

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2019] NZERA 126
3038094

BETWEEN	FIRE CONTROL SERVICES LIMITED Applicant
AND	CHERRY BANNON Respondent

Member of Authority:	Rachel Larmer
Representatives:	Jeremy Lynch, counsel for the Applicant Allan Goldstone, counsel for the Respondent
Investigation Meeting:	On the papers
Submissions and Other Information Received:	16 January 2019 from the Respondent 21 January 2019 from the Applicant 25 January 2019 from the Respondent
Date of Determination:	06 March 2019

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Fire Control Services Limited (Fire Control) and Ms Bannon entered into a settlement agreement which was certified by a mediator from Mediation Services under s 149 of the Employment Relations Act 2000 (the Act) (“the settlement agreement”).

[2] The settlement agreement contained a non-disparagement clause.

[3] Fire Control claims that Ms Bannon breached that non-disparagement clause by providing a written statement to a third party (former employee of Fire Control’s) to use for that third party’s mediation with Fire Control.

[4] Fire Control seeks:

- (a) A compliance order directing Ms Bannon to comply with the terms of the certified settlement;
- (b) A penalty of \$10,000 be imposed on Ms Bannon for breaching the certified settlement;
- (c) Costs.

[5] Ms Bannon denies Fire Control's claims.

[6] Ms Bannon claims that the written statement she provided to the third party for that third party's mediation with Fire Control did not breach the certified settlement.

[7] Alternatively, Ms Bannon claims that if her written statement was disparaging then it was a statement that was provided solely for mediation, which was being conducted by a mediator from the Ministry of Business Innovation and Employment, so the contents of the disputed written statement are inadmissible in these proceedings.

Issues

[8] The following issues are to be determined:

- (a) Is the written statement Ms Bannon provided to a third party, which was used by that third party in their mediation with Fire Control admissible in these proceedings?
- (b) If so, was the statement provided by Ms Bannon to the third party disparaging of Fire Control?
- (c) If Ms Bannon breached the certified settlement, should a penalty be imposed on her?
- (d) What, if any, costs should be awarded?

Is Ms Bannon's written statement to the third party to use at their mediation admissible in these proceedings?

[9] Section 148 of the Act provides that, subject to the consent of the parties, the person providing mediation services (the mediator) and the parties to the mediation must keep matters relating to the provision of the mediation services confidential.

[10] In particular, no statement, admission or document created or made for the purposes of the mediation or information disclosed orally in the course of the mediation is admissible in the Authority or higher courts.

[11] The absolute confidentiality afforded to mediation appears to have been weakened since the Court of Appeal's decision in *Just Hotel Limited v Jesudhass* which contained obiter that public policy considerations could require s 148 of the Act to be interpreted in a way that allowed evidence of serious criminal conduct which occurred during a mediation being held to be admissible.¹

[12] However, the Court of Appeal did not decide that appeal on that basis, and instead held that s 148(1) of the Act should be construed as applying to all statements or submissions made at mediation, unless they came into existence independently of mediation.²

[13] In *Te Ao v Chief Executive of the Department of Labour* the Employment Court observed that it was unlikely that the only circumstances in which public policy might allow the mediation confidentiality provided for in s 148 of the Act to be overridden would be in the case of a serious criminal offence occurring during the provision of mediation services.³

[14] The Court in *Te Ao* held that a high standard was required before the confidentiality in s 148 of the Act could be departed from. The Court observed that "*the grounds must be compelling and the departure from the requirement must be no more than is necessary to right any manifest injustice that might otherwise occur*".⁴

[15] *Te Ao* involved allegations that a mediator providing mediation services had made comments about one party's sexual orientation during the mediation. At issue was whether or not evidence of what had occurred during mediation was admissible.

[16] The Court held that what the mediator was alleged to have said during mediation would not have been done for the purpose of the mediation; being the resolution of the parties' employment relation problems. The Court therefore held that the alleged statement by the mediator was not subject to the prohibition in 148(2) of the Act, so was admissible.⁵

¹ *Just Hotel Limited v Jesudhass* [2007] NZCA 582.

² Above n1, at [40]-[44].

³ *Te Ao v Chief Executive of the Department of Labour* [2008] ERNZ 311

⁴ Above n3, at [43].

⁵ Above n3, at [60].

