Employment Court of New Zealand

George v Auckland Council [2013] NZEmpC 76 (7 May 2013)

Last Updated: 23 May 2013

IN THE EMPLOYMENT COURT AUCKLAND

[2013] NZEmpC 76

ARC 91/10

IN THE MATTER OF proceedings removed from the

Employment Relations Authority

AND IN THE MATTER OF an application to strike out evidence and pleadings

BETWEEN LAURA JANE GEORGE Plaintiff

AND AUCKLAND COUNCIL Defendant

ARC 124/10

IN THE MATTER OF proceedings removed from the

Employment Relations Authority

AND IN THE MATTER OF an application to strike out evidence and pleadings

BETWEEN AUCKLAND COUNCIL Plaintiff

AND LAURA JANE GEORGE Defendant

Hearing: By memoranda of submissions filed on 1, 2, 3 and 6 May 2013

Appearances: Tony Drake, counsel for Laura Jane George

Ian Gault and Elizabeth Coats, counsel for Auckland Council

Judgment: 7 May 2013

INTERLOCUTORY JUDGMENT OF CHIEF JUDGE G L COLGAN

LAURA JANE GEORGE V AUCKLAND COUNCIL NZEmpC AK [2013] NZEmpC 76 [7 May 2013]

[1] Auckland Council (the Council) applies to strike out as inadmissible in evidence an account by Laura George of what was said in mediation which attempted to settle her personal grievance that she had been dismissed unjustifiably by the Auckland Regional Council (ARC).[1] The employer also asks the Court to direct that two expert witnesses called by Ms George not repeat or otherwise refer to that evidence as background material in their briefs of evidence.

[2] The Council also asks for an order striking out para 57 of Ms George's amended statement of defence filed on 1 October 2012 in the proceedings under ARC 124/10 brought against her by the Council. That paragraph pleads:

The accusation that the defendant had acted in breach of her employment agreement, as referred to in the paragraph above, was first made by the plaintiff, by its solicitor, at a mediation conference held on 26 April 2010, at which time the plaintiff threatened to make the accusation against the defendant in a legal action unless the defendant agreed to withdraw and

abandon her personal grievance claims against the plaintiff.

[3] Paragraph 57 (set out above) is part of Ms George's defence to the Council's counterclaim for damages for breach of her employment contract. That defence seeks to dismiss the Council's claim against her, not only on its merits but because it is vexatious and an abuse of process. The assertions about what was said and done in mediation are also pleaded to support a claim for indemnity costs and expenses against the Council.

[4] I deal first with the proposed evidence of Ms George. It is set out at paras

83-85 (inclusive) and 102(b) of her brief of intended evidence-in-chief filed on

24 April 2013 for the hearing of this case which is scheduled to start on Monday

13 May 2013.

[5] There was a mediation held about six weeks after her personal grievance claim was filed with the Employment Relations Authority in 2010. Ms George claims that during the mediation the Council's solicitor "threatened" her that unless she agreed to withdraw and abandon her personal grievance claim, then the ARC would allege that she had acted in breach of her employment agreement and would

commence legal proceedings for damages against her accordingly.

[6] Ms George says that she now understands that this threat amounted to blackmail as defined in s 237 of the Crimes Act 1961. Her evidence goes on to say that, after reflecting on the position, she decided to continue with her claim for unjustified dismissal. Shortly before the hearing of her application for special leave to remove the proceedings to this Court, the ARC filed a statement of problem in the Employment Relations Authority alleging breach by Ms George of her employment agreement and claiming damages, costs, and a penalty. The passage in Ms George's intended evidence at para 102(b) says that one of the grounds for her belief that the claims against her had been brought "for tactical reasons" was "exactly what ARC threatened it would do during the mediation conference on 26 April 2010 if I did not withdraw and abandon my claim …".

[7] The references in the briefs of evidence of Ms George's two expert witnesses reiterate, in very summary and hearsay form, what is outlined in her evidence summarised above.

[8] Although the foregoing summarises what is in Ms George's brief of evidence-in-chief, she has now added to that by an affidavit sworn in opposition to this application, and so I will assume that the additional affidavit evidence about the events of the mediation will emerge at trial if it is allowed.

