IN THE EMPLOYMENT COURT OF NEW ZEALAND
WELLINGTON

I TE KŌTI TAKE MAHI O AOTEAROA
TE WHANGANUI-A-TARA

[2021] NZEmpC 208
EMPC 309/2021

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
AND IN THE MATTER	of an application for a permanent non-publication order
BETWEEN	ABC Plaintiff
AND	DEF Defendant

Hearing:	14 October 2021 (Heard at Wellington)
Appearances:	ABC, in person S Hornsby-Geluk, counsel for defendant
Judgment:	25 November 2021

JUDGMENT OF JUDGE B A CORKILL

Introduction

[1] ABC is a former employer of DEF, a law firm. The parties signed a record of settlement concerning an employment relationship problem, which contained confidentiality and non-disparagement provisons. It was counter-signed by a mediator under s 149 of the Employment Relations Act 2000 (the Act).

[2] Subsequently, ABC filed a statement of problem in the Employment Relations Authority which challenged the validity of the agreement and sought removal of the

terms as to confidentiality and non-disparagement. Soon after the pleadings were filed, the Authority considered the issue of mediation.

[3] The Authority Member issued a notice of direction dated 26 August 2021 which recorded he had read the statement of problem and statement in reply and noted that the parties had not attended mediation. The Member then referred to s 159 of the Employment Relations Act 2000 (the Act), noting that direct mediation should be used before the Authority investigates a matter, unless exceptions apply. In the Member's view, exceptions did not apply in this instance. He concluded this was a matter where mediation would contribute constructively to resolving the relationship problem. The parties were to participate in mediation and attempt, in good faith, to reach a resolution of their differences by a particular date. In the meantime, the Authority's investigation would be suspended.

[4] ABC promptly wrote to the Authority asking why mediation should be directed. She said such a direction was inappropriate, since it would not allow her to later challenge any without prejudice statements made at mediation.

[5] The Authority convened a case management conference call at which it received oral submissions. Then the parties were sent an email stating that the Member had considered carefully the forceful submissions made by ABC that mediation should not proceed. The Member considered that mediation remained mandated by s 159 of the Act and could be of assistance to the parties in clarifying the claims or resolving the issues between them. The Member again directed the parties to participate in mediation and attempt in good faith to reach a resolution of their differences, by close of business on 30 September 2021. It was confirmed again that the investigation would be suspended in the meantime. At the request of ABC, the email was issued as a notice of direction, on 3 September 2021.

[6] ABC then brought a de novo challenge to the notice of direction dated 3 September 2021, seeking urgency. She also sought a stay of the direction from the Court, which was granted by consent. A prompt hearing was arranged. ABC filed an affidavit, as did a partner of DEF. Neither deponent was required for cross-examination. The hearing accordingly proceeded on the basis of submissions only.

Overview of the parties' cases

[7] ABC submitted that the notice of direction was in substance a determination which was susceptible to challenge under s 179(1) of the Act. She referred to a recent interlocutory judgment: *WN v Auckland International Airport Ltd.* There, Chief Judge Inglis commented that such a direction could be stayed on the basis it was a determination.[1]

[8] ABC also submitted that under s 179(5) of the Act, the direction was not simply a matter of procedure. Acknowledging that mediation is a cornerstone feature of the Act, she argued that Parliament could not have intended that the Authority would have an unfettered power to direct mediation without challenge. Were this to be the case, a litigant would have no right to challenge what was said in mediation, if, for instance, the without prejudice protection which applies to all mediations was misused or utilised unethically. This point lay at the heart of ABC's challenge.

[9] She also submitted that the Authority is required to assess a range of factors under s 159(1) of the Act, and then make a decision. The language used suggested the decision was one having substantive effect. The procedural limitation of s 179(5) should not therefore apply in the present circumstances.

[10] Turning to the merits, ABC said mediation would not contribute to a constructive resolution of the matter. It would also be inappropriate, since DEF's prior conduct established a likelihood that the confidential forum would be abused, with no legal recourse then being available to her. This was an important issue of principle. She also said there was also a risk she would suffer emotional harm at mediation.

