IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

AA 175/08
5118594

	BETWEEN	DOTSE STAFF ASSOCIATION INC Applicant
	AND	CHIEF OF DEFENCE FORCE Respondent

Member of Authority:	R A Monaghan
Representatives:	T Williams, Advocate for Applicant J Holden, Counsel for Respondent
Submissions received:	16 April and 6 May 2008 from Applicant 2 May 2008 from Respondent
Determination:	13 May 2008

DETERMINATION OF THE AUTHORITY ON PRELIMINARY MATTER

Employment relationship problem

[1] The statement of problem filed in respect of this matter repeats to a substantial extent allegations contained in an earlier statement of problem involving the same parties, the subject matter of which was referred to mediation. A memorandum of agreement was concluded in mediation and the earlier statement of problem was subsequently withdrawn. The DOTSE Staff Association Inc ("the staff association") accepts it has made the same allegations again - being allegations of breach of good faith - but says the Authority should investigate and determine them because of concerns it has about the mediation.

[2] The Chief of Defence Force (referred to in this determination as "the NZDF") says the present statement of problem:

(a) raises matters that were resolved in mediation and cannot be raised again; and

(b) contains only one new matter, being that referred to in paragraph 2.4.

[3] Accordingly it says that only the matters set out in paragraph 2.4 of the present statement of problem can be investigated and determined.

[4] This determination addresses whether the Authority can investigate and determine facts and issues set out in the present statement of problem other than those set out in paragraph 2.4, or whether they have been resolved and cannot be raised again. By agreement, the determination has been made on the papers.

History of the problem

[5] The staff association represents specialist staff employed in what was formerly known as the Defence Technology Agency of the Ministry of Defence.

[6] In July 2006 the staff association initiated bargaining for a collective employment agreement. Negotiations began and terms of settlement were reached in or about July 2007. The collective employment agreement was signed on 1 November 2007.

[7] On 12 September 2007 the staff association filed a statement of problem in the Authority (the first statement of problem), alleging a number of breaches of good faith in relation to the bargaining and raising a dispute about the application of certain salary adjustments with reference to the terms of settlement. The problem was given file number 5084037. The Authority directed it to mediation under s 159(1) of the Employment Relations Act 2000.

[8] Mediation went ahead in or about October 2007. The outcome was reduced to writing under the heading ‘Memorandum of Understanding’, and dated 26 October 2007. The memorandum was signed by the parties and by the mediator, who was a mediator employed by the Department of Labour.

[9] The memorandum expressly addresses some of the issues regarding the application of the salary adjustments as raised in the first statement of problem. Those matters have not been raised again. The final clause of the memorandum reads:

> "4. This agreement satisfies the problems raised by DOTSE Staff Assoc Inc (reference 5084037) and DOTSE Staff Assoc Inc will withdraw its application currently before the Employment Relations Authority as it relates to both allegations of alleged breaches of good faith and the issues relating to the disputed terms of settlement. This in no way detracts from DOTSE Staff Assoc Inc ability to pursue any such allegations that might arise in the future. It is the intention of both parties to 'start afresh' from today's date."

[10] By letter to the Authority dated 23 November 2007 the staff association advised that the matter was withdrawn. The letter also referred to the staff association's view that it had been placed under duress during the mediation, in that the New Zealand Defence Force had threatened to 'negate' the terms of settlement and had given it no option but to accept the NZDF interpretation of those terms and withdraw its claims of breach of good faith. It said further that it had not discussed or resolved the allegations of breach of good faith.

[11] The same concerns have now been raised in support of the request that the Authority investigate and determine matters contained in the present statement of problem which were also contained in the first statement of problem. More particularly, the matters in question comprise the various allegations of breach of good faith in relation to the bargaining.

Determination

[12] There are significant hurdles facing this request. I address them as follows.

1. Existing resolution

[13] On the face of the memorandum of understanding all matters then before the Authority, including the matters raised again in the present statement of problem, were resolved in mediation. Those matters are incorporated in the plain wording of

clause 4 of the memorandum, together with an agreement that the statement of problem before the Authority at the time would be withdrawn.

[14] It is not clear whether the staff association is relying on an argument that the breach of good faith argument can be raised again because it was not discussed in mediation, but if so I do not accept such an argument is capable of rendering unenforceable relevant parts of the memorandum. On the plain wording of the memorandum the matter of breach of good faith was resolved, and it is not open to me to address the extent to which the point was, or was not, discussed before agreement was reached.

[15] Overall in the normal course of events, having signed the memorandum the parties would be bound by its terms whatever view they may have of them. The issues whose resolution is embodied in the memorandum cannot be revisited.

[16] It seems, however, that the staff association is saying some or all of the terms of the memorandum were entered into under duress. On that basis, it does not consider itself bound by those terms. Before I comment on the law of duress another important matter arises out of the fact that the resolution was reached in mediation under the Employment Relations Act 2000.

2. Application of s 148 of the Employment Relations Act

[17] In the normal course of events, again, the Authority would decline to hear any evidence about what happened in mediation or how the memorandum of understanding was reached. That is not only because of the common law concerning the without prejudice nature of negotiations preceding the settlement of litigation, but because of s 148 of the Act.

