

Court of Appeal upholds confidentiality of 'without prejudice' communications in employment disciplinary process

The Court of Appeal in *Morgan v Whanganui College Board of Trustees* [2014] NZCA 340 (22 July 2014) dismissed an appeal from the Employment Court, upholding the confidentiality of 'without prejudice' communications, even when the conversation in question occurred before a decision was made to dismiss the employee.

The decision emphasizes the importance of agreeing to communications being 'off the record' or 'without prejudice', particularly if confidential or sensitive information is disclosed, or concessions are made. It leaves open the question of what bad behavior in a 'without prejudice' communication would justify disclosure of that communication in a subsequent personal grievance claim.

Stuart Dalzell, Partner and Amy Williamson, Senior Associate discuss the case.

Background

Briefly, the facts in *Morgan* are that a teacher came across two students fighting and, in the process of separating them, put one of the boys in a headlock. The teacher's lawyer accompanied him to a subsequent meeting with the school at which the parties agreed the teacher's actions could amount to serious misconduct.

Before the school board had decided whether to characterize the teacher's conduct as serious misconduct, or how the teacher might be disciplined, the school board's lawyer telephoned the teacher's lawyer and they had a 'without prejudice discussion'. The teacher's actions were subsequently characterised as serious misconduct, and he was dismissed.

Decision

The teacher wanted to refer to the contents of the lawyers' 'without prejudice' discussion in his personal grievance claim against the school. He claimed that it would show the school had pre-determined the outcome of the disciplinary process, in that it had already decided to dismiss him. However, the Employment Court and the Court of Appeal both agreed that 'without prejudice' communications of that type cannot be referred to in subsequent litigation.

Although the teacher had not yet been dismissed, by that stage there was clearly a problem relating to or arising out of the employment relationship. The teacher took his lawyer to his meeting with the school, so clearly contemplated a situation whereby he might need to bring a personal grievance claim down the track. Additionally, the lawyers both agreed to the discussion in question being 'without prejudice'.

Therefore, the Court of Appeal held that confidentiality of 'without prejudice' discussions in an attempt to resolve the problem should be upheld.

This was supported, in the Court of Appeal's view, by the Employment Relations Act, which encourages parties to try and resolve their differences through direct discussion where possible before resorting to the formal processes under the Act.

Discussion

This case highlights the importance of clearly stating when communications are 'without prejudice' to ensure both parties are on the same page about the confidentiality of the communication.

Additionally, it raises the interesting question of when 'without prejudice' communications can be referred to in subsequent proceedings.

The general rule is that confidentiality will be upheld so long as:

- There is a problem in the employment relationship;
- The communication is agreed to be 'without prejudice'; and
- The communication is aimed at attempting to resolve the problem.

The main exception is where an agreement or settlement is reached in without prejudice communications but one party reneges. In that situation, the existence and contents of the agreement can be disclosed in a proceeding to enforce that agreement.

The Court of Appeal in *Morgan* left open the question of whether there is a further exception - where a party uses the cover of a without prejudice communication to constructively dismiss an employee. It noted the rule that that unlawful conduct can never attract protection, but, as there was no constructive dismissal in this case, did not have to decide whether that rule would apply to constructive dismissal in the course of 'without prejudice' communications.

This highlights the importance of acting in good faith and complying with procedural requirements at all times throughout a disciplinary process, regardless of whether or not the communications are 'without prejudice'