

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2025] NZERA 112
3300199

BETWEEN STEVE MCCORMACK
 Applicant

AND RESERVE BANK OF NEW
 ZEALAND
 Respondent

Member of Authority: Marija Urlich

Representatives: Michael O'Brien and Joseph Plunkett, counsel for the
 applicant
 Peter Chemis, counsel for the respondent

Investigation Meeting: On the papers

Information received: 17 and 21 February 2025 from the Applicant
 14, 18 and 19 February 2025 from the Respondent

Determination: 24 February 2025

PRELIMINARY DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Reserve Bank of New Zealand (RBNZ) seeks an order directing Mr McCormack amend and re-file an affidavit affirmed 29 January 2025 filed in support of his application for interim reinstatement by replacing exhibits 6 and 10 with appropriately redacted versions. RBNZ says unredacted versions of the identified exhibits were inadvertently disclosed and the exhibits and affidavit should be redacted so the legally privileged material contained therein is not before the Authority member who will determine Mr McCormack's interim reinstatement application.

[2] Mr McCormack says the material does not attract privilege or, if it does, that it is in the interests of justice to set aside any privilege.

The Authority's investigation

[3] By consent this matter is determined on the papers. In determining this matter affidavit evidence filed in support of the directions sought by the RBNZ have been considered as have the parties' submissions. Consideration has also been given to the substantive application and response, the documents attached thereto and the supporting affidavits.

[4] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received.

Relevant law

[5] The Authority has broad power to take into account such evidence and information as in equity and good conscience it thinks fit.¹

[6] In *Morgan v Whanganui College Board of Trustees* the Court of Appeal that while the Authority had a statutory discretion to take into account such evidence and information as in equity and good conscience it thinks fit, whether strictly legal or not under s 160(2), the Authority "must be guided by settled principles of common law and relevant provisions of the Evidence Act 2006, even though it does not govern proceedings in the Authority".² at [24].

[7] Section 54 of the Evidence Act 2006 deals with communications with legal advisers:

54 Privilege for communications with legal advisers

- (1) A person who requests or obtains professional legal services from a legal adviser has a privilege in respect of any communication between the person and the legal adviser if the communication was—
 - (a) intended to be confidential; and
 - (b) made in the course of and for the purpose of—
 - (i) the person requesting or obtaining professional legal services from the legal adviser; or
 - (ii) the legal adviser giving such services to the person.

¹ Employment Relations Act 2000, s 160(2).

² *Morgan v Whanganui College Board of Trustees* (2014) 11 NZELR 832 (CA) at [24].

(1A) The privilege applies to a person who requests professional legal services from a legal adviser whether or not the person actually obtains such services.

Discussion

Is the material at issue subject to privilege?

[8] There are two documents for consideration – exhibit 6 and exhibit 10 to Mr McCormack’s reply affidavit affirmed 29 January 2025.

[9] There is no dispute 6 is subject to legal privilege because it contains legal advice.

[10] Exhibit 10 is also subject to privilege. It has two aspects. The first are communications between Mr McCormack to Nicholas McBride RBNZ’s director of legal services. Mr McCormack emailed Mr McBride in preparation for the parties’ mediation scheduled 10 days later with subject line “[without prejudice]” 15 Jul 2024 Mediation” raising a request as to who should attend the mediation on behalf of RBNZ recognising that ultimately that was RBNZ’s call. In the email Mr McCormack sets out the reasons including raising a conflict of interest issue for an anticipated attendee on behalf of RBNZ. Mr McBride’s response to Mr McCormack does not challenge the confidentiality Mr McBride has asserted, maintains the subject line and advises Mr McCormack the request would be discussed and taken seriously. Section 57 of the Evidence Act privilege applies – Mr McCormack clearly intended the communication to be confidential and it was made in connection with a scheduled mediation.

[11] The second aspect of exhibit 10 are two emails between Mr McBride and his colleagues about Mr McCormack’s proposal. Mr McBride is employed in a legal role at RBNZ, he holds a practising certificate and was providing legal advice on this matter.³ The two emails are subject to legal professional privilege.⁴

Has privilege been waived?

[12] In affidavits affirmed 30 January and 14 February 2025 Gregory Reilly, senior legal counsel at RBNZ sets out how the subject material was provided to the Authority

³ Affidavit Nicholas McBride affirmed 18 February 2025.

⁴ Evidence Act 2006, s 54

and Mr McCormack and that, mistakenly, unredacted versions had been provided. I am satisfied on the evidence before the Authority exhibits 6 and 10 were inadvertently disclosed. Privilege has not been waived.⁵

Should the Authority disallow privilege?

(i) *Section 67(1) Evidence Act 2006*

[13] Privilege can be disallowed if a prima facie case is made out that the communication was made or received, or the information compiled or prepared for a dishonest purpose.⁶ The focus of the statutory provision is the communication itself.

[14] The comments within the subject exhibits which initiate Mr McCormack's submissions to disallow privilege are both communications from legal advisers – one external to RBNZ and the other internal including a summary of external legal advice.

[15] I agree with the submission there is insufficient evidence the communication was made or received for a dishonest purpose. Mr McCormack says, among other matters, these comments are evidence his employer had no or did not intend to comply with the obligation of good faith. The difficulty he faces is there is insufficient evidence the subject communications were intended at the time they were created for a dishonest purpose and neither communication was initiated by the employer decision maker, rather they are properly characterised as legal advice being as they were received during the course of the parties' employment relationship problem. The s 67(1) threshold is not met.

(ii) *Equity and good conscience jurisdiction*

[16] Consideration has been given to whether, having found the communications are privileged, the Authority should exercise its equity and good conscience jurisdiction and admit the material.⁷ For the reasons set out above the subject exhibits were inadvertently disclosed and looking at them in the context of the broader employment relationship problem and its development over the course of many months, including

⁵ Evidence Act 2006, s 65(4).

⁶ Evidence Act 2006, s 67(1).

⁷ Employment Relations Act 2000, s 160(2).

the months between when they were written and the employment relationship ending, I am not satisfied the member investigating Mr McCormack's interim reinstatement application will be misled if they are not before the Authority.

[17] Any gap in the narrative created by privileged communications could be said to be artificial and a distortion of the true nature of the parties' communications. However, such a gap is not unusual in this jurisdiction given the statutory emphasis on the quick resolution of employment relationship problems.⁸ Having considered the subject communications individually and in the broader context of Mr McCormack's personal grievance claims I am not satisfied the material is of such weight that I should exercise my discretion and order the material admissible.

Outcome

[18] Exhibits 6 and 10 to Mr McCormack's affidavit affirmed 29 January 2025 are subject to legal privilege. That privilege has not been waived or disallowed. Mr McCormack is to file an affidavit as soon as practicable attaching as an exhibit the affidavit in reply affirmed 29 January 2025 with the following redacted:

- (a) exhibits 6 and 10;
- (b) paragraphs 15 - 17; and
- (c) other direct or indirect references to exhibits 6 and 10 or their contents.

Costs

[19] Costs are reserved.

Marija Urlich
Member of the Employment Relations Authority

⁸ Employment Relations Act 2000, s 101(ab) and s 143(b).