[17] Alternatively, the Court concluded that even if it was wrong about that, then a strict literal interpretation of s 148 of the Act would still result in a “*public policy waiver*” of statutory confidentiality, in accordance with the Court of Appeal’s obiter in *Just Hotel Limited*.⁶

[18] The Employment Court also reviewed the relevant case law regarding mediation confidentiality in *Rose v Order of St John*, which involved claims by an employee that her employer had declined to discuss her bullying allegations during mediation and had instead focused on a review of her job performance, despite allegedly having promised the employee that her concerns about bullying would be addressed in mediation.⁷

[19] The employer sought an order that the employee’s evidence was inadmissible under s 148 of the Act, on the grounds that it prohibited disclosure of the subject matter and content of the mediation.

[20] The Employment Court distilled the relevant principles relating to mediation confidentiality from the Court of Appeal’s decision in *Just Hotel* and the Employment Court’s decision in *Te Ao* and stated⁸:

All communications for mediation “for the purposes of the mediation” attract the statutory confidentiality except possibly where public policy dictates otherwise. Documents which are prepared for use in, or connection with, a mediation come within the ambit of s 148(1) as do statements and submissions made orally at the mediation or a record thereof. Only documents which come into existence independently in mediation are excluded from this confidentiality. The important distinction is that documents or other communications that exist independently of mediation may be admissible or discoverable even if they were referred to or even had their genesis in mediation.

[21] In *Rose* the employee’s intended evidence related to the important question under s 103(A) of the Act regarding how the employer treated the employee in terms of the requirements of the statutory justification test. The Court concluded that allowing for public policy exceptions, s 148 did not exclude evidence about the general subject matter of the mediation as inadmissible.⁹

⁶ Above n5, at [67].

⁷ *Rose v Order of St John* [2010] NZEmpC 163

⁸ Above n7, [9]

⁹ Above n7, at [25] and [26].

[22] In *Hammon v Coromandel Independent Living Trust* the employee sought to introduce evidence that she alleged showed the employer had tried to blackmail her to resign during mediation.¹⁰ The Employment Court accepted that the *Just Hotel* public policy exception should only be used:¹¹

[...] in the clearest cases and where it has the most important consequences for the parties to the litigation in the Authority or Employment Court if the evidence was to be excluded.

[23] The Court held that what was said in mediation had no direct bearing on the employee's personal grievance so considered there was a real question as to the relevance of the disputed evidence.

[24] The Court noted that the employee's constructive dismissal claim in *Hammon* was not a result of the conduct that allegedly occurred during mediation. The employee's evidence was that she had found her employment relationship an impossible situation and none of her evidence about the constructive dismissal related to the subject matter of the threat allegedly made during mediation.

[25] The Court in *Hammon* held that the s 148 of the Act mediation confidentiality remained in place.

[26] In *George v Auckland Council* the employee alleged that during mediation the employer had threatened to start further legal proceedings against her unless she withdrew her personal grievance.¹²

[27] The Employment Court in *George* dismissed the employee's argument that because the threat was the result of a pre-prepared statement, it qualified under s 148(6) of the Act as having been independently created and therefore was admissible.

[28] The Court dismissed that argument, stating:¹³

While the creation of a document long before proceedings were initiated can be safely said to be independent of the mediation process, a person's thoughts

¹⁰ *Hammon v Coromandel Independent Living Trust* [2013] NZEmpC 56.

¹¹ Above n10, at [41].

¹² *George v Auckland Council* [2013] NZEmpC 76.

¹³ Above n12, at [49].

about how the document might be used at a forthcoming scheduled mediation would not be independent of the mediation process.

It is notable that s 148(6)(a) uses the phrase “the mediation process” rather than, for example, the phrase “the mediation” which is the term used in s 148(1) of the Act. The mediation process includes the process of planning for a forthcoming particular mediation, including what will or will not be said or done at it.

[29] The Court in *George* held that the threat was unlikely to amount to blackmail justifying the public policy exception. Furthermore, the statement was connected to the purpose of the mediation, being the resolution of the personal grievance.

[30] The Court rejected an argument that ruling such statements inadmissible would allow parties to intimidate others, saying that mediators should be able to control the process and how the parties conduct themselves during mediations.

[31] The Court made the following observations about what may constitute a public policy exception:¹⁴

It is unhelpful to categorise arguable exceptions to s 148 as constituting serious criminal offending alone. Although the commission of a serious criminal offence during mediation may provide such an exception, so too might other sufficiently egregious and reprehensible conduct by a party.

