

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2026] NZERA 255
3445864

BETWEEN SONIKA KUMAR
Applicant
AND RED BADGE LIMITED
Respondent

Member of Authority: Eleanor Robinson
Representatives: Zachary Pentecost, counsel for the Applicant
Anthony Drake, counsel for the Respondent
Investigation Meeting: On the papers
Submissions 9 April 2026 from the Applicant
17 April 2026 from the Respondent
Determination: 28 April 2026

PRELIMINARY DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Applicant, Sonika Kumar, claims that she was unjustifiably dismissed and unjustifiably disadvantaged in her employment following a restructuring by the Respondent, Red Badge Limited (Red Badge). These claims are disputed by Red Badge.

The Authority's investigation

[2] Ms Kumar lodged a Statement of Problem on 25 February 2026 which outlined details of a meeting held on 8 September 2025. Red Badge objected to the inclusion of the relevant paragraphs in the Statement of Problem on the basis that they referred to a meeting held on a 'without prejudice' basis.

[3] This matter came before me as Duty Member to determine prior to the application being allocated to a presiding Member. The parties have both lodged submissions on the 'without prejudice' issue and whether or not the meeting held on 8 September 2025 is protected by the 'without prejudice' rule.

[4] Whilst I have not referred to all the submissions made by the parties; I have fully considered them.

[5] 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.

Principles

[6] The Authority is an investigative body with broad powers as regards to evidence. In accordance with s 160 (2) of the Act, it “may take into account such evidence and information as in equity and good conscience it thinks fit”. This is a wide discretion but must be exercised in a principled way and having regard to both common law and the Evidence Act 2006.

[7] It is acknowledged that parties may engage in settlement discussions with a view to settling a dispute. Section 57 of the Evidence Act sets out that privilege attaches to settlement negotiations if the communication between the parties was:

- (a) Intended to be confidential; and
- (b) Was made in connection with an attempt to settle or mediate the dispute between the parties.

[8] The purpose of the privilege is to encourage parties to negotiate and attempt to resolve disputes between themselves freely and openly, knowing that what they discuss will remain confidential.

[9] It is acknowledged that there is a strong public interest in the parties being able to resolve employment relationship problems themselves. Additionally, there is a public interest in agreements to hold discussions on a ‘without prejudice’ being enforced.

Submissions of the Applicant

[10] It is submitted for Ms Kumar that the meeting held on 8 September 2025 was not protected by the ‘without prejudice’ rule. It is submitted Ms Kumar was unexpectedly called into the meeting. She had not been advised of any issues regarding her performance or suitability of the role in which she was employed. She was not given an opportunity to bring a support person or advised of her right to have legal representation.

[11] During the meeting Ms Kumar was presented with two options, firstly resignation with a payment, or to proceed with a restructure process which was likely to result in the termination of her employment.

[12] At the commencement of the meeting, Red Badge stated that the meeting would be conducted on a ‘without prejudice’ basis. It is submitted for Ms Kumar that the ‘without

prejudice' rule does not apply merely because an employer labels a meeting or communication that way. For the protection to apply there must be several factors present. These factors are submitted to be (i) a dispute, (ii) a mutual intention that the communication be confidential and for the purposes of settlement, and (iii) the communication is a genuine attempt to settle that dispute.

[13] It is also submitted by the Applicant that the 'without prejudice' protection may be lost where there is unlawful conduct by a party to the conversation.

No genuine dispute

[14] It is submitted firstly that there was no existing dispute, difference or serious employment relationship problem at the time of the meeting.

[15] Prior to the meeting Ms Kumar was unaware of any issues regarding her suitability, it was only after Red Badge outlined that Ms Kumar might be dismissed that the possibility of litigation arose. This contrasts with the situation in *Morgan v Whanganui College Board of Trustees* in which the employee was alleged to have engaged in serious misconduct.¹

[16] It is submitted that during the meeting Red Badge made it clear that its purpose was to avoid undergoing a restructure process, rather than to resolve a dispute. The meeting was effectively a presentation of a decision which had already been made.

No mutual intention

[17] Secondly it is disputed that there was a mutual intention that the communication be confidential and for the purposes of settlement.

[18] It is submitted that Ms Kumar did not give informed consent to a 'without prejudice' discussion with Red Badge. At the time of the meeting, she did not understand the meaning of 'without prejudice' and was not given the opportunity to seek advice beforehand. It is submitted that Ms Kumar did not understand the meaning or implications of the wording.

[19] It is further submitted that the timeframe for Ms Kumar to respond to the discussions was unreasonably short, so she did not give informed consent even after the meeting.

No Genuine Discussion

[20] It is submitted thirdly that the 8 September 2025 meeting was not a genuine discussion aimed at resolving a matter and therefore cannot be considered an attempt to settle a dispute.

¹ *Morgan v Whanganui College Board of Trustees* [2014] 3 NZLR 713 at [8].

[21] It is submitted that during the meeting Ms Kumar was not invited to discuss possible options but informed she would lose her position regardless of any decision she had made.

