

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKĀURAU ROHE**

[2022] NZERA 52
3154281

BETWEEN	STEVEN BIRD Applicant
AND	VICE CHANCELLOR, UNIVERSITY OF WAIKATO Respondent

Member of Authority:	Peter Fuiava
Representatives:	Allan Halse, advocate for the Applicant David France, counsel for the Respondent
Investigation Meeting:	22 February 2022 by audio-visual link
Submissions received:	30 November 2021 from Applicant 7 December and 12 November 2021 from Respondent
Determination:	25 February 2022

PRELIMINARY DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] This matter came before me as Duty Member. On 26 October 2021, Dr Steven Bird (Mr Bird) lodged a Statement of Problem with the Authority alleging that he was unjustifiably disadvantaged by his current employer, the University of Waikato (the university).

[2] The university denies the claim and has filed a Statement in Reply in response. In addition, the university has filed an application in which it seeks parts of Mr Bird's Statement of Problem to be removed because it contains information or evidence that is caught by the confidentiality provision around mediation under s 148(1) of the

Employment Relations Act 2000 (the Act). Mr Bird opposes the application because on interests of justice grounds and fairness, the paragraphs in question should remain.

The Authority's investigation

[3] A teleconference was held on 23 November 2021 and by mutual agreement with the representatives, timetabling directions were made for the filing of written submissions with the Authority. Given the time of year, a video conference for the hearing of oral submissions was set down for 27 January 2022, but this was further adjourned due to Mr Halse's unavailability.

[4] The submission hearing was rescheduled to 22 February 2022 with the parties attending by audio-visual link. As permitted by s 174E of the Act, this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made but has not recorded all evidence and submissions received.

Relevant background

[5] It is necessary to set out the relevant facts to provide context. However, given that the subject matter of this determination concerns a mediation meeting that took place on 10 August 2020 between Mr Bird, the university and the parties' representatives, I have referred to matters in a generalised way so as to keep matters as confidential as possible between the parties.

[6] During the mediation, the university brought to Mr Bird's attention certain matters which was news to Mr Bird who had previously not been made aware of them until they were raised by the university for the first time at mediation.

Submissions

[7] Mr Halse advises that Mr Bird's employment relationship problem with the university is over two years old and that the university has known about the forementioned matters for over a year. Raising them with Mr Bird only at mediation was an attempt by the university to intimidate or bully him into resigning.

[8] Mr France denies that what took place at mediation amounted to bullying or intimidation, but even if that was Mr Bird's perception, a mere allegation of bullying

was not enough to bring down the four walls of confidentiality around mediation. If it was, this would have the unintended effect of opening the flood gates, deterring employees and employers from using mediation as the primary means by which to resolve employment relationship problems.

[9] As to the paragraphs the university seeks to have removed from the Statement of Problem, Mr Halse relies on section 57 of the Evidence Act 2006 (EVA) which states:

57 Privilege for settlement negotiations, mediation, or plea discussions

- (1) A person who is party to, or a mediator in, a dispute of a kind for which relief may be given in a civil proceeding has a privilege in respect of any communication between that person and any other person who is a party to the dispute if the communication—
 - (a) was intended to be confidential; and
 - (b) was made in connection with an attempt to settle or mediate the dispute between the persons.

[10] Mr Halse submits that the paragraphs in question are not protected by s 148(1) because the matters that were raised with Mr Bird at mediation was not part of a negotiation towards settlement but rather a ploy to get him to resign. The challenged paragraphs in the Statement of Problem should remain as evidence of bullying which is what Mr Bird's case is about. If confidentiality applied this would have the opposite effect of impeding the administration of justice and the rule of law which was not the intent of s 148(1).

[11] In response, Mr France submits that the EVA does not apply to the Authority and even if it did, s 5(1) of that Act makes clear that where there is an inconsistency between the EVA and another enactment, the provisions of that other enactment prevail.

Relevant law

[12] Section 148(1) of the Act states:

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.

[13] The leading case on s 148(1) is *Just Hotel Ltd v Jesudhass*¹ in which the Court of Appeal stated:

[31] We do not see any ambiguity in the words of s148(1). All communications “for the purposes of the mediation” attract the statutory confidentiality, except possibly ... where public policy dictates otherwise.

[32] In accordance with the ordinary meaning of the word “purpose”, that of the intended object of an activity, a communication (written or oral) is protected unless it is created or made independently of the mediation.

