

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2024] NZERA 34
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, counsel for the applicants
Caitlin Sargison, counsel for the respondent

Investigation: On the papers

Submissions and information received: 15 November 2023 from the applicants
2 and 27 November 2023 from the respondent

Determination: 22 January 2024

PRELIMINARY DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] John Faitala and Vahanoa Ve'a (the applicants) say they were unjustifiably disadvantaged and unjustifiably dismissed by The Pacific Island Business Development Trust (the Trust). They also claim penalties against the Trust, saying it breached the duty of good faith and their employment agreements during the restructuring process, which led to the termination of their employment. The breaches of the agreements include a claim that the Trust failed and/or refused to provide sufficient information and meaningful consultation during the process.

[2] Ahead of the Authority's investigation meeting, the applicants seek a direction that the Trust provides them with copies of all of its communications with, and advice relating to the restructuring from Employsure Limited, a workplace relations consultancy business engaged by the Trust.

[3] The Trust opposes the application for the direction on the basis the application amounts to a fishing expedition, disclosure of the documents sought would be injurious to the public interest and may prejudice the Trust's protection against self-incrimination.

The Authority's process

[4] By agreement from the parties, the application for a direction has been determined on the papers. The Authority has taken into account the statement of problem and statement in reply and attached documents, the Authority's communications with the parties to date, and submissions from counsel.

The issue

[5] The issue is whether the Authority should require the Trust to provide the applicants with its communications with and advice from Employsure relating to the restructuring.

Background

[6] The factual background giving rise to the personal grievances has not been tested and will ultimately be subject to any findings of fact by the Authority.

[7] On 24 May 2023 the Trust met with staff including the applicants and presented a restructure proposal. It proposed disestablishing five roles including the applicants', and establishing nine new roles. A consultation process then followed. After meeting with the applicants on 16 June 2023, the Trust confirmed by letter that a decision had been made to proceed with the restructure proposal and the applicants' roles were disestablished. In relation to Mr Faitala, the Trust says he did not express interest in any of the proposed new roles, and in relation to Ms Vea, it says she was not suitably qualified for the two roles she expressed interest in.

[8] In raising personal grievances on 29 and 30 June 2023, the applicants asked the Trust for various documents relating to the restructure including "HR advice" about the process and the new structure.

[9] In August 2023 the applicants lodged their application with the Authority which included an application for penalties for breaches of s 4 of the Employment Relations Act 2000 (the Act). Employsure lodged a statement in reply on the Trust's behalf.

[10] A few days prior to a scheduled mediation set for 19 September 2023, the applicants sought the Authority's assistance regarding the provision of information in the June 2023 letters. An Authority duty Member issued directions requiring the Trust to provide the restructuring related documents identified in the letters to the applicants prior to mediation, by 18 September 2023. On 15 September 2023 the Trust provided the applicants with documents.

[11] On 18 September 2023 the applicants requested a direction that the Trust comply with the Authority's earlier direction and confirm in writing if any of the documents requested do not exist or are no longer available. The duty Member subsequently directed the Trust to provide further comment in respect of the information sought, being "a list of the documents it has been directed to provide but which do not exist or no longer exist".

[12] On the same date a representative of Employsure lodged documents with the Authority. These were largely communications with the applicants about the restructure and position descriptions of new roles already provided to them. An accompanying list of the documents was provided along with statements that the Trust did not have the other documents sought and it had provided "all documents it can possibly find". Of note is that the list stated the Trust did not seek HR advice regarding the restructure process and new structure (inferring no such documents existed).

[13] Mediation took place as planned but did not resolve any matters.

[14] On 1 October 2023 the applicants lodged an amended statement of problem, in which they sought penalties for breaches of their employment agreements as follows:

- (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.

[15] The applicants also sought a finding the Trust was in breach of the Authority's directions and a compliance order in relation to them.

[16] The substantive application was allocated to me to investigate, by which time the Trust had engaged current counsel. The Authority subsequently set the matter down for an investigation meeting, to be held on 20 and 21 March 2023.

[17] Through counsel, the Trust subsequently confirmed all relevant information was provided on 15 September 2023 and that the other information sought does not exist, save one exception - it objected to the Authority's direction to provide copies of HR advice regarding the restructure process and new Trust structure. In submissions, counsel has stated the Trust did indeed engage Employsure to provide "legal advice in relation to the relevant restructure, which resulted in the termination of the applicants' employment".

Applicants' submissions

[18] The applicants submit that disclosure of Employsure communications and advice should be provided. They say this is especially so given the allegations in the statements of problem and the concerns that they did not understand why their positions were identified for disestablishment and why they were ultimately disestablished.