[11] ABC said mediation would be inappropriate for another reason, in that she interacts regularly with mediators at the Ministry of Business, Innovation and Employment (MBIE). ABC said her ability to have free and frank conversation with a mediator would be impeded because she would be required to inform professionals with whom she interacts regularly of information relevant to her personal life.

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1 *WN v Auckland International Airport Ltd* [2021] NZEmpC 145 at [10].

[12] Finally, she submitted that mediation would be impracticable: the enforceability of a record of settlement was not one of the problems that mediation services are intended to address.

[13] For DEF, Mx Hornsby-Geluk emphasised that one of the primary purposes of the Act was to encourage the early resolution of disputes by the parties themselves, including through the use of mediation, as was made clear in the explanatory note to the Employment Relations Bill 2000,[2] in the objects provision of s 3 of the Act, and in the language of s 157 itself. Challenging a direction to mediation would be fundamentally inconsistent with these features of the Act.

[14] She submitted that a direction to mediation was not a determination for the purposes of s 179 of the Act. Substance was important. Whether an utterance of the Authority amounted to a determination should be considered by the minimum requirements of s 174E.[3]

[15] She said that the notice of direction did not include any findings of fact or law. The notice referred only to ABC's "forceful submissions" before concluding mediation was mandated by s 159 and could be of assistance to the parties.

[16] It was clear from the title of the document and its substance that it was simply a "notice" rather than a determination of any matter. It would have no impact on the disposition of the substantive matter before the Authority. Reference to relevant authorities was made.[4]

[17] Mx Hornsby-Geluk then addressed s 179(5) of the Act, arguing that in this case, the requirement for the parties to attend mediation would not have an irreversible and substantive effect on them.[5]

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2 Employment Relations Bill 2000 (8-1) (explanatory note) at 8.

3 *Morgan v Whanganui College Board of Trustees* [2013] NZEmpC 55, [2013] ERNZ 460 at [19]–[20]. The Court considered the predecessor provision to s 174E, being s 147(a), which was not materially different.

4 For example *Kennedy v The Chief Executive of Oranga Tamariki – Ministry for Children* [2020] NZEmpC 58; *Abernethy v Dynea New Zealand Ltd* [2007] ERNZ 271 (EmpC).

5 *H v A Ltd* [2014] NZEmpC 92, [2014] ERNZ 38 at [26].

[18] Mx Hornsby-Geluk submitted that if it was necessary to consider the merits, the direction met with the requirements of s 159 of the Act and should not be set aside. The provision was expressed in mandatory terms. The Authority was required to consider whether mediation should occur in every case before it and must direct parties to mediation unless certain exceptions apply. As Chief Judge Goddard had observed in *Waugh v Commissioner of Police*, mediation is, because of the statutory requirements, a necessary part of "almost every proceeding".[6]

[19] A number of reasons were spelt out in the affidavit filed for DEF as to the likely value of mediation. In summary, DEF wished to understand ABC's case and have the opportunity of a frank discussion regarding her views as to its employment practices, and how these could be improved. The parties had never previously attended mediation. As ABC was self-represented, mediation could be helpful. There would be the benefit of a trained professional mediator to help and test, in a confidential and safe environment, what ABC is seeking to achieve and why. A number of jurisdictional issues had been raised in respect of ABC's pleadings in the Authority, and DEF sought the opportunity to discuss these, potentially with a view to refining, or at least better understanding, the legal basis of the claims made.

[20] Mx Hornsby-Geluk submitted that the essence of ABC's case appeared to be that nothing DEF could say or do in mediation would change her views as to the validity of the record of settlement. It would set a dangerous precedent to allow a party to avoid mediation simply by asserting a pre-determined view as to outcome. Such would be contrary to the statutory duty to attend mediation in good faith.

Prerequisites for a challenge

Was there a determination?

[21] It is well established that references to the term "determination" under the Act are to be interpreted broadly.[7] The way in which a document from the Authority is

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6 *Waugh v Commissioner of Police* [2004] 1 ERNZ 450 (EmpC) at [162].
7 *Abernethy v Dynea New Zealand Ltd*, above n 4, at [31]–[34].

described is not determinative.[8] It is the substance rather than the form of the document that is important.[9]

[22] In the present case, the Authority was asked to reconsider its initial view that mediation was appropriate. A telephone conference was convened. An opportunity for submissions was given. In ABC's affidavit evidence to the Court, she described the telephone hearing with the Member. From her description, it is apparent ABC and Mx Hornsby-Geluk each articulated their respective points of view and answered questions from the Member as to the pros and cons of mediation. The Authority then resolved the issue. Although the notice which was then issued did not spell out all the details as they had been discussed, it is clear the Authority received submissions, considered them, and issued a ruling against ABC's point of view.

