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Talking Off The Record

In a recent decision, ***Morgan v. Whanganui College Board of Trustees*** [2013] NZEmpC 117, the Chief Judge of the Employment Court (Colgan CJ) considered without prejudice communications and their subsequent admissibility as evidence. Such communications generally occur during a discussion surrounding a dispute or as part of the negotiation of a settlement. The purpose being that any offers or concessions made as part of such a communication cannot be subsequently used in evidence.

In ***Morgan***, the Chief Judge discussed a series of preceding cases culminating in the 2006 decision ***Bayliss Sharr and Hansen v. McDonald*** and summarised the findings in that case:

"[28] … the rule which excludes documents marked 'without prejudice' has no application unless some person is in dispute or negotiation with another, and terms are offered for the settlement of the dispute or negotiation. … "

"[29] Judge Couch in McDonald concluded that the word "dispute" in this context has long been taken to mean that the parties must either be engaged in litigation or at least that litigation must have been threatened before the "without prejudice" rule will apply."

"[35] . . . "(w)ithout prejudice" privilege (does) not apply to correspondence which was created to prevent a dispute arising, rather than to compromise an existing dispute."

"[36] Judge Couch, in McDonald, concluded that the "without prejudice" rule cannot apply in the absence of an existing dispute between the parties to the communication in question.

[37] As to the meaning of the word "dispute" in this context, Judge Couch acknowledged that the rule has been extended recently by a broader construction of the word which does not limit it to situations in which litigation has either been commenced or threatened. He concluded, however:

" … On any view of the matter, however, for a dispute to exist there must be a significant difference between the expressed views of the parties about a matter concerning them both"."

On a practical basis these findings limited the opportunity to talk on a without prejudice basis which in many scenarios resulted in a mutually acceptable resolution.

Without expressly overturning those decisions Colgan CJ reviewed the line of cases and ultimately reached a finding that has emphasised the usefulness and protections provided by without prejudice discussions.

In the ***Morgan*** case, Morgan, a teacher, was accused of physically restraining a student during a playground incident. Management and the teacher met (with the teacher's legal representative) several days later to discuss the incident. The meeting was adjourned to enable the school to get representation. The school's solicitor subsequently contacted Morgan's representative and asked for a '*without prejudice'* discussion. This was accepted. It was subsequently alleged that the Board of Trustees representative stated that the conduct amounted to serious misconduct that would justify dismissal. Morgan was asked if he wanted to resign as an alternative to being dismissed. In a subsequent communication (also without prejudice) the Board of Trustees said that if Morgan resigned immediately they would not report the incident to the Teachers Council. No agreement was reached and Morgan was subsequently dismissed.

Morgan initiated a personal grievance and wished to bring evidence including the conduct of the school in these communications.

He argued that although there had been an agreement that the discussions were without prejudice:

"[22] . . . the law should not allow the exclusion of the contents of these in evidence in the Authority

The argument was based on three grounds:

[23] The first ground is that there was then no dispute amenable to resolution between the parties. The second ground is that the communications were "threatening and unambiguously improprietous" and were used to put improper pressure on the plaintiff to resign or face dismissal for serious misconduct. The third ground against exclusion is that the communications:

" … threatened the Plaintiff, expressly and by implication, with intent to cause him to act in accordance with the will of the Defendant and so amounted to blackmail in accordance with s 237 of the Crimes Act 1961. "

Dispute

Colgan CJ, having considered the tone of preceding cases, decided that:

"[43] . . .the phrase "off the record" probably captures better the spirit of what was intended by the legal representatives.

[44] Mr Morgan's conduct was under scrutiny by his employer. It was misconduct (as Mr Morgan conceded from an early stage) which might have led to a number of sanctions, even to dismissal which in fact occurred. No doubt because of the seriousness of that situation, Mr Morgan engaged a legal representative to both advise and represent him. Accepting that he had misconducted himself, Mr Morgan wished to obtain the best outcome possible including the retention of his job and the avoidance of professional disciplinary investigation and sanctions.