[22] It is further submitted for Ms Kumar that Red Badge's actions during the meeting on 8 September 2025 constituted threatening and unlawful conduct and was of a nature that would ordinarily give rise to acclaim of constructive dismissal. As such, the 'without prejudice' privilege does not apply.²

Submissions of the Respondent

[23] The Respondent submits that the legal principles regarding 'without prejudice' communications are not in dispute. It was confirmed in *Morgan* that the protection extends to communications arising where there is a serious employment relationship problem capable of litigation, and where communications are made with an intention that they be confidential, even if a resolution is not ultimately achieved.

[24] It is submitted that the test is objective, not subjective, and it is not determinative whether one party later asserts not to have understood, agreed with, or perceived the discussion as a settlement discussion. It is submitted that the protection is not lost merely because:

- The discussion occurs at an early stage;
- Legal advice has not yet been obtained; or
- The discussion does not result in settlement.

A genuine employment relationship problem

[25] It is submitted for Red Badge that there is no requirement for prior warnings, or for a formal or performance processes to have been raised before a 'serious problem' can exist for the purposes of without prejudice protection.

[26] By early September 2025 Red Badge was facing a real and immediate employment relationship problem concerning the structure and composition of its workforce coordination team, including the viability of Ms Kumar's role. It is submitted that problem was capable of and did give rise to litigation. The 8 September 2025 meeting was to discuss exit options directed towards resolving the problem in a way that avoided more formal processes or litigation.

[27] It is submitted that the 8 September 2025 meeting did not create the problem; it arose because the problem already existed and required management.

² *Morgan* above n 1 at [32].

Mutual intention

[28] It is submitted that the meeting was expressly identified at its outset that it was being conducted on a without prejudice basis. The use of the label is a powerful indicator of mutual intention that the discussion be confidential and directed towards resolution. It is submitted that there is no authority supporting the proposition that an employer must provide a detailed explanation of the doctrine or obtain “informed consent” akin to a waiver of rights before the protection can apply.

[29] It is submitted that if Ms Kumar believed that she could not participate without first obtaining legal advice, she was not compelled to proceed with the discussion or to engage substantively. She could have declined to engage in the conversation but instead chose to participate.

[30] It is also submitted that it is commonplace for parties to enter without prejudice discussion without lawyers, and the law does not impose legal advice as a precondition to privilege.

[31] It is submitted that Ms Kumar’s subjective understanding, or retrospective characterisation of the meeting, cannot override the objectively clear framework in which the communication occurred.

Genuine attempt to resolve matters

[32] It is submitted that Ms Kumar’s assertion that the meeting involved a predetermined outcome is not supported by the legal test. The fact that Red Badge came to the meeting with clear views about the likely or preferred outcome and outlined options for ending the employment relationship does not render the discussion non-genuine. Privilege attaches so long as the communication is directed towards resolving an existing employment problem, even where one party has a strong preference for a particular solution.

[33] It is submitted that a without prejudice discussion may include:

- Reference to a likely or proposed outcome;
- Commercial or practical considerations; and
- An employer’s assessment of the relative merits of available options.

[34] It is submitted that the 8 September 2025 formed part of a genuine attempt to resolve an existing employment relationship problem by exploring how the parties might resolve the ending of the employment relationship on agreed terms rather than through more formal processes or litigation.

[35] In respect of the submission that Red Badge's actions constituted threatening or unlawful conduct sufficient to vitiate without prejudice protection, this is strongly contested. Moreover, it is submitted that the exception is reserved for clear and serious impropriety such as blackmail or perjury. Ordinary employment discussions about resignation, restructuring or redundancy do not meet that threshold. It is submitted that in *Morgan* the Court of Appeal rejected an attempt to characterise robust settlement communication as 'threats' or 'blackmail' so as to strip them of protection.³

Was the meeting held on 8 September 2025 held on a 'without prejudice' basis?

[36] The principle that parties are able to engage in robust conversations in which exit options can be discussed on a 'without prejudice' basis is an important one. As observed there is a strong public interest in parties being able to resolve disputes by free and open communication.

[37] In this case, I find that there was a genuine employment problem existing at the time of the discussion on 8 September 2025 in that Red Badge was looking to restructure, and the continuation of Ms Kumar's position was going to be affected, potentially adversely, by that restructure.

[38] Ms Kumar was informed at the outset that the meeting was to be 'without privilege'. Leaving aside the issue of the existence or non-existence of authority establishing that as a necessary prerequisite, I observe that Ms Kumar was informed of the nature of the meeting and if she had not understood the meaning of the phrase, she could have asked for clarification of the term, or for an adjournment so she would have time to clarify the meaning. However, she chose not to do either but continued with, and participated in, the meeting.

[39] There was a genuine employment problem in existence at 8 September 2022. Red Badge invited Ms Kumar to participate in the decision of a resolution to that problem. I find the fact that Red Badge may have had a preferred outcome does not infer that the discussion was not a genuine attempt to resolve matters.

[40] I am not persuaded on the albeit limited, evidence before me that there was threatening or lawful conduct by Red Badge during the meeting held on 8 September 2025.

[41] Having fully considered the matter, I do not accept that the meeting held on 8 September 2025 was not held on a 'without prejudice' basis, or that there is a basis for the lifting of the privilege in this case.

³ *Morgan* above n 1 at [36].

[42] Accordingly, paragraphs 2.19 – 2.31 and 2.37 are to be redacted before being placed before the presiding Member. In addition, this determination will not be placed before the presiding Member.

Eleanor Robinson
Member of the Employment Relations Authority