FSIN THE EMPLOYMENT COURT
WELLINGTON

[2010] NZEMPC 163
WRC 26/10

IN THE MATTER OF	personal grievance proceedings removed from the Employment Relations Authority
BETWEEN	CHRISTINE ROSE Plaintiff
AND	THE ORDER OF ST JOHN Defendant

Hearing: By written submissions filed on 14 and 20 December 2010

Appearances: Helen Cull QC, counsel for plaintiff
Susan Hornsby-Geluk and Chloe Luscombe, counsel for defendant

Judgment: 21 December 2010

INTERLOCUTORY JUDGMENT OF CHIEF JUDGE GL COLGAN

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[1] As a result of discussions, exchanges of memoranda, and minutes, the issues for decision have narrowed to one. It is whether the plaintiff is precluded from giving evidence that a mediation arranged by the defendant for a specified purpose did not deal with that matter. The plaintiff does not seek to enlarge upon that negative proposition by, for example, giving evidence of what was said or done in the mediation that may support her assertion that the agreed subject matter of the mediation was not addressed at it.

[2] This issue arose at an early stage when the proceeding was before the Employment Relations Authority. The defendant challenged the plaintiff's entitlement to refer to these and other matters in her statement of problem. The Employment Relations Authority removed the proceedings to this Court for hearing at first instance. Counsel agree that the issues between them were essentially ones of evidence admissibility rather than pleading in the sense that they would arise ultimately for determination as ones of admissibility irrespective of what the pleadings included.

Again by agreement, a procedure was arranged so that the plaintiff's intended evidence in (then) two controversial areas would be made known to the Court, as it has been, so that the argument has been able to take place against that factual background.

[3] During her employment Ms Rose became dissatisfied with her treatment by her immediate supervisor that she described as "bullying". Her employer proposed, and she agreed, that her concerns would be discussed in mediation conducted under sections 144 and following of the Employment Relations Act 2000 (the Act). That took place by arrangement with the Department of Labour's Mediation Service and the mediation was convened and conducted by a statutory mediator. Also present at the mediation were Ms Rose, her lawyer, her supervisor, and the employer's lawyer. Ms Rose seeks to lead evidence that her complaints were not dealt with and that the mediation addressed issues other than her own dissatisfactions with her employment, for the resolution of which it had arranged the mediation.

[4] The mediation between the parties had its genesis in a letter dated 28 August 2009 sent by the defendant to the plaintiff. Although the letter also dealt with other matters between the parties, under a heading "Mediation", it said this:

> Unrelated to this allegation, you have recently raised concerns about your working relationship with myself.
>
> In order to demonstrate St John's commitment to resolving these matters in good faith, I would like to suggest that we take part in a mediation, with a view to exploring the issues in a constructive, independent and confidential environment, with the assistance of an impartial Labour Department mediator.
>
> As you will be aware, this is a standard approach for dealing with such relationship issues. While it is naturally entirely up to you as to whether you take part, I do strongly encourage you to do so. ...
>
> You are welcome to seek advice from a lawyer or support person in respect of the ... mediation, and that person is also welcome to attend any meeting between us. As is our standard practice in such situations, we would ask our legal adviser to attend also.

[5] Ms Rose says that she understood from this correspondence that the proposed mediation was to discuss the issue of her working relationship with her supervisor and an allegation that she had been "bullied" by him. She says she did not understand that the intention was to deal in mediation with either a particular allegation of misconduct against her or questions of her work performance.

[6] The mediation took place over two separate days a week apart. Ms Rose complains that her complaint about "workplace bullying" was not dealt with in the mediation. She wishes to say that it dealt with a performance review of her as may be indicated by the written agreement that was signed by the parties evidencing the outcome of the mediation.

The law

[7] The defendant says that Ms Rose is not entitled to give such evidence because s 148 of the Act requires that it not be disclosed in proceedings such as this. Section 148 provides as follows (with relevant passages underlined):

> **148 Confidentiality**
>
> (1) Except with the consent of the parties or the relevant party, a person who—
>
> (a) provides mediation services; or
>
> (b) is a person to whom mediation services are provided; or
>
> (c) is a person employed or engaged by the Department; or
>
> (d) is a person who assists either a person who provides mediation services or a person to whom mediation services are provided—
>
> must keep confidential any statement, admission, or document created or made for the purposes of the mediation and any information that, for the purposes of the mediation, is disclosed orally in the course of the mediation.
>
> (2) No person who provides mediation services may give evidence in any proceedings, whether under this Act or any other Act, about—
>
> (a) the provision of the services; or
>
> (b) anything, related to the provision of the services, that comes to his or her knowledge in the course of the provision of the services.
>
> (3) No evidence is admissible in any court, or before any person acting judicially, of any statement, admission, document, or information that, by subsection (1), is required to be kept confidential.
>
> (4) Nothing in the Official Information Act 1982 applies to any statement, admission, document, or information disclosed or made in the course of the provision of mediation services to the person providing those services.
>
> (5) Where mediation services are provided for the purpose of assisting persons to resolve any problem in determining or agreeing on new collective terms and conditions of employment, subsections (1) and (3) do not apply to any statement, admission, document, or information disclosed or made in the course of the provision of any such mediation services.
>
> (6) Nothing in this section—
>
> (a) prevents the discovery or affects the admissibility of any evidence (being evidence which is otherwise discoverable or admissible and which existed independently of the mediation

