IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

I TE RATONGA AHUMANA TAIMAHI
OTAUTAHI ROHE

[2023] NZERA 576
3219839

	BETWEEN	SUSAN LORIMER PHILPOTT Applicant
	AND	ALLIED PRESS LIMITED First Respondent
	AND	MAINLAND DISTRIBUTION LIMITED Second Respondent

Member of Authority:	David G Beck
Representatives:	Linda Ryder, advocate for the Applicant John Farrow and Jessica Higgins, counsel for the Respondent
Investigation Meeting:	28 September 2023 at Christchurch
Submissions Received:	28 September 2023 from the Applicant 28 September 2023 from the Respondent Further information provided on 2 October 2023.
Date of Determination:	4 October 2023

PRELIMINARY DETERMINATION OF THE AUTHORITY

The employment relationship problem

[1] Ms Philpott is pursuing a personal grievance against both Allied Press Limited (APL) and its closely related company Mainland Distribution Limited (MDL), alleging she has been unjustifiably dismissed in a constructive manner.

[2] In contrast, APL and MDL assert in the latter stages of a lengthy period of employment, Ms Philpott was solely engaged by MDL and resigned of her own volition and denies an allegation that APL disestablished her position prior to Ms Philpott accepting an alternative role with MDL.

[3] A preliminary matter has arisen concerning whether the record of a 17 November 2022 meeting and evidential references to a discussion between the parties during such, is admissible. APL and MDL assert the meeting under scrutiny was conducted on a without prejudice basis and no documentation or evidence pertaining to the meeting should be placed before the Authority member allocated to investigate the substantive employment relationship problem. In addition, what was said during the 17 November meeting is disputed by the participants.

The issue

[4] The preliminary issue I must resolve is whether any evidence pertaining to the 17 November meeting is capable of being viewed as an exception to the well-established rule that such communication normally has the protection of privilege or is otherwise inadmissible.

The Authority's investigation

[5] At the investigation meeting, I considered written and oral evidence from Susan Philpott, David Hilton-Bright and Steve McCaughan and helpful submissions from their representatives.

[6] Pursuant to s 174E of the Employment Relations Act 2000 (the Act), I make findings of fact and law and outline conclusions on matters to resolve the disputed issues and make an order but I do not record all evidence and submissions received.

Background to the disputed evidential issue

[7] Ms Philpott has worked for APL and its predecessor newspaper companies periodically since 1977. Latterly, Ms Philpott worked for APL in a full-time role including dealing with accounts, advertising, front counter sales and incoming calls. In mid-October

2022 due to a steady decline in her role, Ms Philpott and her Regional Manager, Steve McCaughan, met to discuss whether she was interested in moving to an alternative role with MDL, a subsidiary company of APL, on the same terms and conditions pertaining to her APL role. Ms Philpott expressed interest and after returning from annual leave on 31 October, she commenced working at MDL in a role supporting the distribution of APL's newspapers in their South Island territories. Ms Philpott says she struggled in the role with the pace of the workload and what she saw as lack of support and managerial disorganisation. An employment agreement was provided to Ms Philpott on 14 November 2022 by MDL but not signed due Ms Philpott says, to concerns her partner (Mr Hilton-Bright) identified when contrasting it with her existing APL employment agreement.

[8] On 16 November, Ms Philpott met Mr McCaughan to discuss emerging concerns about the new MDL role. They agreed to meet further on 17 November, with Mr Hilton-Bright in attendance as a support.

[9] It was envisaged Ms Philpott's new MDL manager would attend the 17 November meeting but he was unable to do so. Mr McCaughan says he did not have a detailed discussion beforehand with the MDL manager, on how they would approach the meeting. He merely sent him an email invite without any detailed purpose for the meeting being expressed other than: "Catch up with Sue" and got no response. This left Mr McCaughan as the only company representative present on 17 November and he says he was uneasy about discussing the situation without the MDL manager in attendance but chose to continue because of his long and good working relationship with Ms Philpott and his desire to assist her find a solution to her unease about the new role.

[10] Mr McCaughan's evidence demonstrated he approached the meeting with an apprehension it may develop further than an 'informal' discussion and he claimed he was wary of Mr Hilton-Bright's involvement. It was also apparent from his evidence that Mr McCaughan felt responsible for Ms Philpott's situation and he was taking a lead in exploring how it could be resolved. Mr McCaughan's evidence suggested he had a less than well-informed or legally sophisticated perspective, of why a meeting should be held on a without prejudice basis. Mr McCaughan essentially had an expansive view that terming a meeting 'without prejudice' was a protective cloak to allow a frank discussion and could be utilised

without specific cause as in his own words: “You never know where these kinds of meetings can go and what pathways discussions may take”. Mr McCaughan also stressed he had no authority to bind MDL to any course of action as he had to check with the Chief Executive Officer (CEO). The APL and MDL CEO, is the same person.

