disputed) comment Mrs Vailahi alleged was made on 9 December 2021 played no part in that.

[58] Even if the comments (disputed by Marc) that Mrs Vailahi wanted to rely on had been put in issue by the Respondent, the Authority was not satisfied that they would be material or relevant to the interim reinstatement claim or the substantive matters that the Authority will be determining. This is evident from the brief summary of facts below.

[59] On 28 March 2022 a child was left in the 'Old Centre'. Children in the 'Old Centre' were moved across to the 'New Centre' to await pick up by their parent or caregiver. Mrs Vailahi was responsible that day for locking up the 'Old Centre' which closed before the 'New Centre'.

[60] The Centre Manager discovered a sleeping child had been left in the 'Old Centre' unsupervised for 15 minutes. Mrs Vailahi said she was sure that there was no child in the 'Old Centre' when she had locked up. However, Marc conclude the child must have been sleeping there when Mrs Vailahi left the 'Old Centre' and locked it up for the night.

[61] Marc took disciplinary action against Mrs Vailahi that resulted in her dismissal on 14 August 2022, on four weeks' notice. Mrs Vailahi has claimed unjustified disadvantage, unjustified dismissal, breach of good faith, breach of her employment agreement, penalties, and interim and permanent reinstatement (along with other remedies and costs).

[62] The Authority finds that the disputed material (what was allegedly said during the 9 December 2021 meeting) would not be determinative of any of the Applicant's claims. At best, the disputed material could be regarded as background information only, provided Mrs Vailahi's version of what was said was accepted by the Authority over the version given by the other participants in the meeting.

[63] There was sufficient other non-privileged material before the Authority for the Applicant to be able to address the points she had wanted to make without using the disputed material. The Authority finds that privilege should not be lifted merely to provide 'context' to a claim.

Would the disputed material assist the Presiding Member?

[64] The Authority was not satisfied the disputed material would assist the Presiding Member. The evidence Mrs Vailahi wanted to introduce was disputed here say evidence, which this Member considered did not have probative value in terms of the substantive claims that are to be determined.

[65] Introducing it risked undermining the focus of the Authority's investigation of the substantive claims. If the disputed material was admitted it would lengthen the substantive investigation meeting, by requiring the dispute about what Mrs Vailahi claims was said versus what the other participants say was said to be resolved.

[66] The Authority was also not convinced the disputed material supported the point the Applicant wanted to make about it, or even if it did, that such evidence would be material to the Authority's determination of interim reinstatement or of the substantive matters.

[67] None of the attendees at the 9 December 2021 meeting conducted the disciplinary investigation into the 28 March 2022 issue that involved a child being left/locked in the 'Old Centre', or were decision makers regarding the decision to dismiss Mrs Vailahi. Whatever may or may not have been said during a facilitated meeting in December 2021 was not relevant to the dismissal that occurred in August 2022.

[68] The Presiding Member would likely not be assisted in his decision making if the privilege on the disputed material was lifted.

[69] It would make the investigation more complicated, time consuming and costly. It would delay determination of the urgent interim reinstatement application as Marc would call evidence to dispute Mrs Vailahi's version of what was allegedly said during the 9 December 2021 meeting.

[70] It will not advance the Presiding Member's understanding of the matter and will not be decisive of any of the claims that are to be determined by him.

Importance of upholding the privilege

[71] The privilege attaching to settlement negotiations and mediations is well established and there are strong public policy considerations for this type of privilege to be upheld. There should be a high bar reached before it is departed from. The Authority's power under s 160(2) of the Act to consider privileged material should be exercised cautiously and conservatively.

[72] The Employment Court in *Jackson v Enterprise Motor Group (North Shore) Ltd* acknowledged the important role the frequent and long-standing use of “*in confidence*” and “*off the record*” discussions played in resolving employment disputes and commented:⁷

It is in the public interest that such practices be allowed to continue in the safe knowledge that the fact of them and their contents will not be disclosed to the Authority or to the Court or any other persons subsequently. Such procedures lubricate the machinery of employment dispute resolution. Indeed, the emphasis in the problem resolution provisions in the Employment Relations Act 2000 is supportive of this approach.

[73] There are strong public policy considerations that support a finding that the disputed material should remain inadmissible. The Court of Appeal in *D F Hammond Land Holdings Limited v Elders Pastoral Limited* held that the privilege attached without prejudice communications is:⁸

intended to encourage and facilitate the negotiation and settlement of disputes, by preventing any possible admission of liability being raised against the party making it.

[74] This same public policy reasoning is also applicable in the employment law jurisdiction. Admitting the disputed evidence could have a chilling effect on the ability of the parties to have without prejudice communications.

[75] In this case the parties, and the other two employees at the meeting, had good reasons for wanting to discuss their dispute on a confidential without prejudice basis. So there was a legitimate reason for the meeting to have been held on a without prejudice basis.

⁷ [2004] 2 ERNZ 424 at [17].

⁸ 2 PRNZ 232 at 236.

[76] The Employment Court in *Jackson v Enterprise Motor Group (North Shore) Limited* recognised the strong public interest in allowing “*in confidence*” discussions and “*off the record*” communications to continue and described the benefits as follows:⁹

Such procedures lubricate the machinery of employment dispute resolutions. Indeed, the emphasis in the problem resolution provisions in the Employment Relations Act 2000 are supportive of this approach.

[77] There were no compelling countervailing reasons that warranted setting aside the privilege that attached to the disputed material.

[78] The Authority concluded that admitting the disputed material was not in the overall interests of justice. To do so was unnecessary and would be contrary to the s 3(a)(vi) object of the Act.

Outcome

[79] The Respondent’s application for an order that the disputed material was inadmissible succeeded.

[80] The disputed material is to be withheld from the Presiding Member.

[81] Accordingly, within 7 days of the date of this determination the Applicant is directed to refile her affidavit and an Amended Statement of Problem that do not contain references to the privileged disputed material.

What if any costs should be awarded?

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

[83] If that is not possible, the Respondent has 14 days within which to file its cost submissions, with the Applicant having 14 days within which to file her response. A costs application will not be accepted outside this timeframe, without the prior permission of the Authority.

[84] The Authority is likely to adopt its usual notional daily tariff-based approach to assessing costs for this interlocutory application. For the purposes of assessing costs, the

⁹ Above n 16.

Authority considered it appropriate to treat this matter as if it involved a half day investigation meeting.

[85] The notional starting tariff for assessing costs in this matter will therefore be \$2,250. The parties are invited to identify any factors they say should result in the notional starting tariff being adjusted to reflect the particular circumstances of this case.

Rachel Larmer
Member of the Employment Relations Authority