[19] The applicants say the communication and advice between the Trust and Employsure would be a critical part of justification under s 103A of the Trust's decisions and actions in all the circumstances. They say the need for disclosure is made all the more necessary given the Trust's statements that there are no records of any communications with the Trust's Board, or any notes or minutes of meetings where the applicants' positions were discussed including the termination of their employment.

[20] The applicants refer to *Broughton v Microsoft New Zealand Limited* and *Kaikorai Service Centre Limited v First Union Incorporated* in support of their application.¹ In *Broughton*, the then CJ Colgan considered an objection to disclosure of documents and emails on the basis of legal professional privilege. The Court noted that material prepared for human resources advice (and that advice based on that material) cannot attach privilege, nor could strategy documents prepared or varied after receipt of legal advice support a claim for

¹ *Broughton v Microsoft New Zealand Limited* [2011] NZEmpC 102 and *Kaikorai Service Centre Limited v First Union Incorporated* [2018] NZEmpC 83.

privilege.² The applicants submit the Trust seeks the same all-compassing privilege from disclosure as sought in *Kaikorai* which was not accepted by the Court.

[21] The applicants also rely on an Authority determination which involved an objection by the respondent to evidence being given regarding advice received by the respondent from a New Zealand School Trustee Association advisor.³ That determination turned on a consideration of cl 3 of Schedule 2 of the Act and noted the advisor from the relevant school trustee association was a lay advocate and the privilege in cl 3 was limited to litigation privilege, and did not apply to a situation where litigation was neither contemplated or pending.

[22] The applicants submit public interest immunity does not apply here, and any “confidential” agreement between the Trust and Employsure does not override the duty to disclose the documents, and it is in the interests of justice and consistent with the objects of the Act for disclosure to be made even if it incriminates the Trust. They further say to allow a respondent to refuse disclosure because it might incriminate them would undermine s 103A and s 4 of the Act relating to good faith.

The Trust’s submissions

[23] The Trust has submitted that the applicants’ request for HR advice amounts to a “fishing expedition” with the hope of finding evidence to support their allegations or provide a basis of a new head of claim.

[24] Counsel also submits the documentation is not discoverable on the basis that the public interest in maintaining the confidentiality of the relationship in which the communications occurred, outweighs any public interest in disclosure. Applying s 69(3) of the Evidence Act 2006, it is 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 is 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.

² At [7].

³ *West v Kowhai Intermediate School Board of Trustees* [2021] NZERA 484.

[25] The Trust submits that the public interest in maintaining the confidentiality of the advice where there was a legitimate expectation of confidentiality clearly outweighs the applicants' speculative request for disclosure of communications, which may, or may not, support their contentions.

[26] The Trust refers to 69(5) of the Evidence Act which provides that a Judge may give a direction that a communication or information not be disclosed, whether or not it is otherwise privileged. Reference is made to s 69 being "instructive in the balancing exercise that this Court must carry out under reg 44(3)(c)".⁴

[27] The Trust refers to reg 44(3)(c) of the Employment Court Regulations 2000 which provides that a party may object to a request for disclosure on the basis that disclosure would be "injurious to the public interest". Reference is made to *Industrial Equipment Distributors Lifting Centre Ltd v Scouller*, which cites recognition of case law that an interest akin to a privilege is available where the parties expressly agree documents should remain confidential, or there is a special relationship of trust and confidence which would preclude disclosure.⁵

[28] The Trust cites *Edwards v Board of Trustees of Bay of Islands College* as authority for public interest injury privilege being a broader ground than legal professional privilege in that it seeks to protect the community rather than individual litigants who may benefit from it.⁶ It also refers to *Lloyd v Museum of New Zealand Te Papa Tongarewa (No 4)* in which the Court held that a relationship of trust and confidentiality existed between the plaintiff employee and her union representative. The Trust also relies on *Kaikorai* as authority for the court determining that protections should be extended to documents between a union advocate and client that either directly or indirectly contained information about the intended legal strategy.

[29] The Trust submits the principles derived from these 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.

⁴ *Coy v CMR of Police* [2010] NZEmpC 88 at [17].

⁵ *Industrial Equipment Distributors Lifting Centre Ltd v Scouller* [2018] NZEmpC 90 at [24].

⁶ *Edwards v Board of Trustees of Bay of Islands College* [2013] NZEmpC 22 at [17].

[30] Finally, the Trust 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*.⁷

Discussion

[31] The Authority is not subject to a disclosure regime. Sections 157 and 160 of the Act provide the basis for the Authority's power to investigate a matter, which includes its powers to call for evidence when investigating.