[11] Mr McCaughan says he made it clear at the commencement of the 17 November meeting that he was proceeding on a ‘without prejudice’ basis and there was no objection from “either of them at the time, to the meeting being held without prejudice”.

[12] Mr Hilton-Bright confirmed: “The first thing Steve said at the meeting was “this meeting is without prejudice” ”. Mr Hilton-Bright says he thought this was unusual but he did not seek clarity on what it meant despite claiming he “had no idea of its legal significance.” However, Mr Hilton-Bright said at the investigation meeting that he thought it meant (at the time) it was a conversation “without bias” and that he had some previous experience and knowledge in an Australian context, of ‘off the record’ discussions when he had been a workplace union delegate in a car manufacturing plant.

[13] My assessment is neither party had the same level of understanding of without prejudice and its boundaries as for example lawyers being involved in such a discussion would have. To complicate matters, Ms Philpott says because of an impairment she did not hear Mr McCaughan say the meeting was going ahead on a without prejudice basis. She later discussed it with Mr Hilton-Bright (who said he researched the term on the internet) and then obtained legal advice before using the term in a communicated offer. Ms Philpott says she had no idea what the term entailed until after the 17 November meeting. Crucially, even if Mr Hilton-Bright had sufficient understanding of the term, there was no evidence he had explained it during the meeting to Ms Philpott.

[14] A conversation on Ms Philpott’s situation then ensued. After the meeting, the parties entered without prejudice correspondence initiated by Ms Philpott.

[15] The parties were subsequently unable to resolve their differences and by a letter from her advocate, Ms Ryder, of 10 February 2023, Ms Philpott resigned claiming she had been constructively dismissed and outlined reasons supporting that premise.

Submissions

[16] Ms Ryder broadly suggested the notes Mr Hilton-Bright took after the 17 November meeting and his and Ms Philpott's recollection of the meeting, are admissible as a crucial element to establishing Ms Philpott's constructive dismissal claim. In support of this premise, Ms Ryder in summary, contended that:

- No dispute existed prior to the 17 November meeting or if it did, the employer party was not in dispute with Ms Philpott or concerned about her performance or conduct.

- Ms Philpott did not actually or impliedly, consent to the without prejudice nature of the 17 November discussion.

- It would be inequitable to allow the employer to use a without prejudice 'cloak' to hide its intentions from scrutiny in the context of a constructive dismissal claim and generally if an employer was allowed to utilise without prejudice as a cloak in all discussions around employee discourse, then no scrutiny of untoward behaviour would be possible.

- Any bargaining over the terms of an employment agreement should not attract privilege.

[17] In contrast Ms Higgins, in summary, contended that:

- A dispute did exist, in that there was a clear issue about Ms Philpott being acutely distressed and not feeling supported in her new role (which the evidence of Ms Philpott confirmed) that later morphed into a belief that she was trialling the new role with an option of returning to her previous role with APL and, a dispute about her terms of engagement including a belief that she was being transferred on existing conditions.

- Mr Hilton-Bright had sufficient knowledge to appreciate that without prejudice meant the parties could have an 'open discussion' without fear

of it being repeated during any litigation and he had effectively been appointed by Ms Philpott as an advocate. Therefore, as no objection to proceeding on a without prejudice basis came from Mr Hilton-Bright, there was "agreement by acquiescence" given he later emailed an offer to settle using the term without prejudice at the head of the offer letter.

- The Court of Appeal in *DF Hammond Ltd v Elders Pastoral Ltd* held that no form of words is necessary for a communication to be recognised as without prejudice "if the intention of the offeror is clear".[1]

- All other pre-conditions existed that the courts have found need to be present for privilege to exist.[2]

- Express agreement to without prejudice discussion is unnecessary when the context is clear (citing *Matinsen v Target International (NZ) Ltd* as authority for this proposition)[3] and in this instance the purpose of the 17 November meeting was to "discuss options for resolving the problem, including settlement".

- There was no dispute that the 17 November meeting led to a continuum of bargaining as Ms Philpott forwarded a without prejudice letter of 23 November referencing matters discussed at the 17 November meeting.