process) merely because the evidence was presented in the course of the provision of mediation services; or

(b) prevents the gathering of information by the Department for research or educational purposes so long as the parties and the specific matters in issue between them are not identifiable; or

(c) prevents the disclosure by any person employed or engaged by the Department to any other person employed or engaged by the Department of matters that need to be disclosed for the purposes of giving effect to this Act; or

(d) applies in relation to the functions performed, or powers exercised, by any person under section 149(2) or section 150(2).

[8] This section has been interpreted on a number of occasions by this Court and the Court of Appeal. The first case in this Court was *Shepherd v Glenview Electrical Services Ltd.*[1] Next was *Jesudhass v Just Hotel Ltd* at both first instance in the Employment Court[2] and on appeal.[3] The latest case was *Te Ao v Chief Executive of the Department of Labour*,[4] another judgment of this Court.

[9] The principles distilled from these cases are as follows. All communications in mediation "for the purposes of the mediation" attract the statutory confidentiality except possibly where public policy dictates otherwise. Documents which are prepared for use in, or in connection with, a mediation come within the ambit of s 148(1) as do statements and submissions made orally at the mediation or a record thereof. Only documents which come into existence independently of mediation are excluded from this confidentiality. The important distinction is that documents or other communications that exist independently of mediation may be admissible or discoverable even if they were referred to or even had their genesis in mediation. The *Te Ao* case illustrates one exception to confidentiality on the public policy basis enunciated by the Court of Appeal in *Jesudhass*. That concerned the entitlement in law of the mediator to give evidence of what had occurred in a mediation chaired by him as a result of which he was himself dismissed and subsequently challenged this by personal grievance.

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[1] [2004] 2 ERNZ 118.
[2] [2006] ERNZ 173.
[3] [2007] ERNZ 817 (CA).
[4] [2008] ERNZ 311.

The defendant's case against admissibility

[10] The defendant objects to the plaintiff giving evidence that her complaint about workplace bullying was not dealt with at the mediation. It says that if permitted to give this evidence, the plaintiff will prevent unfairly the defendant from responding meaningfully to it. That is because s 148 will preclude the defendant from calling evidence about what was discussed at the mediation in order to establish its assertion that Ms Rose's complaint about workplace bullying was indeed dealt with. The defendant says that, if admissible, the plaintiff's evidence will put the defendant "in the absurd position of not being able to say – 'we did address the claim of bullying in mediation', …"

[11] I disagree. The plaintiff, to be consistent, could not argue against the defendant doing so and does not seek to do so. If the plaintiff is entitled to give evidence that a particular topic was not dealt with at the mediation, the defendant must, in fairness, be entitled to say that it was. The difficulty will be encountered if either party seeks to give evidence of the particulars of what were said and done at the mediation. Section 148 prohibits that without consent which is not forthcoming.

[12] So, the defendant says, that by giving evidence of what did not occur at the mediation, the plaintiff is effectively giving evidence about what did occur.

[13] Although it may be difficult for the Court to determine the truth of the plaintiff's assertion that bullying was not covered at the mediation, that is not a reason to exclude the evidence. Indeed, in this case, there is a record of the outcome of the mediation to which there is no admissibility objection which may well corroborate the account of one side or the other about the subject matter of the mediation.

[14] The defendant also relies on s 8 of the Evidence Act 2006. This provides relevantly:

> **8 General exclusion**
>
> (1) In any proceeding, the Judge must exclude evidence if its probative value is outweighed by the risk that the evidence will—
>
> (a) have an unfairly prejudicial effect on the proceeding; or
>
> (b) needlessly prolong the proceeding.

[15] As has been said many times before, proceedings in this Court are not governed by the Evidence Act although its provisions are taken into account in the exercise by the Court of its relevant jurisdiction under s 189 of the Act. I propose to deal with the defendant's submission as one under s 189 but guided by the approach of the courts of general jurisdiction under s 8 of the Evidence Act.

[16] The defendant says that the evidence intended to be called by the plaintiff is prejudicial in that it accuses the defendant of not dealing with the plaintiff's complaint of bullying but, instead, subjecting her to a performance review without notification. That may be so: indeed, that is probably the reason the plaintiff wishes to lead it, to prejudice the defendant's case that it acted justifiably.

