IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA254/2022
[2022] NZCA 339

BETWEEN	REEGAN PAORA LAWTON Applicant
AND	ORMOND BRIAN STOCK Respondent

Court:	Dobson and Simon France JJ
Counsel:	P A McBride and S P Radcliffe for Applicant K T Dalziel for Respondent
Judgment: (On the papers)	27 July 2022 at 3.30 pm

JUDGMENT OF THE COURT

A The application for leave to appeal is declined.

B The applicant must pay the respondent costs for a standard application on a band A basis and usual disbursements.

REASONS OF THE COURT

(Given by Dobson J)

[1] The applicant (Mr Lawton) seeks leave to bring an appeal from an interlocutory judgment of the Employment Court addressing admissibility of a letter sent by solicitors for the respondent (Mr Stock) that was endorsed "without prejudice save as to costs". Judge Holden ruled the letter admissible on the issue of a claim by Mr Stock for costs, admitting the letter in a redacted form.[1]

[1] *Lawton v Steel Pencil Holdings Ltd (in liq)* [2022] NZEmpC 72.

[2] Section 214 of the Employment Relations Act 2000 enables a party to proceedings before the Employment Court to seek leave to appeal to this Court on questions of law. This Court may grant leave if the question of law involved is one that, by reason of general or public importance or for any other reason, ought to be submitted to the Court of Appeal for decision.

[3] Mr Stock opposes leave on grounds that the proposed appeal could not raise a question of law that is capable of genuine and serious argument, involving either a public or private interest of sufficient importance to outweigh the costs and delay of an appeal. Further, Mr Stock contends that the feature of the interlocutory judgment challenged in essence raises factual findings rather than a question of law. On 22 July 2022 counsel for Mr Lawton filed submissions in reply to those on behalf of Mr Stock. They do not add to the matters in issue.

[4] The relevant issue arose in the course of an application on behalf of Mr Stock for costs following a substantive Employment Court judgment. In support of his application, Mr Stock's counsel attached a letter sent by Mr Stock's solicitor to the solicitor for Mr Lawton containing an offer to settle the dispute between them. Mr Lawton had objected to the admissibility of the letter and in seeking a ruling, counsel filed a joint memorandum which attached a redacted version of the offer letter, omitting the detail of the offer that had previously been relayed on Mr Stock's behalf.

[5] By way of background, the parties had a without prejudice discussion during which Mr Stock made a settlement offer. The letter in question was written a week later expressly noting that the parties had discussed settlement orally and indicating that the purpose of the letter was to commit Mr Stock's offer to writing. It added that what had been offered a week earlier was now repeated, on a without prejudice save as to costs basis, and that the offer needed to be accepted by a specified date. When the letter was placed before the Court, Mr Lawton objected arguing that it was inadmissible either because it referred to earlier privileged discussions or because it repeats an offer that was made during without prejudice discussion.

[6] Judge Holden ruled the letter admissible on the issue of Mr Stock's claim to costs for the proceedings first as constituting a Calderbank offer, the status of which

is recognised generally as admissible on the issue of costs.[2] Alternatively, if the letter did not qualify as such then the Judge would have admitted it in any event, applying the equity and good conscience jurisdiction of the Employment Court.[3]

[7] Mr Lawton now seeks to challenge that ruling, contending that the status of such communications and preservation of privilege in without prejudice communication raises a question of law that is of sufficient general importance to warrant an appeal to this Court.

[8] The initiative of making offers that are without prejudice save as to costs is widely recognised for positive policy reasons.[4] The limitation on the claim to privilege for settlement negotiations where the document has this purpose is recognised in s 57(3)(c) of the Evidence Act 2006. Procedurally, the prospect is specifically provided for, for example, in r 14.10 of the High Court Rules 2016. It is by no means unusual for a party attempting to settle a dispute to convey an offer to settle, initially in a communication that is without prejudice in all respects, and thereafter to convey the offer in written terms endorsed with the status "without prejudice save as to costs". That is in essence what occurred in this case.

[9] Mr Lawton attempted to constrain Mr Stock's ability to rely on the communication of an offer made by Mr Stock without prejudice save as to costs on the basis that it derived from a without prejudice discussion that was subject to a "jointly owned privilege". That proposition is misconceived. The letter did not include any statements attributed to Mr Lawton during the without prejudice discussion, containing instead only a repetition of the terms of Mr Stock's offer. It was entirely a matter for Mr Stock as to whether he repeated the terms of his own offer in a manner that reserved his entitlement to refer to it on the issue of costs, subsequent to any substantive resolution. An additional component in the letter was the stipulation of a time limit for acceptance of the offer.

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2 At [15]–[17].
3 At [18]; and Employment Relations Act 2000, s 189(2).
4 See for example, *Moore v McNabb* (2005) 18 PRNZ 127 (CA) at [56].

[10] Mr Lawton could only complain if, and to the extent that, Mr Stock's letter made reference to Mr Lawton's contributions to their without prejudice discussion. Mr Lawton obviously retained privilege in what he had said without prejudice, but that is not in issue here.

[11] It is not clear who initiated the redaction of parts of the letter for the purposes of argument on its admissibility. For a Calderbank letter to have validity on a costs argument, generally the Court would need to know the terms of the offer to assess whether (and if so, by how much) the recipient would have been better off accepting the offer than the outcome achieved at trial. The redaction process is a distraction, and cannot separately give rise to a question of law worthy of argument on appeal.

[12] Mr Lawton also sought to challenge the lawfulness of the Judge's resort, in the alternative, to the equity and good conscience jurisdiction of the Employment Court. In the context of this decision, that could not raise a question of law that would warrant leave.

[13] We accordingly see no question of law that is capable of bona fide argument that would justify the granting of leave for an appeal to this Court.

[14] The application for leave to appeal is dismissed.

[15] The applicant must pay the respondent costs for a standard application on a band A basis and usual disbursements.

Solicitors:
McBride Davenport James, Wellington for Applicant