IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON

I TE RATONGA AHUMANA TAIMAHI
TE WHANGANUI-Ā-TARA ROHE

[2021] NZERA 233
3128934

	BETWEEN	NEW ZEALAND PUBLIC SERVICE ASSOCIATION INCORPORATED TE PUKENGA HERE TIKANGA MAHI Applicant
	AND	CHIEF EXECUTIVE OF THE INLAND REVENUE DEPARTMENT Respondent

Member of Authority:	Michael Loftus
Representatives:	Peter Cranney, counsel for the Applicant Susan Hornsby-Geluk, counsel for the Respondent
Investigation Meeting:	19 April 2021 at Wellington
Submissions Received:	At the investigation meeting
Date of Determination:	31 May 2021

PRELIMINARY DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The parties are in dispute over the meaning of various words contained in the management of change provisions in a collective agreement to which they are a party. Consequential to the dispute is the question of whether or not the Inland Revenue Department (IRD) may have breached its obligations under those provisions.

[2] In an attempt to resolve the dispute the parties attended a mediation on 7 December 2020 and there are various references to what occurred during the mediation in documents attached to the pleadings lodged with the Authority in respect to the substantive dispute.

[3] The Union (PSA) objects and wishes to see those references redacted. IRD considers their inclusion proper and it is that this determination addresses.

Background

[4] As already said the parties attended a mediation on 7 December 2020 to address their differences with respect to the substantive dispute.

[5] On the same day, and after the mediation, a PSA delegate who had been present sent an email to a number of affected members. Contained therein is a brief reference to the parties' position during the mediation. On 9 December the PSA sent a more widely distributed notice to its membership which again referred to the parties' position during mediation.

[6] The following day PSA's National Secretary wrote to the Commissioner of Inland Revenue. The response from IRD on 11 December contained a detailed chronology of the dispute, the parties' actions and their understanding as to the meaning of the disputed provisions. Contained in the letter are three paragraphs which refer to exchanges during the mediation of 7 December.

[7] Crucial, for the purposes of this dispute, is the assertion in one of those paragraphs that:

> The parties agreed that it (the mediation) was on the record unless agreed otherwise. There was not agreement otherwise. The common sessions were on the record.

[8] The PSA responded on 21 December asserting:

> The mediation was not on the record unless the parties agreed otherwise. It was without prejudice with an agreement that any comment to represented parties would be agreed at the conclusion of the mediation. Please resend your letter with the reference to what was said in mediation removed.

[9] In the interim, and on 15 December, the PSA lodged a statement of problem with the Authority in respect to the substantive dispute. IRD lodged its statement in reply on 22 December and attached thereto was the letter of 11 December sans redactions.

[10] The PSA reacted stating the parties were in dispute regarding references to mediation and requesting the letter be removed. IRD replied it was not appropriate that the letter be removed and asked that the question of its inclusion be put before the Authority for consideration in the new-year.

[11] This occurred and subsequent discussion with the parties led to an agreement the issue required investigation and determination.

[12] In support of its position the mediation was not confidential IRD relies on the evidence of Karen Rhodes, one of its staff who was present. Essentially the evidence is that the PSA raised the issue of whether or not it could report back to its members and the outcome was an agreement the parties could report back but any actual offers would be privileged. The only written evidence of that agreement are Ms Rhodes' notes. They record:

> Confidential – Report back, bargaining like – not conf [confidential] in terms of leg [legislation].

[13] It is common ground there was no formal record of this purported agreement.

[14] The PSA chose not to give any evidence, being of the view that to do so would, in itself, constitute a breach of s 148 of the Employment Relations Act 2000 (the Act). This is a similar argument to that recently referred to by Judge Beck in her decision *Neil & West v New Zealand Nurses Organisation.*[1] The PSA chose instead to rely upon submissions.

Discussion

[15] The statutory presumption, and therefore the starting point, is that what occurred in the mediation is confidential and … *statements and submissions made orally at mediation come within the ambit of s 148(1) of the Act and the parties are therefore required to keep them confidential*.[2]

[16] While section 174E states I need not record the parties submission I consider an abridged, albeit incomplete, summary useful here.[3]

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[1] *Neil & West v New Zealand Nurses Organisation* [2020] NZEmpC 238 at 7
[2] *Just Hotel Limited v Jesudhass* [2007] NZCA 582 at 34 referred to *Neil & West v NZNO* at 16
[3] Section 174E(b)(ii) of the Employment Relations Act 2000

[17] The argument for the PSA is that while I have some evidence about the alleged agreement the mediation was not confidential it is far from adequate. That is because it:

(a) Relies on comments that were made in the mediation which must, themselves, be inadmissible;

(b) Attributes a number of those statements to the mediator and as such constitutes hearsay evidence. Furthermore it is hearsay evidence of the statements of an individual who is prohibited from giving evidence;[4]

(c) In any event the evidence in inconsistent in that the notes differ from what it is said occurred in the affidavit of Ms Rhodes;

(d) Even if consent was granted, which is denied, it was subsequently withdrawn as is evidenced by the letter of 21 December.