[9] Ms George says that until 26 April 2010 (the date of mediation) there had been no previous accusation or suggestion made to her by anyone from the ARC about the competence of her work or any breach of her employment agreement. Ms George says that at the same time as the advice from the solicitor, he gave her what she describes as a draft unsigned letter from an entity called Toovey Eaton & Macdonald Ltd dated in 2007 (about three years before the mediation) and indicated to her that the contents of this document were the basis for legal action that would be commenced unless she abandoned her personal grievance claims.

[10] Ms George says this document was not one prepared for the purpose of the mediation. She asserts that neither the document nor the threat made to her had any connection to any of the facts or issues involved in her personal grievance claims at the time of the mediation.

[11] Ms George says that, at the time, she was and has been a chartered accountant for about 16 years and was a member of the New Zealand Institute of Chartered Accountants (the Institute). No professional misconduct or incompetency complaint had ever been made to the Institute about her. Ms George believes that the solicitor's threat was to disclose information, suggesting that several years previously she had been negligent or incompetent and says she was very concerned about what that would do to her standing as a chartered accountant.

[12] Ms George's evidence is that at the time of the mediation in April 2010 she was actively searching for employment as an accountant and was very concerned that any allegation of incompetence or misconduct in that role would, if known to prospective employers, severely prejudice her chances of finding alternative employment.

[13] Ms George professes also to have been concerned about her membership of, and standing within, the Institute which has professional disciplinary processes to deal with chartered accountants against whom complaints are made. It must, however, be remembered that there is no suggestion that the threat was of a complaint to the Institute or to otherwise publicise the Council's concerns about her work performance as a chartered accountant. The threat was limited to a claim for damages for breach of the employment agreement that Ms George herself claimed had been breached by the ARC by dismissing her unjustifiably, and which has eventuated in the form of a counterclaim in those same proceedings.

[14] The question of the admissibility of this evidence (although not directly of the propriety of the allegations contained in the pleadings) is addressed by statute and has been informed by a number of judgments of this Court and the Court of

Appeal.

[15] Section 148 of the Employment Relations Act 2000 (the Act) provides materially as follows (the emphasis for the purposes of this case is mine):

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.

...

(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.*

...

[16] The Council, as a party to whom mediation services were provided, does not consent to a waiver of the substantive requirements of subs (1). Assuming, as I do for the purpose of determining admissibility, that Ms George's account of what was said to her in mediation by the solicitor is accurate, it is not an unusual occurrence. Although robust and even threatening, as Ms George categorises it, it was a statement made to her that unless she abandoned her claims against her former employer, it would bring its own proceedings against her for losses incurred by it as a result of her breach or breaches of her employment agreement, as has indeed transpired.

[17] As has been said before,[2] s 148 imposes apparently watertight obligations of confidentiality about statements made in mediation for the purposes of that mediation. That is to encourage parties to disclose mutually the strengths and weaknesses of their cases and to promote settlements after reflection on those strengths and weaknesses. In order to achieve settlements, it is important that attendees at mediation cannot reiterate these communications later in proceedings.

[18] This case has many similarities to, but also differs from, that decided recently by Judge Travis in *Hamon v Coromandel Living Trust*.[3] In *Hamon* the parties

attended mediation after personal grievance proceedings had been issued by the

former employee against her employer. The employee wished to give evidence about what was said by the employer's representative in mediation alleging, as in this case, that it amounted to blackmail. In *Hamon*, however, the Judge concluded that whatever may or may not have been said in mediation after grievance proceedings had been issued, this would not be relevant to the question of determining the justification for dismissal.

[19] In this case Ms George's defence to the Council's counterclaim may provide

a relevant context for what was said about bringing that counterclaim.

[20] The question comes down to a consideration of whether the communication in mediation can be said to provide a public policy exception to the strict prohibition under s 148 of the Act. This was addressed by the Court of Appeal in *Just Hotel Ltd v Jesudhass*.[4] The Court of Appeal (Wilson J) wrote as follows:

[41] We now return to the question of public policy considerations. As the Employment Court stated, it may be that such considerations require s 148 be interpreted so as to permit evidence of serious criminal conduct during a mediation to be called, including evidence from the mediator.