[23] The document did not expressly refer to each of the requirements described in s 174E of the Act, as ABC noted. I consider that the provisions of the section are directory rather than mandatory. Parliament cannot have intended that a determination would cease to have effect by the absence of express reference to such elements.

[24] I am satisfied that it is appropriate to regard the minute as having resolved an important issue, and that it should accordingly be characterised as a determination.

A matter of procedure?

[25] Next is the issue as to whether a challenge is precluded by s 179(5) of the Act, because it is about the procedure the Authority has followed, is following or is intending to follow.

[26] Again, the general principles underpinning the subsection are not controversial. The primary one is that Authority proceedings should not be interrupted by challenges at a preliminary stage. Continuity increases the speedy and non-legalistic decision-making of the Authority, keeps costs down, and avoids delay.[10]

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8 *Morgan v Whanganui College Board of Trustees*, above n 3, at [15].

9 *Morgan v Whanganui College Board of Trustees,* above n 3, at [21]; and *MAS Zengrange (NZ) Ltd v HDT Ltd* [2013] NZEmpC 210, [2013] ERNZ 716 at [26]–[30].

10 *Johnstone v Kinetic Employment Ltd* [2019] NZEmpC 91, [2019] ERNZ 250 at [27].

Access to justice considerations are dealt with in the right of challenge or review once the Authority has made a final determination on the matter before it.[11]

[27] But it is also the case that the Court must have regard to the effect of determinations in light of other policy objectives. The Court can consider determinations that have an irreversible and substantive effect.[12] That said, it is not enough that an order has an impact on the parties, because any decision achieves that.[13] In the end, the question for the Court is whether the issue at stake is justiciable, or whether it is a matter of procedure.[14]

[28] ABC submitted that there would be an irreversible effect on her, if the direction to attend mediation were to stand. It imposed a legal obligation on her to attend mediation. She said non-compliance could result in compliance orders and/or penalties being made.[15] Such outcomes do apply potentially to a person who does not participate in Authority directed mediation.

[29] ABC also said that her right to have a hearing could be affected. I consider that prospect to be inherently unlikely, although it could affect the timing of an investigation, since the Authority must prioritise previously mediated matters: s 159A.

[30] A point not referred to by either party is that the Authority has "suspended" its investigation "in the meantime". This appears to be an informal indication that no further steps would be taken by the Authority until after mediation occurs. The Authority went on to say that the applicant should "advise the Authority, following mediation, whether the matter has been resolved or whether they wish the Authority to continue its investigation." The Authority did not refer to the consequences of non-attendance at mediation.

[31] Nor has a formal order of stay been made. Neither side argued that if ABC did not attend mediation, a permanent order of stay could be made which would prevent

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11 *H v A Ltd*, above n 5, at [23]; *MAS Zengrange (NZ) Ltd v HDT Ltd*, above n 9, at [41].
12 *H v A Ltd*, above n 5, at [26].
13 *Fletcher v Sharp Tudhope Lawyers* [2014] NZEmpC 182 at [18].
14 *Aarts v Barnados New Zealand* [2013] NZEmpC 85, [2013] ERNZ 201 at [69].
15 Employment Relations Act 2000, ss 137(1)(b), 139 and 140. Section 140 provides for a fine rather than a penalty.

her case ever being investigated. For the avoidance of doubt, it is likely that such an approach would be contrary to s 159A; priority may be affected, but the section does not mandate indefinite delay in an investigation or permanent stay of a proceeding. If Parliament had intended such a possibility, it would have said so. A decision to stay a case permanently, in light of a failure to attend mediation, would be one amenable to challenge as going beyond what Parliament intended. It would normally be contrary to justice for a litigant to be denied the right to pursue a claim on the basis of a mediation issue.[16]

[32] However, in my view, these hypothetical points cannot properly be considered at the stage where the Court is considering whether a direction is procedural or not.