[33] Documents which are prepared for use in or in connection with a mediation therefore come within the ambit of s 148(1). So do statements and submissions made orally at the mediation, or a record thereof. Only documents which come into existence independently of the mediation are excluded.

[34] There is nothing surprising in this conclusion. To the contrary, it reflects the desirability of encouraging parties to a mediation to speak freely and frankly, safe in the knowledge that their words cannot be used against them in subsequent litigation if the dispute does not prove capable of resolution at mediation.

[35] As this Court said in *Carter Holt Harvey Forests Ltd v Sunnex Logging Ltd* [2001] 3 NZLR 343 at 349, “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.”

[14] The Court of Appeal held that all statements or submissions made during mediation are confidential and inadmissible unless one or two exceptions apply:

- (i) the correspondence is pre-existing evidence or can be said to have come into existence independently of the mediation; or alternatively
- (ii) there is a good public policy reason to admit the evidence such as evidence of serious criminal conduct during mediation.

Discussion

[15] I begin by acknowledging that mediation is the cornerstone of this jurisdiction. The process works because of the absoluteness of confidentiality as provided for under s 148(1) of the Act. I am advised by Mr Halse however that the system is open to abuse.

¹ *Just Hotel Ltd v Jesudhass* [2007] NZCA 582, [2008] 2 NZLR 210.

At the heart of his submissions is reform of s 148(1). However, that is ultimately a matter for the legislature. I must interpret the law as it presently stands.

[16] I have considered the paragraphs that the university wish to have deleted from the Statement of Problem. I accept that Mr Bird would have been taken aback by the matters that were put to him for the first time at mediation. He would have been disappointed to hear of them for the first time and it may well have been the university's strategy to rattle him. However, even so, it is not uncommon for parties to adopt a hard line with each other at mediation and for things to be said that would not otherwise be said elsewhere. Nor is it unusual for discussions to be robust, contested, and hard-nosed in nature which Mr Bird's and the university's mediation appears to have been.

[17] If the paragraphs in question were removed from the Statement of Problem, I find that nothing is lost from Mr Bird's narrative of unjustified disadvantage against his employer. However, if the paragraphs were to remain, this would be contrary to s 148(1).

[18] I have carefully considered the paragraphs in question. With the exception of one sentence (the second sentence of paragraph 52 beginning "*No information or evidence...*") which falls into the first exception category of *Just Hotel* – independent from the mediation – I am satisfied that the remaining paragraphs contain either specific references to statements and discussions that took place at mediation, or indirectly referred to the nature of those discussions during mediation. Either way, the paragraphs fall within the ambit of s 148(1) and are confidential and inadmissible.

[19] As to the second exception from *Just Hotel* (public policy reasons), on its face, this does not apply to the paragraphs at issue. Nor has it been suggested something akin to a serious crime took place during the mediation for the public policy exemption to be engaged also.

[20] As to the applicability (if any) of s 57 of the EVA to s 148(1) of the Act, *Just Hotel* establishes that s 148(1) is unambiguous. The section speaks for itself. In any case, the Authority is not bound by the EVA, but it is a relevant consideration.

[21] For the above reasons, I grant the university's application to remove content from the Statement of Problem. Mr Bird is to lodge and serve an Amended Statement

of Problem with the Authority by 4 pm, Friday 11 March 2022. The following paragraphs are to be deleted from that document:

- (i) The final six lines of paragraph 15, from “*Eventually*” onward
- (ii) The first five words of paragraph 16 “*Since these ... were made*”
- (iii) Paragraph 43 from “*At that meeting,*” on the second line, to “*could be resolved*” on line eight.
- (iv) Paragraph 50 from “*and it was anticipated*” onwards, including sub-paragraphs a-k on pages 29 – 32.
- (v) The whole of paragraph 51.
- (vi) Part of sentence one, paragraph 52 that states “*talked about during mediation*” and sentence three from “*reminding*” to “*and this time*”.
- (vii) Sentence three of paragraph 53, beginning with “*It is important...*”

[22] In his memorandum of 7 December 2021, Mr France seeks directions that would limit any witness being called to give evidence for Dr Bird from referring to matters raised during the course of mediation. A direction against asking questions that would elicit such a response was also sought.

[23] As I will not be dealing with Mr Bird’s substantive dispute with the university, I leave this to the investigating Member to determine if required.

[24] Costs are reserved.

Peter Fuiava
Member of the Employment Relations Authority