[42] An example given by Sinclair J in *Milner v Police* (1987) 2 FRNZ

693; [1987] NZHC 1346; (1987) 4 NZFLR 424 (an authority to which Mr Corkill referred in the course of his argument) provides a good illustration of why there should possibly be an exception for criminal conduct. The Judge said:

For example, if a counsellor has before him [or her] a husband and wife and in the course of the counselling session one party physically attacks another and causes either serious injury or death to the other party then surely it would be necessary to have the counsellor available to give evidence as to what actually occurred. [P 696; P 427]

[43] It is not, however, necessary for us to decide on this appeal whether there should be such an exception.

[21] Although the Evidence Act 2006 does not apply to proceedings in the Employment Relations Authority or the Employment Court, the principles and contents of that Act are nevertheless an important source of reference whenever the admissibility of evidence is challenged or is otherwise in question. The Evidence Act will inform and guide the exercise of the Court's equity and good conscience

jurisdiction under s 189(2) of the Act:[5]

[22] Section 57(1) of the Evidence Act provides:

(1) A person who is a 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.

[23] 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. Here, however, the plaintiff has chosen to categorise the conduct, said to justify an exception to the section's confidentiality, as a particular crime.

[24] Although it is not the role of this Court to determine criminal proceedings including whether there may be a prima facie case of blackmail disclosed or even to determine whether what is alleged to have been said by the Council's solicitor amounted to the crime of blackmail under s 237 of the Crimes Act, I have very serious doubts that it did so. Section 237 of the Crimes Act provides materially:

237 Blackmail

(1) Every one commits blackmail who threatens, expressly or by

implication, to make any accusation against any person (whether living or dead), to disclose something about any person (whether living or dead), or to cause serious damage to property or endanger the safety of any person with intent—

(a) to cause the person to whom the threat is made to act in accordance with the will of the person making the threat; and

(b) to obtain any benefit or to cause loss to any other person.

(2) Every one who acts in the manner described in subsection (1) is guilty of blackmail, even though that person believes that he or she

is entitled to the benefit or to cause the loss, unless the making of the

threat is, in the circumstances, a reasonable and proper means for effecting his or her purpose.

(3) In this section and in section 239, benefit means any benefit,

pecuniary advantage, privilege, property, service, or valuable consideration.

[25] Accepting at face value what Ms George's evidence will be, it is difficult to conclude that a threat to sue if a proceeding is not abandoned, is a threat under s 237(1):

... to disclose something about any person ... or to cause serious damage to property or endanger the safety of any person with intent ... to cause the person to whom the threat is made to act in accordance with the will of the person making the threat; and ... to obtain any benefit or to cause loss to any other person.

[26] Even accepting that the Council's solicitor was speaking on its behalf to Ms George, what she says the solicitor said to her was not a threat to disclose something about her or to cause serious damage to her property or to endanger her.

[27] The example provided by the judgment in *Milner v Police*,[6] and which the Court of Appeal in *Jesudhass* appears to have

concluded was a good illustration of a public policy exception for criminal misconduct, is of conduct that is far removed from the purpose of the mediation. It is difficult to categorise a serious physical assault resulting in serious injury or death as being within the ambit of the purposes of the mediation.

[28] Here, however, the alleged statement of the Council's solicitor has a connection to the proper purpose of the mediation, that is to seek to resolve Ms George's personal grievance. Although it was clearly not intended to resolve the personal grievance in the way that Ms George wished it to be, the statement by the solicitor nevertheless contained a proposal to settle the grievance by the grievant abandoning it in view of the prospect of a counterclaim being brought against her, perhaps for a substantially larger sum of money than she was either claiming or might reasonably have expected to have received to resolve her personal grievance.

[29] So the question is whether the threat falls within the ill or even non-defined category of exceptions on public policy grounds identified by the Court of Appeal in

Jesudhass.

The case for admission

[30] The impugned statements, said to have been made on behalf of the Council at mediation, falling prima facie within the prohibitions of s 148, it is for Ms George to establish that they constitute an exception to that section. In these circumstances it is necessary to examine and decide each of the several arguments put up by Mr Drake on behalf of Ms George as to why s 148 does not apply.

[31] The plaintiff 's first ground of opposition is that the statement made by the Council's solicitor was not created or made for the purpose of the mediation that was held on 26 April 2010. I disagree. Although the statement proposed a resolution of the proceedings that was not as Ms George would have wished, it was nevertheless made with a view to settling the litigation by seeking to persuade Ms George to discontinue her claim. It was made for the purpose of the mediation. Even although the document that accompanied the statement was probably not created for the purpose of the mediation, it has little significance on its own without the lawyer's accompanying statement.