[33] It would not be appropriate for the Court to resolve the s 179(5) issue on the basis that a party asserts that they do not intend to comply with a direction of the Court. Accordingly, I place these asserted outcomes to one side.

[34] The final point as to whether making such a direction would have irreversible and substantive effect, concerns health and safety issues. This topic was touched on at the hearing, but as clarified at that point, there was in fact no evidence that the process of mediation could give rise to health and safety outcomes which could be taken into account. When I raised this issue at the hearing, leave to produce such evidence was not sought.

[35] In my view, whilst such a factor might be relevant when determining whether a direction to mediation is procedural only, or is one having an irreversible and substantive effect because of the potential impact of the process on a party, on the basis of the evidence before the Court such a conclusion does not arise in the present case.

[36] I agree with Mx Hornsby-Geluk's submission that every decision or direction by the Authority is likely to have some sort of impact on the parties. However, a decision or direction concerning mediation must be weighed against the overall policy objectives of the Act, and in particular, the principle that Authority proceedings should

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[16] See *FMV v TZB* [2021] NZSC 102 at [135]–[136], where the Supreme Court commented on the undesirability of such a circumstance, albeit in a wholly different situation.

not be interrupted by challenges at the predetermination stage, unless there are good and proper reasons for doing so.

[37] To conclude otherwise could undermine the ability of the Authority to deliver speedy, effective and non-legalistic problem resolution services, and lead to the Court being clogged with unmeritorious challenges by parties attempting to put pressure on the other by increasing the costs of litigation and delaying the resolution of the matter.

[38] Standing back, I am satisfied that on this occasion the direction to attend mediation related to a decision made by the Authority about the procedure that it was following, and intending to follow, prior to the investigation of ABC's matter. Consequently, although the direction did amount to being a determination, it was not one which is challengeable.

The merits

[39] In case I am wrong in the foregoing conclusion, I now consider the merits of the issues raised by ABC. She brought her challenge on a de novo basis, which means that had the issue been amenable to challenge, the Court would have been required to reach its own conclusion as to whether a direction to mediate should be made. I do not, therefore, approach the issue by reference to the question of whether the Authority was wrong in law or in fact when it directed mediation.

The statutory framework

[40] The meaning of s 159 of the Act must be ascertained from its text, in light of its purpose and context.[17] Thus, the Act as a whole may be considered, as can relevant legislative history.

[41] Section 159 provides:

> **159 Duty of Authority to consider mediation**
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> (1) Where any matter comes before the Authority for determination, the Authority—

[17] Interpretation Act 1999, s 5; Legislation Act 2019, s 10(1); *Commerce Commission v Fonterra* [2007] NZSC 36, [2007] 3 NZLR 767 at [22]; *Four Midwives v Minister for Covid-19 Response* [2021] NZHC 3064 at [22]-[23].

(a) must, whether through a member or through an officer, first consider whether an attempt has been made to resolve the matter by the use of mediation; and

(b) must direct that mediation or further mediation, as the case may require, be used before the Authority investigates the matter, unless the Authority considers that the use of mediation or further mediation—

(i) will not contribute constructively to resolving the matter; or

(ii) will not, in all the circumstances, be in the public interest; or

(iii) will undermine the urgent or interim nature of the proceedings; or

(iv) will be otherwise impractical or inappropriate in the circumstances; and

(c) must, in the course of investigating any matter, consider from time to time, as the Authority thinks fit, whether to direct the parties to use mediation.

...

(2) Where the Authority gives a direction under subsection (1)(b) or subsection (1)(c), the parties must comply with the direction and attempt in good faith to reach an agreed settlement of their differences, and proceedings in relation to the request before the Authority are suspended until the parties have done so or the Authority otherwise directs (whichever first occurs).