[45] The purpose of the legal representatives speaking "off the record" was to explore potential agreed outcomes including, from Mr Morgan's point of view, one that he might find acceptable in the circumstances. It was inherent in these "off the record" discussions that either side might make concessions for the purpose of obtaining a settlement which, if one was not agreed, the maker of those concessions would not wish to be held to in subsequent litigation. That applied equally to Mr Morgan and to the Board. That is what was meant by the parties' legal representatives when they proposed and agreed to holding those discussions "without prejudice" or as I have described it, "off the record".

[46] In addition to agreeing to cloak their discussions with this privilege for advantageous reasons, there were, and must have been known to the parties' representatives to have been, potential disadvantages to doing so. These included, if no resolution was able to be reached, the inability to expose a concession made, a weakness acknowledged, or anything else that was said for the purpose of obtaining a settlement which could not be achieved. That is the situation Mr Morgan now faces, his legal representative having, on his behalf, agreed to that risk by agreeing to the discussions being "off the record"."

The Chief Judge went on to describe the importance of "*off the record*" discussions:

"Such discussions are a longstanding, important and frequent feature of attempting to resolve employment relationship disputes. Parties, and especially their representatives, hold such meetings and discussions frequently and much litigation, or potential litigation, is resolved or narrowed in scope by frank exchanges that are "off the record". It is in the broader public interest that such practices be allowed to continue in the safe knowledge that the fact of them, and particularly their contents, will (except in some extraordinary circumstances) not be disclosed to the Authority or the Court subsequently. Such procedures lubricate the machinery of employment dispute resolution. Indeed, the emphasis in the problem resolution provisions in the Employment Relations Act 2000 is supportive of this approach."

He concluded that it was not necessary for there to be a (narrowly defined) dispute in existence before the parties can assert the protections inherent in without prejudice discussions.

Unambiguous Impropriety or Blackmail

The Chief Judge went on to consider the other two grounds of Morgan's case and found that:

"[57] The "without prejudice" or "off the record" privilege just described is, however, not absolute or to be upheld invariably. If the conduct of one party during such discussions is not in good faith or is not for the purpose genuinely of obtaining a resolution of the issue between the parties, or is otherwise so egregious that it is unconscionable, evidence of those exceptional circumstances (including what was said) will be permitted as part of the determination of the justification for the party's actions."

Communications defined as '*blackmail*' or of '*unambiguous impropriety*' cannot hide behind the cloak of being on the basis of '*without prejudice*' or '*off the record*' terms which he concluded were synonymous. On the facts of this case he decided that neither had occurred.

In conclusion he decided that without prejudice discussion did not need to be predicated by the existence of a formal dispute. Rather, it was necessary:

"[82] . . .to determine how the legal advisers intended their conversation to be treated at the time they embarked upon it. There is no single or magic formula used by lawyers or other representatives in employment matters to describe such agreements, certainly not even a standard (although not invariable) one as in the case of offers to settle litigation made in writing and labelled "without prejudice". Lawyers or other representatives may use phrases such as "Can we speak off the record?", "Can we speak confidentially?", or "Can we speak without prejudice?". These are all shorthand labels for discussions that are intended to remain in confidence in the sense that they cannot be used subsequently in litigation. Such discussions are not in absolute confidence because they can and indeed must be relayed to clients, but this will (or at least should) usually be with an explanation about the confidentiality agreement. Nor are they absolute in the sense that their protected status may be lost if they consist of, or include, unambiguous impropriety, bad faith or other egregious conduct. There will be times when one party will not agree to a discussion on this basis so that the party wishing to explore a resolution will need to decide whether it is still worthwhile to do so, although that is not the case here."

This case therefore seems to have broadened the approach that the Courts (and the Authority) should take to off the record discussions. It is noteworthy however that Colgan CJ tended to define such communications as being '*inter-lawyer*' or between other representatives. He made no express comment on whether such communications between the employer and employee without respective intermediaries, would be similarly treated.

This newsletter is not intended as legal advice but is intended to alert you to current issues of interest. If you require further information or advice regarding matters covered or any other employment law matters, please contact **Neil McPhail**, **Raewyn Gibson**, or **Peter Zwart**.

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