The relevant legal principles

[18] In short, *Morgan v Whanganui College Board of Trustees* a Court of Appeal decision held the requirements for protecting without prejudice communication that will assist my analysis of this situation are, in summary:

> (i) The existence of an agreement between the parties that the communication is without prejudice.

[1] *D F Hammond Land Holdings Ltd v Elders Pastoral Ltd* (1989) 2 PRNZ 232 (CA) at [9].
[2] Ibid.
[3] *Martinsen v Target International (NZ) Ltd* (2009) NZEmpC 89.

(ii) The existence of at least a 'difference' to warrant the conversation in the sense the parties are "in dispute" with such a premise not warranting a "narrow construction" including the existence of a communicated settlement offer not being required; and

(ii) That the problem be one "that could give rise to litigation, the result of which might be affected by an admission made during negotiations." [4]

[19] While the Authority has a broad power to consider such evidence and information as in equity and good conscience it thinks fit whether strictly legal or not,[5] such as arguably, suggested by the Employment Court in *Bayliss Sharr v McDonald*;[6] where the effect of excluding it will be more prejudicial than admitting it, the court has also held the Authority is guided by the relevant provisions of the Evidence Act 2006 and settled common law principles. On the latter, the court in *Morgan* noted the law has never recognised there was a residual discretion "of this nature" suggested by the Employment Court in *Bayliss Sharr* [7] to admit without prejudice communications.[8] Notwithstanding, the Court of Appeal in *Morgan* recognised that "the law allows exceptions to the without prejudice rule" but as a guide "the Court should be very slow to lift the umbrella [of protection] unless the case for doing so is absolutely plain".[9]

[20] The Court of Appeal although not required to specifically deal with it in *Morgan,* initially put the question in granting leave to appeal, as: "Is a more nuanced approach required in the employment law context where statements made in privileged communication may constitute evidence of constructive dismissal?".[10] This is a directly relevant question to the problem now before the Authority.

[21] Each case must be assessed on a 'fact specific' basis and here some distinct features existed in both the lead up to and purpose of, the disputed 17 November meeting. These included that: Mr McCaughan arguably had only ostensible authority to bind MDL at the meeting (event though he was not an MDL employee); neither party was legally represented and objectively both parties may have had limited understanding of the concept of 'without

[4] *Morgan v Whanganui College Board of Trustees* [2014] NZCA 340, ERNZ 80 at [18].
[5] Section 160(2) Employment Relations Act 2000.
[6] *Bayliss Sharr v McDonald* [2006] ERNZ 1058.
[7] At [49].
[8] *Morgan* above n 1 at [22] –[24].
[9] Ibid at [32].
[10] Ibid at [3].

prejudice'; the meeting was not disciplinary in nature or prompted by anything that could have led to such an outcome for Ms Philpott and, no decided outcome that bound MDL resulted from the exchange. However, the discussion was initiated by Ms Philpott identifying her concerns and it did lead to lengthy and inconclusive without prejudice negotiations after the meeting, that both parties participated in before Ms Philpott resigned.

Discussion

[22] Applying the *Morgan* framework, the following factors are assessed and balanced.

Was there agreement that the meeting be conducted on a without prejudice basis?

[23] The evidence did not convince that Mr McCaughan adequately explained the purpose of making his discussion on a 'without prejudice' basis at the meeting's outset, despite him professing he had thought carefully about his reasons in suggesting it. Regardless, I accept Ms Philpott's evidence as credible that she did not hear Mr McCaughan outline the without prejudice premise he wished to impose on the meeting. Consequently, there was no evidence (as in *Morgan*) of any mutual intention that the discussion was intended to be privileged from the outset.

[24] While *DF Hammond* did make it clear that the use of the words without prejudice may not be necessary, that was in the context of written communication containing a settlement offer and here Mr McCaughan's intentions were not clear at the relevant time – he admitted he used the vehicle of without prejudice just in case anything arose at the meeting that would require a frank discussion in which the company may want to express opinions that they wished not to be repeated in litigation. I am also conscious that the company view of Ms Philpott was overwhelmingly positive and she was regarded as flexible and accommodating. Therefore, unlike the situation in *Martinsen* where the employer had communicated a preliminary decision to dismiss, the context from the employer's perspective, was not clear.

Was there an identified dispute prior to the 17 November meeting?

