

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

[2011] NZERA Wellington 182  
5307443

BETWEEN

ROSALIND CLEWLEY  
Applicant

AND

FEATHERSTON STREET  
MEDICAL CENTRE LIMITED  
t/a CITY MEDICAL CENTRE  
Respondent

Member of Authority: Alastair Dumbleton

Representatives: David Burton, counsel for Applicant  
Phillip Green, counsel for Respondent

Telephone Conference: 11 November 2011

Determination: 15 November 2011

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**DETERMINATION OF THE AUTHORITY**

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**Removal of matter to Court**

[1] In the telephone conference on 11 November 2011 counsel for the parties, Mr Burton and Mr Green, advised that their clients wished to have the matter before the Authority removed to the Court under s 178 of the Employment Relations Act 2000 for the Court to hear and determine it without the Authority investigating.

[2] The Authority is of the opinion that in all the circumstances the Court should determine the matter and on that basis therefore grounds are present under s 178(2) of the Act for ordering removal.

[3] The Authority's opinion has been formed from the unusual scope of the investigation required by the applicant Ms Clewley to determine her personal grievances of unjustifiable disadvantage and dismissal.

[4] Ms Clewley's claim lodged in the Authority sets out in the statement of problem events occurring over a period of time in her employment with the respondent City Medical Centre that are alleged to have been breaches of statute and also the terms and conditions of her employment. She complains that in committing the various breaches City Medical Centre followed a course of conduct with the deliberate and dominant purpose of coercing her to resign.

[5] Of particular relevance to my view that removal is appropriate is Ms Clewley's complaint that she was subjected to threatening and intimidatory conduct amounting to blackmail under s 237 of the Crimes Act 1961 by her employer when, during mediation, it presented her through the mediator with a document containing allegations that the City Medical Centre advised, by implication, that it would refrain from disclosing to the Health and Disability Commissioner if Ms Clewley resigned from her employment.

[6] Objection has been taken by City Medical Centre to those allegations being made to the Authority about what had occurred in mediation, as to raise matters about conduct and communications during mediation breaches s 148(1)(3) of the Employment Relations Act 2000 which provides extensively for confidentiality to preserved in relation to any mediation.

[7] In response to the objection reference was made by Mr Burton to the decision in *Just Hotel v. Jesudhass* [2007] ERNZ 817, in which the Court of Appeal left open a possibility that public policy considerations may require s 148 to be interpreted so as to permit evidence of serious criminal conduct during a mediation to be called. This may include evidence from the mediator. The Court did not however find it necessary to finally decide whether there should be such an exception, as the Employment Court had determined there to be in the decision appealed from.

[8] Counsel and the Authority had previously discussed the approach of having a preliminary investigation meeting to determine the admissibility of the allegations and particular documentary and oral evidence that was to be presented in support of them. This raised the possibility of the mediator having material evidence and whether the mediator was able to provide that evidence or whether the Authority was able by order if necessary to obtain it.

[9] In these circumstances I am therefore of the opinion that the Court should determine this matter. It also raises an important question of law not yet finally determined but identified by the Court of Appeal in *Just Hotel*, as to whether there is a public policy exception to the confidentiality conferred by s 148 of the Employment Relations Act 2000.

### **Determination**

[10] Accordingly, for the above reasons the Authority orders the removal of the entire matter before it to the Court for hearing and determination.

A Dumbleton  
**Member of the Employment Relations Authority**