[17] This evidence is said to be of limited probative value for a number of reasons. First, the defendant says it is unable to give evidence in rebuttal as it cannot provide evidence of what actually occurred at the mediation. I have already addressed this proposition. Next, the defendant says it cannot cross-examine the plaintiff in relation to her claim that mediation did not address her claim of bullying and was a performance review because she cannot in law answer questions about what occurred at the mediation. The defendant can cross-examine the plaintiff about admissible evidence but cannot about what is inadmissible.

[18] Penultimately, the defendant says that if the plaintiff is permitted to give evidence that the mediation was not about her bullying allegation and was a performance review, the defendant is entitled equally to claim that mediation was about her bullying complaint and was not a performance review. The defendant says that because witnesses will not be able to be cross-examined about what actually occurred, the Court is unlikely to be able to reach a decision as to whose evidence should be preferred on this point. I have already addressed this argument also, finding that difficulty of decision is not a ground for admissibility and that there is a record of the outcome of the mediation that is not objected to.

[19] Finally, the defendant points out that the only "independent" witness, being the mediator, is unable to give evidence pursuant s 148 of the Act. I simply note here that the parties were represented by solicitors at the mediation whose accounts, if they were

permitted to be given, I would presume to be truthful and accurate. I agree that, pursuant to s 148(2), the mediator would not be a competent or compellable witness on the question at issue.

[20] In these circumstances the defendant says that the plaintiff's proposed evidence should not be admitted because its prejudicial effect will outweigh its probative value. I find against that contention.

Decision

[21] The purpose of s 148 is to permit the parties to a mediation to speak freely in a confidential environment in an attempt to resolve their differences. An important part of that purpose is achieved by prohibiting them from later raising concessions or other things that were said or done in an effort to achieve a settlement but which, if they were admissible in the litigation, might or would constrain those parties and others from making such concessions in mediation.

[22] The question in this case is whether evidence of the subject matter of the mediation is confidential under s 148(1). There is no express reference to the subject matter or topic of a mediation in s 148. Experience shows, and common sense dictates, that the subject matter of mediation is frequently known to the Court (or the Authority) dealing subsequently with the case between the parties in any event. For example, if this Court, pursuant to its powers under s 188, directs parties to mediation or further mediation in an attempt to settle their litigation, the Court will be well aware of the subject matter of the mediation because it is the subject matter of the litigation before the Court. The same process applies to the Authority. If, despite attempts to resolve the litigation by mediation or further mediation, that is not forthcoming, then the Court which subsequently hears and decides the case will usually, if not invariably, be aware of the subject matter of the mediation. Even where mediation has taken place other than by direction of the Court or the Authority, this fact and the subject matter of the mediation will often be known to them. This is inherent in the exercise of the obligations under ss 159 and 188. There is no danger to the efficacy of mediation in this. All the Court or the Authority knows is that the parties have attempted to resolve their dispute the subject of the litigation, but this has been unsuccessful.

[23] In a sense, mediation is the modern day formalised equivalent of without prejudice settlement negotiations between parties through their lawyers, the concessionary detail of which cannot be used in evidence subsequently if there has been no settlement. In such settlement negotiations which, of course, continue to operate alongside the more modern notion of mediation, there is nothing objectionable about a court subsequently knowing that attempts to settle have been made and about the subject matter of the attempts. Courts almost invariably know that such exercises have gone on and it is not difficult to deduce their subject matter which is the same subject matter of the litigation. What is important to remain confidential is the fact and detail of concessions which may have been made in an attempt to reach a settlement but to which a party should not be bound if the matter must be decided in litigation.

[24] An important element of the plaintiff's claim of unjustified constructive dismissal is that despite raising with her employer a serious complaint about the conduct towards her by her supervisor which she categorises as "bullying", the employer did nothing or at least insufficient to meet its obligations in such circumstances. As I understand the plaintiff's case, she says that this breach by the employer and manifestation of its intention not to be bound by such obligations caused her to resign, constituting a constructive dismissal. If evidence establishes sufficiently that an employer has breached the terms and conditions of an employment agreement and evinced an intention not to be bound by them, the employee's repudiation of the breach by resignation or abandonment of employment may amount to a constructive dismissal which is actionable as a personal grievance.

[25] The evidence that the plaintiff intends to lead relates to the important question under s 103A of how the employer treated the employee. This included a proposal to go to mediation for specified purposes. None of that is made inadmissible by s 148. The plaintiff intends to pick up the story after the end of mediation by complaining that her issues with the employer were not dealt with as a fair and reasonable employer would have done, including by attempting to resolve them in mediation. It will be appropriate to a consideration of the employer's compliance with s 103A as to whether it made good its stated intention of addressing these matters in mediation. How it did so is inadmissible in evidence but whether it did so is not.