[18] For IRD it is argued:

(a) Section 148 (1) of the Act provides mediation shall be confidential except with the consent of the parties and that consent was granted;

(b) That even if it were not granted, which is denied, this is an argument about what was not discussed at the mediation and evidence about that is permitted[5];

(c) The Authority's is an equity and good conscience jurisdiction where the Authority should take into account such evidence as in equity and good conscience it thinks fit. In this case it is argued it would be improper to preclude the evidence of the Inland Revenue wishes to tender about a mediation.

[19] I find the PSA's argument far more persuasive though the argument the IRD's position be put aside as it relies on evidence which must, in itself, be inadmissible I reject. That is because s 148(1) of the Act provides there can be an exception (consent) and the only way that can be ascertained is to examine the evidence which might include events at the mediation (and that is the IRD's point in [18](a) above).

[20] The PSA's second point, and despite IRD's contrary protestation, is one with which I concur. This evidence and the way it was presented was, in my view, evidence of statements attributable to a person precluded from giving that evidence and it was proffered in order to

[4] Section 148(2) of the Employment Relations Act 2000
[5] See *Rose v Order of St John* [2010] NZEmpC (3) at 30 and 31

assert the truth of the assertion upon which IRD relied. It and the way it was presented was, in my view, classic hearsay and while the Authority is not required to adhere to the rules of evidence[6] I consider that inappropriate when being asked to set aside a statutory presumption. This is a situation in which I also agree with the PSA's submission that if one is to set aside a statutory presumption then there should be conclusive supporting evidence. In other words the agreement should have been properly, and formally, recorded during or preferably prior to the mediation. It wasn't.

[21] There is then the notes upon which IRD relies and which I consider the most important evidence. That is because I do not accept they necessarily say what the Inland Revenue asserts. They could just as easily be read to say "The mediation is *Confidential* – except for *Report back,* which is *bargaining like* and - *not conf in terms of leg.*"

[22] Here I also have to note this later construct, which the PSA asserts is correct, seems far more likely as it fits with the legislation. What the IRD is asking me to accept is that *the parties could report back to their constituents what had occurred, but that any actual offers would be privileged.*[7] This is asking me to accept that the only prohibition on feedback applies to the one thing it would be mandatory to give feedback about in a bargaining like situation, which the IRD is encouraging me to see this as. That is the actual offer so ratification can occur.

[23] The alternate interpretation in [21] above would fit much more closely with the statutory presumption and other statutory requirements. It also its fits far better with the subsequent correspondence. The PSA's notes to members are both short and could be seen to paraphrase the unions barging stance which IRD rejected and then there is the clear statement denying the proposition the mediation was on the record.

[24] Finally I note IRD's argument that it is entitled to proffer evidence about what was not discussed in mediation but to do so I need to know what was. They therefore argued it would not, therefore, be just and equitable to preclude the evidence IRD wishes to tender about the mediation.

[25] For two reasons I disagree totally. The first is the statutory presumption. The second is the admission IRD wishes to be able to canvass a number of aspects of the mediation which are not within the ambit of evidence currently before the Authority. In other words this is an

[6] Section 160(2) of the Employment Relations Act 2000
[7] Affidavit of Ms Rhodes at [9]

attempt to set precedent with respect to the mediation of 7 December and I have no knowledge of what floodgates I am being asked to open. That is, I conclude, completely inappropriate.

Conclusion and Orders

[26] For the above reason I accept the PSA claim the mediation of 7 December 2020 was, with the exception of offers, confidential and certain evidence lodged with the Authority in respect to the substantive application should be inadmissible. In particular the PSA's e-mails of 7 and 9 December to members and paragraphs 36 to 38 of the Inland Revenue letter of 11 December 2020 are inadmissible and should be redacted from the file. That, in turn, means I have seen evidence which precludes me from considering the substantive claim and the file must now be reassigned to another member of the Authority.

Michael Loftus
Member of the Employment Relations Authority