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[42] The text of this provision plainly reinforces the desirability of resolving matters by mediation before the formal procedures of investigation take place, if possible. The Authority "must" consider whether there has been an attempt to resolve a matter through mediation; it "must" consider whether further mediation is required before hearing the matter; and it "must" during the investigation consider whether further mediation is appropriate. As already noted, the Authority is to prioritise matters where there has been an attempt to resolve the matter by mediation.[18]

[43] There are, however, certain defined exceptions.[19] It is the exceptions contained in s 159(1)(b)(i) and (iv) which require consideration in this case: would mediation "contribute constructively to resolving the matter", and would mediation be "otherwise impractical or inappropriate in the circumstances"?[20]

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18 Employment Relations Act 2000, s 159A.

19 Employment Relations Act 2000, ss 159AA and 159A.

20 The statement of claim also referred to the public interest ground, s 159(1)(b)(ii), but this exception was subsumed by the submissions made with regard to those based on s 159(1)(b)(i) and (iv) of the Employment Relations Act 2000.

[44] The first three exceptions all confirm that a threshold must be cleared. It is only if the Authority considers that the use of mediation or further mediation will not contribute constructively to resolving a matter or will not in all the circumstances be in the public interest; or will undermine the urgent or interim nature of the proceedings, that it may conclude that mediation should not be directed.[21]

[45] The final subsection must be construed in light of these factors, because it refers to mediation being "*otherwise* impractical or inappropriate in the circumstances" (emphasis added). Again a threshold must be cleared to persuade the Authority not to direct mediation.

[46] I turn now to the purpose of mediation and to the context of the section.

[47] Section 3 states that one of the objects of the Act is to promote mediation as the primary problem-solving mechanism other than for enforcing employment standards;[22] a related object is to reduce the need for judicial intervention.[23]

[48] Part 10 of the Act describes institutions under the Act, including mediation services. In its object provision it too emphasises that relationship problems are more likely to be successful if problems in those relationships are resolved by the parties themselves, in a prompt and flexible way, and that persons who provide mediation services can manage any mediation process actively.[24] An elaborate description of the requirements of mediation services follows.[25]

[49] Mediation continues to be important for the purposes of "any matter" that comes before the Court.[26] The Court has a mandatory obligation to direct mediation or further mediation, unless such will not contribute constructively to resolving the matter, would not be in the public interest, or would undermine the urgent or interim

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21 Employment Relations Act 2000, s 159(1)(b)(i)–159(1)(b)(iii).
22 Employment Relations Act 2000, s 3(a)(v). The enforcement of employment standards is not relevant to this matter: see Part 9A and s 159AA of the Act. There is therefore a carve-out of the general presumption concerning mediation in s 159AA.
23 Employment Relations Act 2000, s 3(a)(vi).
24 Employment Relations Act 2000, s 143(b)–143(da).
25 Employment Relations Act 2000, s 144–153.
26 Employment Relations Act 2000, s 188(2).

nature of the proceedings.[27] The Court's obligation is, as is the case in the Authority, an ongoing one.[28] Parliament plainly intended mediation would continue to play an important part in the resolution of employment relationship problems.

[50] Section 144 of the Act describes mediation services, which may include services that "assist persons to resolve, promptly and effectively, their employment relationship problems".

[51] The procedure which is to be adopted in relation to mediation services is addressed in s 147 of the Act. Parliament has described the requirements in some detail. It is evident that a trained mediator is required to provide services that are flexible in the circumstances, whether structured or unstructured. Information may be received, whether or not it would be admissible in judicial proceedings. Caucusing is expressly allowed for. The statute also provides for the possibility that a mediator can express his or her views either on the substance of the issues between the parties, or the process.

[52] As already noted, parties are directed to attend mediation in good faith to reach an agreed settlement of their differences. As observed recently by the Supreme Court, good faith means the parties must not mislead or deceive one another, but its effect is wider than that.[29] Parties must also be "active and constructive ... [and] ... among other things, responsive and communicative".[30]

[53] In the context of mediation, acting in good faith does not mean parties must settle at any cost, but common sense would suggest parties should not deceive or mislead; and should also, for example, be responsive and communicative.

[54] There are protections which may facilitate the process. First, confidentiality is provided for in s 148 of the Act. There have been many discussions as to the scope of the section. The leading case is *Just Hotel Ltd v Jesudhass* where the Court of Appeal remarked that the provision reflected "the desirability of encouraging the parties to a

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27 Employment Relations Act 2000, s 188(2)(a) and (b).
28 Employment Relations Act 2000, s 188(2)(c).
29 *FMV v TZB* [2021] NZSC 102 at [50].
30 Employment Relations Act 2000, s 4(1A)(b).