[32] In *McConnell v Board of Trustees of Mt Roskill Grammar School* the employee challenged the Authority’s finding that certain paragraphs in briefs of evidence filed in advance of an investigation meeting indirectly referred to discussions which had occurred at mediation, so were therefore confidential and inadmissible in accordance with s 148 of the Act.¹⁵

[33] The disputed evidence detailed the discussion between the parties’ representatives about the position the defendant might take at a scheduled mediation meeting. The proposed evidence concluded with the assertion “*As matters transpired, that was exactly what happened at the mediation*”.

[34] The Employment Court in *McConnell* held that the Authority’s ruling on admissibility of that evidence related to the way in which the Authority had decided to conduct its

¹⁴ Above n12, at [23].

¹⁵ *McConnel v Board of Trustees of Mt Roskill* [2013] NZEmpC 150.

investigation, so was procedural in terms of s 179(5) of the Act and therefore was not able to be the subject of a challenge.¹⁶

[35] The Court then discussed the implications of s 148 of the Act in dicta and stated that even if jurisdiction existed to hear the challenge, the Court would not have found in favour of the employee.¹⁷

[36] The Court in *McConnell* noted, citing *Just Hotel*, that the underlying policy objectives of s 148 are well known, namely to encourage parties to mediation to speak freely and frankly and safe in the knowledge that their words cannot be used against them in subsequent litigation if the dispute does not prove capable of settlement.¹⁸

[37] The discussions that the employee sought to admit were inextricably linked to mediation, and compromised statements for that purpose. The Court held that the protection afforded by s 148 cannot be limited to exclude pre-mediation communications. If that were so, documentation produced by the parties for the purposes of pending mediated discussions would not be protected under s 148 which would be inconsistent with that section's underlying purpose.¹⁹

[38] The Court noted that the position is less clear in situations preceding an application for mediation being made, but that was not an issue in the *McConnell* case.

[39] The Court agreed with the Authority that the circumstances of the case were distinguishable from *Rose* because the *McConnell* matter focused on the response given by a party during the course of mediation and not the subject matter of the mediation.²⁰

[40] The Court in *McConnell* held that reference to alleged oral disclosures during mediation was squarely within the protected category of communications referred to in *Just Hotel*.²¹

[41] In *Rodkiss v Carter Holt Harvey Limited (No 2)* the Employment Court held that the employee's advice to the mediator that he was resigning was not a negotiation ploy and that

¹⁶ Above n15, at [50].

¹⁷ Above n15, at [61].

¹⁸ Above n15, at [53].

¹⁹ Above n15, at [60].

²⁰ Above n15, at [62].

²¹ Above n15, at [65].

by the time the resignation was proffered the employee did not want to mediate any further. The mediator passed that information to the employer and the employee later sought to have that information ruled inadmissible under s 148 of the Act.²²

[42] The Employment Court held that the mediator had been required to convey the resignation information and that in doing so was not conveying information for the purposes of mediation. The Court held that what happened was independent of the mediation, so the evidence of the employee's resignation was admissible.²³

[43] In *Watson v Capital & Coast District Health Board* the Authority directed the parties to mediation to discuss arrangements for reinstatement. Reinstatement was not agreed and the employer terminated the employment on the basis of incompatibility and that the necessary trust and confidence inherent in the employment relationship was absent.²⁴

[44] The employer claimed that because the parties had never entered the same room while attending mediation, mediation had never commenced and that was relevant to the employer's decision to dismiss.

[45] The Employment Court was required to determine as a preliminary issue whether the action or inaction in mediation was admissible. The Court confirmed its statements in *Rose* that only documents or other communications that exist independently of mediation may be discoverable and that a purposive interpretation of s 148 is appropriate.²⁵

[46] Prima facie, s 148 of the Act does not necessarily preclude the giving of evidence as to actions (or inactions) of a participant in mediation. However, the Court held that evidence such as the location of the parties at mediation cannot be considered in isolation. In order to provide the necessary context, it may be necessary to refer to statements, admissions, documents, other information that is made or disclosed for the purposes of the mediation in which case such evidence would not be admissible.²⁶

[47] In *Tulloch v Hayes Specialist Recruitment (Australia) Pty Ltd* the Employment Court was required to determine as a preliminary issue whether an email that the employee alleged

²² *Rodkiss v Carter Holt Harvey Limited (No 2)* [2014] NZEmpC 77.

²³ Above n22, at [16], [18], [19] and [20].