[32] The Authority is an investigative body, and as the Member I must establish the facts in order to make a determination on the case, and I should do so on the substantial merits of the case without regard to technicalities. In carrying out investigatory powers, the Authority may call for evidence and information from the parties or any other person and may take into account such evidence and information, which in equity and good conscience, is fit to do so. The guidance from ss 157 and 160 of the Act coupled with the investigatory powers and the obligations I have to discharge in investigating indicates that I can call for information to be provided on a fairly broad basis.

[33] Matters in the Authority are not subject to the Evidence Act nor are they controlled by the Court Regulations. However, generally accepted principles of privilege from the Evidence Act and the Court Regulations regarding the disclosure of documents are normally applied.

[34] The duty member who directed disclosure of the HR advice documentation was satisfied it was appropriate and reasonable for the material to be disclosed. However, I note at the time the request was dealt with and directions made, there was no information before the Authority suggesting the information sought related to the Trust's communications with EmploySure.

[35] Having reviewed the evidence and information lodged by the parties, I do not consider the applicants' request for the information at all a fishing expedition. Rather, the information before the Authority (and provided to the applicants to date) suggests the applicants were given limited access to information relevant to the decision affecting the continuation of their employment. If the information does exist (which the Trust now appears to acknowledge it

⁷ *New Zealand Meat Workers Union Inc v South Pacific Meats Ltd* [2015] NZEmpC 138 at [84].

does), the documents in question relate to the matter being investigated as they could potentially assist me in investigating the matter and establishing the facts to enable me to make a determination.

[36] There is no suggestion that there is an issue around the practicality of producing the documents or cost involved or whether disclosure would be too onerous. There is also no suggestion a direction to disclose would produce too much information so as to be unwieldy and unhelpful.

[37] I take note of the Court's comments in *Kaikorai* where it considered reg 44(3) of the Court Regulations, and commented:⁸

[41] While it is apparent from cases such as *Woolf* and *Edwards* that the Court has previously accepted a relationship of trust and confidence may emerge from dealings between a party and an advisor, which could be the foundation for excusing a witness from giving evidence, or documents being disclosed, **the mere fact that confidentiality is expected is not sufficient, by itself, to justify such a result.** As was discussed earlier, in *Edwards*, the Court noted that **an expectation or even an assurance of confidentiality may not override a statutory or regulatory requirement for disclosure** regardless of that confidence.

...

[45] What the plaintiff is seeking to achieve is not just the protection of identified documents that might disclose its strategy for bargaining but blanket coverage for all documents created during its relationship with Mr McPhail. If granted that would be indistinguishable from legal professional privilege. That cannot have been the intention behind reg 44(3)(c). **The limited right to be represented by a lay advocate, and the corresponding limit to privilege extended by the Act and Regulations to parties who make that election, is a clear indication Parliament did not intend to provide the extensive privilege sought by the plaintiff in this case.** Had the intention been to provide an all-encompassing privilege from disclosure where an advocate has been retained an express statement to that effect might have been expected in the Act or Regulations.

[38] Taking into account the above, I accept the Trust may assert privilege in respect of certain confidential communications depending on the context. However, such privilege cannot be asserted in the extensive and blanket coverage way suggested by the Trust, in a vacuum.

[39] Further, the Authority acknowledges 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-

⁸ Emphasis added.

incrimination is available to a party. However, the Court does not appear to have been condoning the assertion of a blanket privilege as sought by the Trust. I also note that the Trust has given no indication that the documents or information sought may in fact tend to incriminate it in breaching the Act or the applicants' employment agreements.

[40] For completeness, it is acknowledged that privilege may be asserted by the Trust pursuant to cl 3 of Schedule 2 of the Act, depending on the circumstances.

Outcome

[41] Subject to any assertion of privilege in relation to any particular documents, the Pacific Island Business Development Trust should disclose its communications with Employsure Limited and advice from Employsure relating to the restructuring process and assessments and the new Trust structure. Disclosure should be made by the Trust by listing the documents and serving this list on the applicants who can then request copies of any documents they wish to see or by providing copies of all documents to be disclosed to the applicants. The list and/or documents is to be provided by **3pm Friday 26 January 2024**.

[42] If the Trust wishes to assert a privilege in respect of a particular document(s), it can withhold those from disclosure to the applicants. The list should identify the date of the document, nature of and description of the document and the privilege being asserted. If the applicants believe the Trust has not complied with its disclosure obligations then it can apply to the Authority for it to consider the particular document or documents.⁹

[43] An amendment to the Authority's current timetabling directions will need to be made.

Costs

[44] Costs are reserved.

Sarah Blick
Member of the Employment Relations Authority

⁹ Noting that in *New Zealand Meat Workers Union Inc v South Pacific Meats Ltd* [2015] NZEmpC 138 at [84], the Employment Court stated that the decision as to whether a documents is privileged rests with counsel but in if there is a challenge to that decision then the Authority may inspect the document to determine if it is privileged.