[25] In *Morgan* an expansive view of what is a dispute was taken and the broader term "difference" was seen as sufficient or merely something that has arisen between the parties

which must be resolved and "they have expressly agreed their communications should be protected for that purpose."[11]

[26] On the facts, it was evident that prior to 17 November, Ms Philpott was unhappy in her new role; was seeking to have this situation resolved and options explored including her belief that she was only trialling the new role; she had not agreed to any terms and thought she had an option of returning to her previous role. In addition, Ms Philpott had an issue about the contrast between the MDL employment agreement she had not signed and her existing employment agreement. These issues became central to the subsequent matter in dispute (whether Ms Philpott was constructively dismissed).

[27] It is also of significance that Ms Philpott chose to have a support person present at the meeting albeit not an experienced legal representative. Mr Hilton-Bright was someone she had discussed the parameters of her issue with beforehand and at the meeting, he spoke on her behalf and later corresponded with MDL but only after obtaining legal advice.

[28] In contrast, Mr McCaughan is an experienced manager, knew of Ms Philpott's concerns prior to the 17 November meeting and was of the view she was employed by MDL. Objectively from his evidence, Mr McCaughan sought to advance a potential solution that he contemplated should be discussed in a without prejudice context. This suggests a calculated approach to the meeting.

[29] While the parties were certainly not at an advanced stage of negotiations by 17 November, they were engaging at a low level, consistent with one of the objects of part 9 of the Act that suggests "employment relationships are more likely to be resolved quickly and successfully if they are first raised and discussed directly between the parties".[12] In *Morgan*, the Court of Appeal affirmed earlier comment made by the Employment Court that without prejudice discussions are a "long standing, important and frequent feature of attempting to resolve employment relationship disputes" – "with the parties safe in the knowledge that what they say is protected from admission before the Authority or the Employment Court".[13]

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[11] Ibid at [17].
[12] Section 101(ab) Employment Relations Act 2000.
[13] *Morgan* above n 1 at [27].

[30] I find there was an identified dispute by the 17 November meeting that was initiated by Ms Philpott and Mr McCaughan was broadly aware that should Ms Philpott wish to return to her APL role this was becoming problematic.

Could the dispute or problem give rise to litigation?

[31] This question is easily answered in the affirmative, as the matters discussed at the 17 November meeting did give rise to litigation and objectively both parties could have reasonably anticipated that situation.

Should the context of Ms Philpott's constructive dismissal claim be assessed?

[32] In assessing this as an additional factor, I am conscious that the relevance of the 17 November discussion may not objectively have any bearing on Ms Philpott's claims as the discussion was not between her and the alleged employer (MDL). All Mr McCaughan says he did at the meeting, was to suggest that Ms Philpott advance a proposal to resolve her dilemma. Objectively the meeting could easily be viewed as having no status other than a former co-worker having a discussion with an ex-co-worker. Having said this, it was not entirely clear why Mr McCaughan then sought to have the discussion on a without prejudice basis unless he was potentially acting consciously or unconsciously as an agent of MDL. Mr McCaughan's evidence was he had the ear of the CEO and was acutely aware and took the responsibility of, acting for 'the company' seriously and was aware of MDL being closely allied to APL. The issue of employer identity is however, a factual and/or credibility issue to be assessed at the substantive investigation meeting.

Outcome

[33] Overall, while I am convinced that the pre-conditions for privilege to protect the parties' communication on 17 November 2022 existed (as do public policy reasons for taking great care to preserve without prejudice protection), I am not sufficiently convinced as a threshold issue in this context, that Ms Philpott agreed to the meeting proceeding on a without prejudice basis or was aware of Mr McCaughan's view of why the meeting should proceed on that basis. As outlined to him during the investigation meeting, Mr McCaughan had the option of proceeding with an open meeting and then at some point when he wished to introduce a

suggestion that a negotiated solution was in contemplation, he could have introduced the concept of continuing the discussion on a without prejudice basis. I am also not convinced that the cases cited in submissions assist as they are set against contexts where negotiations had reached a more advanced state.

[34] Further, given this is a constructive dismissal claim, I do consider that the 17 November meeting and differing recollections of what occurred at it, may assist the Authority investigation to determine Ms Philpott's constructive dismissal claim and the circumstances of the engagement with MDL. I however stress it is not up to me to express any view on the strength or otherwise of Ms Philpott's personal grievance claims.

Finding

[35] On carefully balancing all the factors above, I find that the application for a direction from the Authority that Mr Hilton-Bright's note of the 17 November meeting is admissible and any evidence (from both parties) pertaining to the said meeting can be led, is successful.

[36] Another Authority member will be in contact with the parties to timetable a further investigation meeting and to discuss the scope of such.

Costs

[37] Costs are reserved until conclusion of the substantive matter.

David G Beck
Member of the Employment Relations Authority