²⁴ *Watson v Capital & Coast District Health Board* [2016] NZEmpC 107.

²⁵ Above n24, at [18]-[19].

²⁶ Above n24, at [23].

was sent in the context of and as part of “*the continuum of the mediation*” was admissible.²⁷ The Court held that the essential issue was whether the email, and subsequent discussions between the parties, occurred in the course of mediation.²⁸

[48] The Court held that the email was not inadmissible because it referred to events which occurred after and outside of the mediation process, it related to issues that did not involve resolving a personal grievance, and there was no evidence that obtaining further information would be confidential.²⁹

[49] The Employment Court in *Elisara v Allianz (New Zealand) Ltd*, in determining a preliminary issue relating to the disclosure of certain categories of documents, considered the confidentiality provisions of s 148 of the Act.³⁰

[50] The Court held that the confidentiality afforded by s 148 does not apply to the terms of settlement. That was reflected in the fact that the final certified settlement is a result of the mediation, it is a record of the mediation being completed and not a document made for the purposes of mediation.

[51] However, the Court held that documentation relating to the settlement negotiations that took place at mediation that was provided to the parties under the Act was covered by the confidentiality requirements of s 148(1) of the Act, and was therefore inadmissible under s 148(3) of the Act.³¹

[52] After reviewing the applicable case law the Authority finds on the balance of probabilities that Ms Bannon created the disputed written statement for the purposes of mediation. Her written statement contained information that Ms Bannon intended the third party to use during mediation, and which the third party did in fact use during mediation.

[53] There was no evidence before the Authority that Ms Bannon’s written statement had existed independently to the third party’s mediation.

[54] Although it was created prior to the actual mediation occurring between Fire Control and the third party, Ms Bannon’s creation of the written statement was nevertheless part of

²⁷ *Watson v Capital & Coast District Health Board* [2017] NZEmpC 26.

²⁸ Above n27, at [27].

²⁹ Above n27, at [28].

³⁰ *Elisara v Allianz (New Zealand) Ltd* [2018] NZEmpC 100.

³¹ Above n30, at [39].

the preliminary preparation that the third party was doing for the mediation, in advance of the actual mediation occurring.

[55] The Authority considers that if Ms Bannon had used the disputed written statement for purposes other than as a document produced solely in preparation for the third party's mediation, for example, to disclose to others who were not involved in the mediation, then the confidentiality in s 148 would not apply to that other use.

[56] However that was not the case here. Ms Bannon prepared the disputed written statement for use at mediation that was being conducted by a mediator from the Ministry of Business Innovation and Employment's Mediation Services. It was used solely at the mediation. There is no evidence that the disputed written statement was ever used outside of mediation.

[57] Accordingly, Ms Bannon was successful in claiming that her disputed written statement, which gave rise to Fire Control's breach of certified settlement allegations, was inadmissible.

[58] Having declared Ms Bannon's statement inadmissible, that leaves Fire Control in a position where it is unable to provide any evidence that is not protected by the mediation confidentiality in s 148 of the Act in support of its claim that Ms Bannon has breached her obligations under her certified settlement with Fire Control.

[59] Accordingly, on that basis, Fire Control is unable to discharge the onus of establishing on the balance of probabilities that Ms Bannon has breached her certified settlement, so its claim does not succeed.

[60] However, Ms Bannon is clearly on notice that if she disparages Fire Control outside the confines of a mediation process, in terms of the protections that are provided under s 148 of the Act then she will be at risk of penalties for breaching a certified settlement. She is reminded to fully comply with her obligations under her own certified settlement.

What, if any, costs should be awarded?

[61] Ms Bannon as the successful party is entitled to a contribution towards her costs. Parties are encouraged to resolve costs by agreement.

[62] If that is not possible then Ms Bannon has seven days from the date of this determination within which to file a costs application, which must provide proof of the actual costs incurred.

[63] Fire Control then has seven days within which to file its response with Ms Bannon having a further three working days if required within which to file any reply cost submissions.

[64] Any departure from this costs timetable requires the prior written approval of the Authority.

[65] The parties are invited to provide submissions on:

- (a) How much pro-rated time costs should be assessed on;
- (b) Factors that should warrant adjustments being made to the Authority's usual notional daily tariff;
- (c) Comparable Authority costs cases;
- (d) Any other relevant costs considerations.

Rachel Larmer
Member of the Employment Relations Authority