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".[31] That said, there may be public policy considerations in respect of, for example, serious criminal conduct.[32]

[55] Second, the privilege for settlement negotiations or mediation may apply. Section 57 of the Evidence Act 2006 provides for such a privilege. This section has required consideration from time to time. As Chief Judge Inglis explained in *Elisara v Allianz New Zealand Ltd*, the Employment Court is not bound by the Evidence Act 2006.[33] But it is bound to apply s 189(2) of the Act which provides that the Court may accept, admit, and call for such evidence and information as in equity and good conscience it thinks fit, whether strictly legal evidence or not.[34] It is in that context that consideration may be given to the desirability of the privilege being respected.

[56] Finally, I refer to the statutory history which reinforces the intention that mediation is to be regarded as a preferred option. The explanatory note to the Employment Relations Bill 2000 said this:[35]

> In terms of problem resolution in employment relationships, a strong emphasis is placed on the prior resolution of problems by the parties themselves, who will have access to a wide range of resources, through information provision, structured or unstructured mediation and other services to voluntarily resolve matters at an early stage. Mediation is the preferred option at all stages, although it is recognised that some problems will nevertheless eventually require specialist intervention, but this should not necessarily be constrained by the application of strict procedural requirements.
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> ...
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> The Bill embodies a general presumption that mediation will be the first port of call for dispute resolution before any decision-making forum is sought.

[57] In short, as both parties accepted in this case, mediation is an important cornerstone feature of the Act. Parliament intended that is would be used unless there is good reason not to. The threshold to which I referred earlier is one which needs to

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31 *Just Hotel Ltd v Jesudhass* [2007] NZCA 582, [2008] 2 NZLR 210, [2007] ERNZ 817 at [34].
32 At [41] and see *Te Ao v Chief Executive of the Department of Labour* [2008] ERNZ 311 (EmpC) at [67].
33 *Elisara v Allianz New Zealand Ltd* [2018] NZEmpC 100, [2018] ERNZ 298.
34 At [29].
35 Employment Relations Bill 2000, above n 2.

be squarely addressed. Not to do so would undermine the well-defined regime which Parliament has established for mediation. Usually mediation will be directed.

[58] At a practical level, it may well be the case that mediation will work only if both parties are agreed that this is an appropriate method. As Chief Judge Colgan put it in one case, a party "adamantly opposed to settlement can, to use the old truism, be led to water but cannot be compelled to drink".[36] He made the point that mediation is not a panacea, and Judges and Authority Members sometimes consider that a referral to mediation will not only not resolve a dispute, but by delaying its resolution may exacerbate it.

[59] However, this is a consideration which has to be assessed on a case-by-case basis. That is because there are also numerous cases where parties consider that mediation would be a waste of their time and energy but attendance, with the assistance of a specialist mediator, turns out to be of value.[37]

[60] The question in this case is which side of the line the circumstances lie, when considering the question of whether making a direction will not "contribute constructively to resolving the matter", or would be "otherwise inappropriate or impracticable", under s 159(1)(b)(i) and (iv) of the Act.

ABC's concerns

[61] A key concern raised by ABC related to what she described as "defendant's conduct". She referred to an aspect of her substantive case that the settlement agreement should be regarded as invalid, in whole or in part. She referred to what she described as unethical, and possibly illegal, use of without prejudice communications at the time of the events which led to a record of settlement being agreed.

[62] Whilst I do not in any way suggest that her concerns at to what occurred when the record of settlement was entered into will, or will not, be established, as the Court cannot comment on issues which have yet to be investigated, it can, at least, be said that the circumstances then were wholly different. The parties did not attend mediation

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36 *Pollett v Browns Real Estate Ltd* [2011] NZEmpC 116 at [28].
37 *WN v Auckland International Airport Ltd,* above n 1, at [18].

at the time. The communications that took place between them which led to their respective decisions to enter into a record of settlement did not involve a mediator, although a mediator did sign the document under s 149. No structured and facilitated dialogue occurred of the kind which would take place in mediation.

