

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2024] NZERA 153
3246679

BETWEEN	JOHN FAITALA First Applicant
AND	VAHANOA VEA Second Applicant
AND	THE PACIFIC ISLAND BUSINESS DEVELOPMENT TRUST Respondent

Member of Authority: Sarah Blick

Representatives: Paul Pa'u, advocate for the applicants
Jessie Laphorne and Caitlin Sargison, counsel for the
respondent

Investigation meeting: On the papers

Determination: 18 March 2024

PRELIMINARY DETERMINATION OF THE AUTHORITY (No. 2)

Employment relationship problem

[1] In a determination dated 22 January 2024, the Authority found the Pacific Island Business Development Trust (the Trust) should disclose its communications with and advice from Employsure Limited (Employsure), a workplace relations consultancy business which was engaged by the Trust.¹ The information sought related to a restructuring process and assessments and the new Trust structure, which preceded the ending of John Faitala and Vahanoa Vea's (the applicants) employment. The Authority's findings were subject to privilege being asserted in respect of a particular document or documents.

¹ *Faitala & Anor v The Pacific Island Business Development Trust* [2024] NZERA 34.

[2] The Trust has since disclosed 10 email communications between itself and Employsure, to the applicants. The Trust has withheld 13 email communications and some attachments to those emails from the applicants, with counsel for the Trust asserting they contain advice and information and documents exchanged under an expectation of confidentiality.

[3] The Authority application includes applications for penalties. Counsel for the Trust is asserting the Trust's privilege against self-incrimination in relation to nine of the 13 withheld email communications.

[4] Ahead of the investigation meeting beginning on 20 March 2024, the applicants seek a direction that the Trust provides them with copies of the withheld email communications.

The Authority's process

[5] By consent from the parties, the privileged status or otherwise of the emails and attachments is being determined on the papers. By agreement, the Trust has provided the Authority with the withheld email communications and attachments for me to inspect.

The issue

[6] The issue is whether the Authority should require the Trust to provide the applicants with email communications it had with Employsure relating to the restructuring.

Background

[7] The applicants' employment was terminated by way of redundancy in June 2023. It is apparent from the email communications supplied to the Authority that the Trust sought and received advice from Employsure during the restructuring process.

[8] The applicants raised personal grievances for unjustified disadvantage and unjustified dismissal and are now pursuing these in the Authority. The applicants' amended statement of problem also includes claims for penalties for breaches of good faith obligations pursuant to s 4A of the Employment Relations Act 2000 (the Act). They claim the Trust breached its obligations to act in good faith, not to mislead or deceive and to be constructive and communicative:

- (a) in the decision to commence the restructure process against them;
- (b) in selecting their positions for disestablishment without proper consultation;

- (c) in not applying a reasonable or justifiable selection criteria or process against them;
- (d) in the way it conducted the restructure process, not being open to concerns and proposals, and showing a closed mind;
- (e) in the decision to disestablish their positions;
- (f) in the pre-determination of the outcome and the failure or refusal to consider the feedback with an open mind;
- (g) in the decision to terminate their employment.

[9] Penalties are sought on the basis the Trust's failure to comply with section 4(1) was deliberate, serious and sustained or was intended to undermine an employment relationship.

[10] The amended statement of problem also claims the Trust breached clause 12.5 of its employment agreements with the applicants by:

- (a) failing to properly and reasonably consider alternatives to dismissal including redeployment and displayed a closed mind on the issue;
- (b) failing and/or refusing to provide the applicants with sufficient information to enable understanding and meaningful consultation;
- (c) failing and/or refusing to consider the applicants' views with an open mind.

[11] Penalties are sought for those alleged breaches pursuant to s 134 of the Act.

Discussion

[12] The Trust has submitted that the likely extent of harm that may result from an order to provide confidential communications exchanged between an employment consultancy and its client is considerable. It was said it would damage public trust in the services provided by employment relations consultancies which provide cost effective advice on employment obligations; prevent the free flow of information between employers and their advisors; and fundamentally undermine the value proposition of employment relations consultancy businesses. It further says the principles derived from cases about the special relationship between unions and members can similarly be applied to a relationship involving an organisation like Employsure, where advice was provided in circumstances where there would be a legitimate expectation of confidentiality.

[13] The Trust further says it is entitled to resist disclosure on the basis of privilege against potential self-incrimination. The Trust relies on *New Zealand Meat Workers Union Inc v South Pacific Meats Ltd*.²

Discussion

[14] At the time of my earlier determination, the Trust was essentially asserting a blanket privilege as to confidentiality and self-incrimination of documents, without acknowledging a document by document approach ought to be taken.

[15] I acknowledge the Court's findings in *South Pacific Meats* where it was stated that while the Authority is empowered by s 160(1)(a) and (2) of the Act to direct disclosure in a proceeding where a statutory penalty is sought, the privilege against self-incrimination is available to a party. The Court noted the decision as to whether a document is privileged rests with counsel for the party seeking to assert that privilege, and in the exceptional event that there is a challenge to that assertion (and thereby to counsel's assessment), the Authority may inspect the document to determine whether it is indeed privileged.

[16] Here, the applicants are applying for statutory penalties for breaches of good faith obligations and of their employment agreements during the restructuring and redundancy process. The Trust was entitled to assert privilege in respect of the relevant documents, which has been challenged by the applicants. Having now reviewed each of the withheld documents, the Authority is satisfied there is a basis for asserting the privilege against self-incrimination in respect of the nine documents that privilege is asserted. These documents do not need to be disclosed on this basis.

[17] This leaves the balance of documents for assessment - withheld documents numbered 11, 13, 16 and 18 in the Trust's list of withheld documents. In my earlier determination, I accepted the Trust may assert privilege in respect of certain confidential communications depending on the context. However, the Authority found such privilege again could not be asserted in the extensive and blanket coverage way suggested by the Trust. Having reviewed the balance of each of the withheld documents, the Authority is not satisfied the mere fact that

² *New Zealand Meat Workers Union Inc v South Pacific Meats Ltd* [2015] NZEmpC 138 at [84].

confidentiality was expected is not sufficient, by itself, to justify withholding those documents.³

[18] For completeness, there has been no suggestion that privilege is asserted by the Trust pursuant to clause 3 of Schedule 2 of the Act.

Outcome

[19] The Trust should provide the applicants with disclosure of documents numbered 11, 13, 16, 18 from its list of documents, by **12pm 19 March 2024**.

Costs

[20] Costs are reserved.

Sarah Blick
Member of the Employment Relations Authority

³ *Edwards v Board of Trustees of Bay of Islands College* [2013] NZEmpC 228, [2013] 11 NZELR 506 at [16].