IN THE EMPLOYMENT COURT OF NEW ZEALAND
AUCKLAND

I TE KŌTI TAKE MAHI O AOTEAROA
TĀMAKI MAKAURAU

[2019] NZEmpC 109
EMPC 87/2019

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	DOWNER NEW ZEALAND LIMITED Plaintiff
AND	CLEMENT BRIAN LIVINGSTONE Defendant

Hearing: On the papers

Appearances: A Russell, counsel for plaintiff
Defendant in person

Judgment: 26 August 2019

JUDGMENT OF CHIEF JUDGE CHRISTINA INGLIS

Introduction

[1] Downer New Zealand Limited has filed a challenge to a determination of the Employment Relations Authority.[1] The plaintiff does not seek a full rehearing of the entire matter. Rather, the challenge is directed at the Authority's finding that two emails were not covered by mediation confidentiality conferred by s 148 of the Employment Relations Act 2000 (the Act).

[2] Mr Livingston wishes to refer to the contents of the emails to support a claim that he raised a personal grievance in relation to the termination of his employment within the 90-day timeframe for doing so. The company objects, saying that the emails

1 *Downer New Zealand Ltd v Livingstone* [2019] NZERA Auckland 134.

are subject to statutory confidentiality and are inadmissible. It was agreed that the challenge could be determined on the papers.

[3] The background facts can be summarised as follows. Mr Livingstone was employed by the company until his departure on 19 September 2017. He pursued a grievance in relation to the way in which his final pay had been calculated. The Authority referred the parties to mediation.

[4] Mediation Services wrote a combined email to the parties in relation to suitable dates. Mr Livingstone confirmed his availability by way of email dated 16 October 2017 and said that he wished to have two other matters addressed at mediation. He copied the Human Resources manager into the email, who responded by requesting that Mediation Services ask Mr Livingstone to provide full details of his further claims, otherwise the company would only attend mediation to respond to the matters lodged in the Authority. Mediation Services replied, asking Mr Livingstone to communicate with the company on the matter and asking him to copy it (Mediation Services) into the reply.

[5] Mr Livingstone took up the request and emailed the company on 13 November 2017. In the email, he set out fuller details of his issues concerning the basis on which his employment had been terminated. He copied Mediation Services into the email, as he had been asked to do.

[6] Mr Livingstone was, and still is, acting on his own behalf. He did not have it drawn to his attention that s 148 of the Act might present difficulties for him if he failed to raise his additional grievances by way of direct correspondence with the company, and that potential issues might arise if he copied Mediation Services into the correspondence setting out details of his additional concerns.

Outline of the parties' submissions

[7] Both parties agree that determination of the challenge centres on the correct interpretation of s 148 of the Act. It provides:

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] The company argues that the application of s 148 to the current case is straightforward. Mediation services were provided and the emails in question were "[documents] created or made for the purposes of the mediation". That, it is said, means that they must be kept confidential (s 148(1)) and are inadmissible in any court (s 148(3)). The Court of Appeal's judgment in *Just Hotel Ltd v Jesudhass*[2] is cited in support of the proposition that s 148 is unambiguous on its face – any document made for the purpose of, or in connection with, mediation is protected. The company submits that since the emails were about issues that should be discussed at mediation, the purpose of them was "inextricably linked to the mediation that was set down". The fact that they were sent prior to the mediation makes no difference, citing *Lowe v New Zealand Post Ltd*,[3] *New Zealand Fire Service Commission v McEnaney*[4] and *McConnell v Board of Trustees of Mount Roskill Grammar School.*[5]

[9] Two further points were made on behalf of the company. First, if s 148 confidentiality applies, it is not up to Mr Livingstone (as author) to decide whether or not they should be admitted – both parties need to consent.[6] Second, even if public policy exceptions exist in relation to the scope of s 148 (a point which the Court of Appeal left open in *Just Hotel*), there is nothing to suggest that any such exception would apply in the circumstances of this case.

[10] Mr Livingstone submits that a purposive interpretation to s 148 is required and that such an approach leads to the admission, rather than the exclusion, of the two emails. In this regard he says that he sent the emails for two discrete purposes: one was to continue the mediation, but the other was to raise further grievances against the employer. Even without mediation, he would have sent the emails because the purpose of raising the grievances would still be active. Thus, he says, the emails would have existed independently of the mediation and therefore should not be covered by s 148.

---

2 *Just Hotel Ltd v Jesudhass* [2007] NZCA 582, [2008] 2 NZLR 210, [2007] ERNZ 817.
3 *Lowe v New Zealand Post Ltd* [2003] 2 ERNZ 172 (EmpC).
4 *McEnaney v New Zealand Professional Firefighters Union* EmpC Auckland ARC 33/03, 21 August 2003.
5 *McConnell v Board of Trustees of Mt Roskill Grammar School* [2013] NZEmpC 150, [2013] ERNZ 310.
6 *Idea Services Ltd v Barker* [2012] NZEmpC 112, [2012] ERNZ 454 at [24]-[33].