[63] Mx Hornsby-Geluk confirmed that those attending mediation for DEF would be herself and a partner of the firm. The partner filed an affidavit indicating the range of topics he thought could usefully be discussed at mediation, as already mentioned.[38] Again, I make no comment on the merits of those topics, other than to observe that it appears a constructive approach is intended. The contents of the affidavit are respectful. It indicated that even if the relationship problem could not be resolved outright, constructive discussion could occur as to the way in which the investigation might proceed.

[64] That significant issues of principle may arise from ABC's employment relationship problem, is not a reason for concluding that the case is inappropriate for mediation when there could, at least, be constructive dialogue as to the nature of the issues between the parties. That may, for example, refine the matters that require investigation.

[65] ABC also argued in effect that mediation is not helpful when an issue of principle arises – she is concerned that the confidential mediation process, the misuse of the without prejudice privilege, and the use of non-disparagement/confidentiality clauses can be abusive and contrary to access to justice considerations. She was concerned that if problems of this nature occurred, she would have no right to challenge what had occurred.

[66] Independent professional mediators have an obligation to ensure that dialogue between the parties remains appropriate. If a privilege is misused, the opposing party is entitled to identify this issue; it may result in the conclusion of the mediation. If a threatening or abusive stance is adopted, the same outcome may occur. In such instances, the process of caucusing might be important to mitigate these problems, or

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[38] At [19].

to allow the issues to be carefully discussed. Moreover, the presence of suitable support person or persons may be important.

[67] Experience suggests that, at the end of the day, the parties will either agree on one or more outcomes, or they will not. If they do not, then that is the end of mediation, and the case will return to the Authority for investigation.

[68] In short, the parties are entitled to expect that the process would be safe and constructive, since this is a realistic expectation of the good faith behaviour which is required by the statute.

[69] ABC submitted that mediation is not about the enforceability of a record of settlement and is not one of the services which the process is designed to address. However, here the issue is not one of enforceability, but validity. The problem falls within the broad description of mediation services set out in the Act. The employment relationship problem relates to, or arises out of, an employment relationship.[39] A mediator may provide services of a type that can address a variety of circumstances that assists persons to resolve, promptly and effectively, their employment relationship problems.[40]

[70] Finally, ABC said that she works with mediators from time to time on behalf of persons whom she represents. She said it could be inappropriate for her personal circumstances to be discussed before a mediator. As I noted at the hearing, the same issue arose when ABC placed her claim before the Authority, and now her challenge before the Court. ABC has elected to bring a matter to the employment jurisdiction and must accept that the institutions within that jurisdiction will carry out their statutory functions.

[71] Having considered the careful submissions ABC has made as to her concerns, I am unable to conclude that mediation would not contribute constructively to resolving the matter, or that it would be impractical or inappropriate for mediation to take place.

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39 Employment Relations Act 2000, s 5.
40 Employment Relations Act 2000, s 144(2).

[72] For these reasons, I would have dismissed ABC's challenge.

[73] For completeness, I refer to a final submission made by ABC, to the effect that the entire matter should be heard by the Court, because "by determining that the defendant's actions did not give rise to a situation which made it impracticable or inappropriate to attend mediation [the Authority] has effectively made a determination about the subject matter". This submission was made in reliance of comment of the full Court in *Abernethy v Dynea New Zealand Ltd*.[41]

[74] However, what the full Court determined in *Abernethy v Dynea New Zealand Ltd* is that where a party elects to challenge a preliminary determination of the Authority which has the effect of resolving the employment relationship before it, the entire relationship problem is then before the Court.

[75] In that particular case, the Court was concerned with a preliminary issue as to accord and satisfaction. The Court also recognised that the situation would be different where, for example, the Authority had determined a preliminary point in favour of a grievant and stated it would continue to investigate the substance of the employment relationship problem. It is this latter situation that would have applied here.

[76] Accordingly, I would not have accepted that ABC's case would remain in the Court, were her challenge to have succeeded.

Non-publication

[77] At a telephone directions conference held shortly after the challenge was filed, Mx Hornsby-Geluk applied orally for name suppression of the parties, stating that one of the terms of the record of settlement to which the matter related, was the fact that the settlement was to be private and confidential. To allow for the possibility of this argument being considered, I made an interim order of non-publication of names and identifying details of the parties.