[26] Applying a purposive interpretation to s 148 and allowing for public policy exceptions to what might otherwise be a harsh result inconsistent with the spirit of the legislation generally, I consider that s 148 does not exclude as inadmissible evidence about the general subject matter of the mediation. Statutory confidentiality can and will be protected by making inadmissible any evidence about "any statement, admission, or document created or made for the purposes of the mediation and any information that, for the purposes of the mediation, is disclosed orally in the course of the mediation."

[27] Although it may be more difficult for the Court to decide whether, as Ms Rose says, her claims of bullying were dealt with at the mediation, there will be independent corroborative evidence beyond the accounts of those present at the mediation, being the parties and their representatives. There is unobjectionable documentary evidence about the purpose for which mediation was arranged and about its outcome that will assist in determining the probabilities of the accuracy of Ms Rose's claim.

[28] When one reads closely the (admissible) "agreement as an outcome of mediation" signed by the parties, there may be significant assistance provided to the trial Judge to determine any disputed questions between the parties about what was or was not addressed in the mediation. For example, the agreement sets up an independent process of review of the employee including the identification of barriers to communication between Ms Rose and her manager and identifying strategies to improve their relationship and communication. The agreement also contains recorded "expectations" of the employee and of the employer (including the supervisor about whose conduct towards her Ms Rose had complained). The employer's commitments to standards of conduct by the management towards Ms Rose may appear, on their face, to relate to the issues about which the plaintiff had complained and for which the mediation was set up. I do not intend, by these references, to decide the question: that will be for trial. Rather, these are illustrative of the fact that there will not simply be starkly contrasting assertions of witnesses.

[29] I agree that the mediator cannot give evidence because of the absolute prohibition contained in s 148(2) which would preclude evidence from that source even about those matters that I have determined should be admissible.

[30] When one compares subs (2), which contains the prohibitions on a mediator giving evidence, with subs (1) of s 148, it is clear that the subs (2) prohibition is much stricter than that which is at issue in this case. Under subs (2), a mediator cannot give evidence about "the provision of the [mediation] services". This would preclude the mediator from giving evidence about arrangements made for the mediation and, in particular, the subject matter of the mediation. The lesser prohibition under subs (1) on statements, admissions, documents made for the purpose of the mediation, or oral disclosures indicates that Parliament has allowed for a greater degree of extra-mediation discussion about what goes on in this forum.

[31] A purposive interpretation of s 148 will both allow the Court to determine the s 103A tests in this case by considering whether Ms Rose's complaints of workplace bullying were addressed in that forum as the defendant proposed to her and, on the other hand, by maintaining the confidentiality of the particular communications that passed between the mediation participants in that regard. This means that the descriptions of the mediation communications set out in s 148(1)(a) are not to be interpreted and applied broadly. They are deliberately specific. The evidence that the plaintiff intends to lead does not come within those prohibited categories so interpreted.

[32] Standing back from the particular merits of this case, I do not consider that the interpretation of s 148 arrived at in this decision will affect adversely other parties in other mediations, or the mediators. The confidentiality of what should be kept confidential to preserve the efficacy of mediation is not in doubt. As this and previous cases illustrate, the developing application of s 148 means that it is not an absolute prohibition on the recounting subsequently of any communications in or to do with mediation. Both the purposive interpretation of the section and the allowance for extraordinary public policy exceptions, identified by the Court of Appeal in *Jesudhass*, will allow justice to be done in cases where there is a demonstrated need and good reasons to have a limited knowledge of the generalities of what went on at mediation.

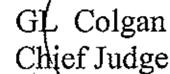
[33] For these reasons I find that the following evidence intended to be led by the plaintiff is not inadmissible:

> 10. The first mediation was spread over two days, one week apart. My complaint about the workplace bullying was not dealt with. Instead it

> was a performance review of me, as the "Agreement as an outcome of Mediation" records. …

[34] The plaintiff is entitled to costs on her successful defence of the defendant's challenge to admissibility of intended evidence but I reserve the amount of these costs for subsequent determination along with any other questions of costs in the proceedings.

[35] I should record that, in the course of a telephone discussion with counsel on 10 December 2010, the parties agreed to attempt to resolve the case in a judicial settlement conference. This will be held in the Employment Court at Wellington on Friday 4 March 2011. The Registrar will issue the usual directions in preparation for a judicial settlement conference, a template of which is set out on the Court's website. If the case does not settle at the conference, the Judge who chairs the conference may make any other interlocutory directions to a hearing of the plaintiff's challenge.



GL Colgan
Chief Judge

Judgment signed at 2.15 pm on Tuesday 21 December 2010