[11] Further, Mr Livingstone says that the legislative purpose behind s 148 supports admissibility. In this regard, reference is made to *Rose v Order of St John*,[7] where Chief Judge Colgan observed that the purpose of mediation is to allow the parties to speak freely. Section 148 is designed to facilitate this by protecting any concessions made in an effort to achieve a settlement that might constrain them later if settlement is not achieved. Mr Livingstone contends that s 148 protects "any facts and details of concessions", and the emails do not contain such information. It is also argued that the subject matter of mediation is not usually itself confidential, and it is the subject matter of the emails which is relevant in this case. Admitting the emails would not cut across what s 148 is designed to protect, namely the integrity of the mediation process.

Discussion

[12] On one reading of s 148, it creates an all-or-nothing choice between two possibilities – either a document was "created or made for the purposes of the mediation" or it "existed independently of the mediation process." While cases may often fall neatly into one or other category, the facts of this case reflect the difficulties which can arise when documents are written for dual purposes, only one of which relates to mediation.

[13] The judgments relied on by the company do not deal with precisely the same situation that the present case gives rise to and are of limited assistance. In *Just Hotel*, the statements which were said to support an unjustified dismissal claim were allegedly made during the mediation itself, and the Court of Appeal's analysis proceeded on that factual basis. In *Lowe*, the document in question was prepared at the request of the mediator; no such request was made in the present case. Rather, it was a response to a request by the company to enable it to understand and have an opportunity to respond to Mr Livingstone's additional concerns. In *McEnaney,* settlement agreements achieved at mediation were at issue. That is not the situation here. In *McConnell*, the evidence was mostly regarding things that happened during mediation and a discussion, prior to mediation, about a planned position at mediation. This too differs from the circumstances in this case, where the

---

7 *Rose v Order of St John* [2010] NZEmpC 163, [2010] ERNZ 490 at [21].

emails were not about what the position would be at mediation but rather about the identity of the employee's grievances.

[14] In any event, characterising documentation as being either created for mediation (and therefore covered by mediation confidentiality) or as existing independently of mediation (and therefore not), misreads s148(1) and (6).[8] Section 148(6) simply sets out, for the avoidance of doubt, the sort of documentation which will *not* come within the reach of s 148 confidentiality. Thus, evidence which would otherwise be discoverable or admissible and which existed independently of a mediation will not be made inadmissible (s 148(6)(a)). It does not, however, follow that a party wishing to argue that a document is not covered by mediation confidentiality and is admissible needs to establish that one or other of (what the company calls exceptions) in s 148(6)(a)–(d) apply. To put it another way, it is not a case of whether an exception applies and, if it does not, the document in question is automatically deemed to be confidential and inadmissible.

[15] The key question is whether the two emails were created for or made for the purposes of the mediation. The Authority member found as a matter of fact that the documents were created to be used outside of mediation if matters did not resolve. In this regard she held that:[9]

> [13] I am satisfied it is more likely than not that the purpose of Mr Livingstone's emails were to put Downer on notice that apart from the issues raised in his application to the Authority he wished to have two other matters discussed at mediation. While it is arguably "in connection with a mediation" *I find it is likely the documents were created to be used in the wider context of matters he wished to have addressed including outside of mediation if matters did not resolve*.

[16] The company contends in its statement of claim that there was no evidential basis for this finding and that it amounts to an error of fact and law. The difficulty with that contention is that there is no evidence before the Court as to what evidence

---

8 Note that in *Just Hotel* the Court of Appeal observed (at [37]) that s 148(6) supported its analysis of s 148(1). This was in the context of communications made during mediation itself. The Court stated that "The obvious implication of s 148(6)(a) is that communications at a mediation which do not exist independently of it will not be discoverable or admissible. There is no reason why such evidence should be discoverable or admissible unless it attracts the confidentiality conferred by subs (1)."

9 (emphasis added).

the Authority had before it and, as the Authority's determination notes, it does not record all evidence received in that forum.[10] The company has not satisfied me that the Authority erred in its finding.

[17] The company also contends that the Authority misinterpreted and misapplied s 148. The Authority considered the central question to be whether the emails were created "for the purpose" of mediation. Documents created for use in or in connection with a mediation will, it was held, come within the ambit of s 148(1); documents created or made independently of mediation will not. Because of the factual findings made (which I have already referred to), the emails fell outside s 148(1) and were admissible.

[18] In order to understand what s 148, correctly interpreted, means it is helpful to return to what the relevant provisions of the Act when read in context, rather than in isolation, are designed to achieve. The relevant provisions include s 148, s 114, the objects of the Act and s 189 (which confers jurisdiction on the Court to decide all matters coming before it as in equity and good conscience it thinks fit).

[19] The overriding objective of the Act is to build productive employment relationships through the promotion of good faith in all aspects of the employment relationship, including by acknowledging and addressing the inherent inequality of bargaining power; by promoting mediation as the primary problem-solving mechanism; and by reducing the need for judicial intervention.[11] Employees wishing to raise a personal grievance with their employer are required to do so within 90 days, unless exceptional circumstances exist.[12] Section 114(2) provides that a grievance is raised with an employer as soon as the employee has made, or has taken reasonable steps to make, his/her employer aware that they allege a personal grievance which they want the employer to address. The Court has previously made it clear that an overly stringent approach to what constitutes the raising of a grievance is not to be adopted.

