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The Advocate

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How far does privilege extend in employment matters?

In a recent case, *Faitala v Pacific Island Business Development Trust* [2024] NZERA 34, the Employment Relations Authority ("the Authority") considered a direction for disclosure and the extent of information required to be disclosed in the context of a restructure process carried out by the Pacific Island Development Trust ("*the Trust*").

The applicants had applied to the Authority claiming they had been unjustifiably disadvantaged and dismissed from their employment. The employees also claimed that the Trust had breached its duty of good faith and their employment agreements due to a failure and/or refusal to provide sufficient information and meaningful consultation during the restructure process, as was required under their employment agreements.

The Trust had engaged Employsure Limited ("*Employsure*"), a workplace relations consultancy business, to assist with the restructure process. However, the information between Employsure and the Trust was not provided during the restructuring process.

The Authority considered the preliminary issue of the applicants' request for disclosure from the Trust of all communications with and advice relating to the restructure from Employsure, including "*HR advice*".

Disclosure of documents

There are three grounds for which a party to proceedings in the Authority or Employment Court may object to disclosure of information, these are where the documents:

1 are subject to legal professional privilege;
2 if disclosed, would tend to incriminate the objector; or
3 if disclosed, would be injurious to the public interest.

The issues in *Faitala* and for the Trust fell within grounds 1 and 3 above.

Legal professional privilege

The Authority considered the extension of legal professional privilege to lay advocates, noting the all-encompassing privilege that attaches to legal professional privilege.

Legal professional privilege is the protection of communications between lawyer and client, which arises from the relationship of trust and confidence that exists between them. It provides absolute protection of communications between lawyer and client for the purpose of obtaining or receiving advice from being disclosed, unless with the express consent of the client (*B v Auckland District Law Society* [2004] 1 NZLR 326, [2003] UKPC 38).

Lay advocates are not lawyers, in that they are not governed by the same ethical and legal obligations that lawyers are. The law sets out restricted areas of practice that only lawyers may practice within. However, there is a "*carve out*" in the case of employment law which allows for lay advocates to provide representation to employees and employers, as provided under section 236 of the Employment Relations Act 2000 ("*the Act*").

Under the Act, legal professional privilege extends to lay advocates, however it is a limited extension (clause 3, Schedule 2). The extension only applies to communications between a person/company and lay advocate in contemplation of or in relation to current proceedings in the Authority, commonly referred to as "*litigation privilege*".

The Authority referred to the Employment Court decision of *Broughton v Microsoft New Zealand Limited* [2011] NZEmpC 102 in which Chief Judge Colgan found at [7]:

"only material referred to lawyers for legal advice (and that advice which is not in issue in the case) can attract legal professional privilege. Material prepared for human resources advice (and that advice based on that material) cannot attach privilege. Nor can strategy documents prepared or varied after receipt of legal advice support a claim for privilege."

In the Faitala case, the communications concerned human resources advice, there was no contemplated or actual litigation until after the restructuring process concluded, and therefore the Trust could not rely upon legal professional privilege.

"Injurious to the public interest"

The Trust sought to rely upon the third ground for its objection to the documents being disclosed. This was on the basis that there is public interest in maintaining confidentiality of advice where there is a legitimate expectation of confidentiality. That should outweigh the request for disclosure of documents which may, or may not, support their claims.

The Trust referred to the case of *Industrial Distributors Lifting Centre Ltd v Scouller* [2018] NZEmpC 90, where the Employment Court observed at [24] that public interest protection *"is available on the basis that privilege exists, or an interest that is akin to a privilege where the parties expressly agree the subject documents should remain confidential, or there is a special relationship of trust and confidence which would preclude disclosure*".

Further, the Trust relied on the case of *Edwards v Board of Trustees of Bay of Islands College* [2013] NZEmpC 228, where the Employment Court observed that *"public interest injury privilege is a broader ground in the sense that it seeks to protect the community rather than individual litigants who may benefit from it. It has a higher threshold in the sense that the Court is required to be satisfied that the public interest would be injured if disclosure were to take place. No such test applies to legal professional privilege".*

The Authority considered the Trusts arguments in reliance of the third ground, and found:

(a) It accepted that the Trust could "*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*";
(b) The "*mere fact that confidentiality is expected is not sufficient, by itself*", "*an expectation or even an assurance of confidentiality may not override a statutory or regulatory requirement for disclosure*";
(c) The limited application of privilege to lay advocates under the Act is a clear indication that Parliament did not intend to provide the all-encompassing privilege that attaches to legal professional privilege between lawyer and client, to lay advocate and client; and Subject to any assertion of privilege to particular documents, the Trust was required to disclose its communications with Employsure and advice from Employsure relating to the restructure process, assessments and the new structure.

Conclusion

This case sets an important precedent of communications between consultants, such as HR consultants and lay advocates, on employment matters. It develops on the decision of the Employment Court in *Kaikorai Service Centre Limited v First Union Incorporated* [2018] NZEmpC 83, which addressed confidentiality and privilege in collective bargaining. Only when the advice sought and provided relates to litigation does privilege apply for HR consultants and advocates. Conversely, all communications with lawyers, including the team at MGZ, are privileged.

Employment Law Update

The minimum wage is increasing from $22.70 to $23.15 per hour from 1 April 2024.

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