[18] For present purposes s 148 means:

> (a) both the mediator and the parties must keep confidential any statement, admission or document created or made for the purposes of the

mediation and information that, for the purposes of the mediation is disclosed orally in the course of the mediation (subsec (1));

(b) the mediator cannot give evidence about the mediation or anything related to the mediation which came to his knowledge during the mediation (subsec (2)); and

(c) no evidence is admissible before the Authority of any statement, admission, document or information that is required to be kept confidential by (a) above (subsec (3)).

[19] The scope of s 148 has recently been discussed by the Court of Appeal in **Just Hotel Limited v Jesudhass**[1]**.** Regarding the confidentiality of mediation in general, the court said:

> "… 'the very nature of a mediation requires that, in principle, it be conducted on a confidential basis, with the parties encouraged to 'lay bare their souls' for the purpose of facilitating a conciliation and resolution of the dispute."' [2]

[20] It said too:

> "All communications 'for the purposes of the mediation' attract the statutory confidentiality, except possibly … where public policy dictates otherwise."[3]

[21] I was not addressed on whether public policy 'dictates otherwise' here. Moreover, neither the Employment Court nor the Court of Appeal has finally determined the matter.

[22] The staff association has alleged certain things were said to it in the course of mediation to cause it to agree to sign the memorandum of understanding. The allegations go to the heart of the discussions concerning settlement, so it would be difficult to say the communications in question were not 'for the purposes of the mediation'. Indeed no such suggestion was made.

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[1] [2007] NZCA 582
[2] At [35]
[3] At [31]

[23] On that basis, if it exists any evidence relevant to the staff association's allegations of fact is not admissible.

[24] However the staff association says s 148(5) applies. Section 148(5) reads:

> "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."

[25] The staff association says s 148(5) applies because the mediation was undertaken with the intent of resolving a disagreement regarding the new terms and conditions of employment, in particular the salary scales. However it did not develop that argument any further.

[26] On the material I have I do not accept that is an accurate characterisation of the nature of the mediation. The mediation was undertaken pursuant to a direction of the Authority, in order to resolve an employment relationship problem which included a disagreement about the interpretation and application of terms of settlement already reached, as well as allegations of breach of good faith. The problem was not one of 'determining or agreeing on new collective terms and conditions of employment' in the sense meant by s 148(5). In other words it was not concerned with negotiating new terms and conditions of employment[4]. It concerned the interpretation and application of new terms already agreed. The former falls within s 148(5), while the latter does not.

[27] Another difficulty with invoking s 148(5) is that the staff association is not seeking to address again the dispute about the application of the terms of settlement. It seeks to raise only its allegations of breach of good faith. Such allegations do not directly concern the determination or agreement of new collective terms and conditions of employment. They concern breaches of statutory and contractual obligations associated with the determination or agreement of the new terms and

[4] In comparison, the mediation associated with the agreeing of the terms of settlement in July 2007 probably was a mediation of this kind.

conditions. Section 148(5) does not extend to negotiations associated with the settlement of those issues.

[28] For these reasons I do not accept s 148(5) applies to render admissible evidence about the exchanges the staff association says occurred. Accordingly the Authority is unable to investigate and determine the alleged exchanges.

3. Duress

[29] 'Duress' has a legal meaning when used to argue that an agreement should be held not to be enforceable. The staff association has not addressed me on the law of duress, rather it has simply asserted that the allegations to which it pointed amounted to duress.

[30] Even if evidence concerning the allegations relied on was admissible, the staff association would be obliged to persuade me of matters such as the following:

> "In summary, the elements of duress in New Zealand law today are these: First, there must be a threat or pressure. Secondly, that threat or pressure must be improper. Thirdly, the victim's will must have been overborne by the improper pressure so that his or her free will and judgment have been displaced. Fourthly, the threat or pressure must actually induce the victim's manifestation of assent. Fifthly the threat or pressure must be sufficiently grave to justify the assent from the victim, in the sense that it left the victim no reasonable alternative. Sixthly, duress renders the resulting agreement voidable at the instance of the victim. This may be addressed either by raising duress as a defence to an action, or affirmatively, by applying timeously to a court for avoidance of the agreement. Seventhly, the victim may be precluded from avoiding the agreement by affirmation." **Pharmacy Care Systems Limited v Attorney General** (16 August 2004, McGrath, Hammond and O'Regan JJ, CA 198/03)

[31] It is not self-evident from the allegations already made that the above elements were present.

[32] In the absence of admissible evidence, or legal argument regarding the presence of duress, I cannot take the allegations of duress any further.

4. Conclusion

[33] Matters other than those raised in paragraph 2.4 of the present statement of problem have already been resolved in mediation in terms of the parties' memorandum of understanding. Those matters cannot be relitigated.

[34] The Authority will contact the parties shortly regarding a procedure for investigating paragraph 2.4.

R A Monaghan
Member of the Employment Relations Authority