---

10 At [3].
11 Employment Relations Act 2000, s 3.
12 Section 114.

[20] The dispute resolution process effectively spans three stages – mediation, investigation, and an adversarial process in the Court. Before any investigation in the Authority takes place, consideration must be given to referring the parties to mediation.[13] The Authority must direct mediation unless satisfied that it would not contribute constructively to resolving the matter; be in the public interest; in circumstances of urgency; or where it would be inappropriate or impracticable.

[21] All of this reflects a Parliamentary intent to create a framework to support early resolution through direct discussion between the parties and (where appropriate) with the assistance and support of a specialist mediator appointed under the Act. This objective is in turn supported by s 148, which provides a shield of protection for parties who engage in mediation (voluntarily or not) to resolve their differences from their own admissions and concessions. Section 148 recognises that the ability to engage in open dialogue is conducive to productive settlement discussions because it allows parties to speak more freely without worrying about jeopardizing their case if mediation fails.

[22] It is immediately apparent that the position advanced on behalf of the company would see s 148 operating in reverse to its intended design and undermining the purpose of s 114. Mr Livingstone, in engaging in the mediation process as he was required to do, has (on the company's analysis) destroyed his chances of bringing a claim of unjustified dismissal at all, despite the fact that the company, through its Human Resources manager, was on notice of his additional grievances before the 90-day period expired. I note too that the company's analysis would mean that the other potential route by which Mr Livingstone might be able to pursue his grievances (namely an application for leave on the basis of exceptional circumstances under s 114(4)) would also be stymied. That is because he would not be able to refer to the emails to support his application, s 148(3) rendering them inadmissible in *any* proceeding.

[23] All of this apparently arose out of a failure by a self-represented litigant to appreciate that he might be required to write two separate letters to his employer – one

---

[13] Section 159.

for the purpose of confidential mediated discussions; the other for the purpose of advising his employer that he wished to raise additional grievances which he wanted the company to address.

[24] I do not suggest that the company was obliged (as a matter of law) to draw the potential perils to Mr Livingstone's attention in the context of its request that he take the step of setting out his additional grievances in correspondence to Mediation Services; or that Mediation Services was obliged to do so when suggesting to Mr Livingstone that he set out any additional grievances in correspondence to the company and provide a copy of that correspondence to it. But what I do suggest is that the way in which this case unfolded and the ramifications of the interpretation advanced by the company draw serious issues about access to justice into stark relief.

[25] I see s 189(1) as providing a clear pathway to the answer in this case. It provides that:

> In all matters before it, the court has, for the purpose of supporting successful employment relationships and promoting good faith behaviour, jurisdiction to determine them in such manner and to make such decisions and orders, not inconsistent with this or any other Act … as in equity and good conscience it thinks fit.

[26] Equity, good conscience and the interests of justice squarely point to a finding that the two emails are admissible in the particular circumstances. I do not consider that an application of these principles is, for the purposes of s 189(1), inconsistent with a proper interpretation of s 148. Nor do I consider that an application of the jurisdiction conferred by s 189 would cut across the ratio in *Just Hotel*.

[27] I agree with the conclusion reached by the Authority member – the two emails are not protected by the s 148 confidentiality shield. The challenge is dismissed.

[28] For completeness I touch on the other arguments raised on behalf of the company, although not strictly necessary to do so in light of my conclusion on the s 148 interpretation point. The company referred to the need for *both* parties to consent to the admission of a document covered by s 148. Section 148 starts not just with the words "Except with the consent of the parties", but also with the words "or the relevant party". There appears to be no authority on the meaning of the latter phrase, or which

party is considered "relevant". What does however appear to be clear from the wording of s 148 is that, in at least some circumstances, there is no need for *both* parties to consent.

[29] It seems to me that there is room for argument that consent must only be obtained from the party who actually prepared the document at issue, consistent with the purpose of s 148 to protect parties who make admissions or give away facts that they may later regret if mediation fails. In that context, it is hard to see why their right to reuse the same document, if they so choose, ought to be constrained simply because they have used it for mediation purposes. Nor is it clear why the other party's consent would be considered necessary and/or appropriate in such circumstances. It might accordingly be said that s 148 only requires the consent of a party who prepared the document to waive privilege, and that such an interpretation better serves the purpose of s 148 and, in the context of this case, the purpose of s 114.[14]

[30] Counsel for the company also referred to *Idea Services Ltd v Barker*.[15] That case concerned without prejudice communications and the privilege that attaches to those; it did not address s 148.

Conclusion

[31] The company's challenge is dismissed. The two emails are not covered by mediation confidentiality and are admissible in proceedings.

[32] Costs are reserved.

Christina Inglis
Chief Judge

Judgment signed at 3.30 pm on 26 August 2019

---

[14] And, while not directly applicable, sits comfortably with provisions of the Evidence Act 2006. See, in particular, s 57(2).

[15] *Idea Services Ltd v Barker*, above n 6.