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41 *Abernethy v Dynea New Zealand Ltd*, above n 4, at [34].

[78] Subsequently, DEF filed a formal application for non-publication of name and identifying details, which is opposed by ABC. It was considered at the hearing of the challenge.

[79] In support of DEF's application, Mx Hornsby-Geluk submitted that one of the provisions in the record of settlement was that its terms, and the fact settlement had been reached, were to be strictly confidential to the parties and their representatives, except as required by law. She argued that prior to the investigation as to the validity of the record of settlement, it would be premature to assume that the provision contained in the record of settlement should not be respected. To do otherwise, by allowing publication of the identities of the parties to the challenge, would mean that the terms in the record of settlement relating to confidentiality would be rendered nugatory.

[80] She submitted that in various authorities, courts have taken into account the fact that the normal principle of open justice would not apply either to settlements effected between the parties,[42] or where the Court had not resolved the issues between the parties.[43]

[81] ABC's position was, first, that she would have no objection to certain terms of settlement being the subject of a non-publication order but not the terms as to confidentiality and non-disparagement. However, such an approach would not address the fact that the parties chose to agree that these terms would be included in the record of settlement, which at this stage must be regarded as valid.

[82] ABC also submitted that in exercising the Court's discretion to make a non-publication order, it would be necessary to acknowledge and address the inherent inequality of power between the parties, noting that as the weaker party, she does not seek non-publication. She argued that this is a fact that the Court should respect. She also submitted that when exercising its discretion, the Court should consider whether publication would be inconsistent with the obligations to which DEF should be held

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42 *Chief Executive of the Department of the Prime Minister and Cabinet v Sisson-Stretch* EmpC Wellington WC 20/06, 25 October 2006 at [11].

43 *Ryan v Auckland District Health Board*, HC Auckland CIV 2007-404-006177, 5 December 2008 at [14], [17] and [20].

under the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008.

[83] I have concluded that it is not appropriate for these issues to be explored in relation to non-publication issues until the underlying problem between the parties has been investigated. An aspect of that problem is whether the apparent protections the parties agreed to are valid. Until that point is reached, the status quo, that is, the last settled position between the parties, should be maintained.[44] It is premature to consider the discretionary points raised by ABC.

[84] At the point of considering whether a permanent order should be made, the issue as to non-publication may be somewhat complex. The Court does have power to grant non-publication of name under cl 12 of sch 3 of the Act. A party cannot contract out of the Act: s 238. However, where there is a valid s 149 agreement, the terms are final and binding on, and enforceable by, the parties, and no party may seek to bring those terms before the Authority or the Court. The issue may then be which provision of the Act should take precedence: cl 12, sch 3 of the Act which permits the exercise of a discretion with regard to non-publication, or the provisions of s 149 stating that the terms are final, binding and enforceable? The issues raised by ABC and referred to previously may also fall for consideration at that stage.[45]

[85] It is not appropriate to take any step which would pre-judge any of these issues at this very early stage of the proceedings. The justice of the case is best met by allowing the interim order, which the Court has already made, to continue.

[86] I reserve leave to either party to apply on reasonable notice for any modification of that interim order.

Result

[87] The direction to mediate was contained in a determination, but as it related to a matter of procedure, a challenge is statute-barred. Alternatively, if the challenge

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44 *Savage v Wai Shing Ltd* [2019] NZEmpC 141, [2019] ERNZ 370 at [32].
45 At [81].

were to be regarded as justiciable, I would not have been persuaded that it would be either impracticable or inappropriate to make a direction that the parties mediate.

[88] I discharge the order of stay of the direction to mediate. The Authority's direction stands.

[89] The interim order as to non-publication of name and identifying details of the parties continue until further order of the Court.

[90] I reserve costs. The parties should discuss these in the first instance. My provisional view is that Category 2B of the Court's Guideline Scale as to Costs should apply.[46] Any necessary application is to be filed within 21 days with a response given 21 days thereafter.

B A Corkill
Judge

Judgment signed at 12.10 pm on 25 November 2021

[46] "Employment Court of New Zealand Practice Directions" <www.employmentcourt.govt.nz> at No 16.