[32] Second, Mr Drake submits that s 148 does not make inadmissible, evidence about a serious criminal offence that occurred during mediation. So put, that is not an accurate reflection of either the legislation or the case law interpreting it. Rather, the Courts have left open the possibility of a public policy exception to s 148, hypothetical examples of which may include the disclosure of evidence of the commission of a serious criminal offence during the mediation. However, I find that there is an insufficient case advanced for the defendant that the solicitor committed a serious criminal offence (blackmail) when he threatened, on behalf of the ARC, to issue proceedings for damages for breach of contract if Ms George persisted with her claims, that were also employment related, against the Council.

[33] Next, Mr Drake submitted that evidence of a threat of disclosure, made during mediation to cause the other party to act in accordance with the will of the threatening party so as to obtain a benefit or cause loss, is not admissible evidence in a proceeding concerning the same matter in the Employment Court. He submitted

such evidence should be held to be contrary to the objects and scheme of the Act and to public policy.

[34] I disagree. It is not a tenable application of the statutory constituents of the offence of blackmail under s 237 of the Crimes Act to say that a threat to issue civil proceedings in respect of the same matter that the parties are attempting to settle by mediation, is to make an accusation or disclose information about the other party to cause that other party to act in accordance with the will of the party making the threat so as to obtain a benefit or cause loss to the other party.

[35] Next, Ms George invokes the Court's equity and good conscience jurisdiction. That cannot, however, be used in a way that is contrary to the statute and cannot defeat the clear statutory expectations of absolute confidentiality under s 148.[7]

[36] Ms George says she will be prejudiced if the evidence is not able to be heard by the Court at the trial. That may be so but prejudice alone does not determine admissibility. A party prevented from calling admissible evidence will almost inevitably feel prejudiced by that inability and may in many cases be prejudiced in the sense that the party is not permitted to present the case that he or she wishes to present. That is, however, the consequence of very tightly drawn legislation and the very narrow exceptions to it for which Ms George does not qualify in this case.

[37] Although I accept that, unlike in *Hamon*, there may be relevance in what the solicitor said to Ms George at mediation, she can nevertheless call other evidence as to the timing of the Council's counterclaim and its inherent merits. Relevance is not, however, the test for an exception under s 148. While the statement must be relevant to be admissible, there are additional obligations on Ms George to establish a public policy exception to s 148 if the statement is to be admissible.

[38] Ms George argues that s 237(2) of the Crimes Act does not save the Council. This provides that the offence is committed even if the alleged blackmailer believes

that he or she is entitled to the benefit or to cause the loss referred to in subs (1),

unless the making of the threat is, in the circumstances, a reasonable and proper means of affecting his or her purpose.

[39] Mr Drake argues that if the Council and its officers and representatives had truly and genuinely believed that its claim for breach of contract against Ms George had a proper basis, it or they would have written by solicitors to Ms George's solicitors setting out that claim in a reasonable and proper way. Although that is one (and a conventional) way of bringing notice of a civil claim to a potential party, I do not accept that the making of a statement such as is alleged to have been made to Ms George in mediation, is not a reasonable and proper means of doing so in all the circumstances. I do not consider that subs (2) catches the Council's solicitor and precludes a defence to blackmail.

[40] Next, Ms George says that the real purpose of the Council's solicitor's statement to her in mediation was to cause her considerable embarrassment and/or to put her at risk of the commencement by the Institute of its own investigation of her, once disclosure of those allegations had been made. I do not agree. The evidence intended to be led is quite specific and does not include any reference to an intention to cause Ms George embarrassment or to have the matter brought to the attention of the Institute. I accept that embarrassment may have been the consequence of the making public of these allegations, as may have occurred subsequently by proceedings having been issued in this Court. Although it is conceivable that if the Council's allegations against Ms George had been brought to its attention, the Institute may have sought to commence its own investigation of her, it seems much more probable in that event that the Institute would await the outcome of this proceeding before considering whether to commence its own investigation.

[41] Mr Drake relies on the maintenance of the integrity of the scheme of the Act as a public policy reason for admitting evidence of the statement. I agree that one of the schemes of the legislation is to promote mediation as the primary problem solving mechanism in employment disputes. It must follow, however, that effective mediation will include elements of confidentiality and privilege such as are sought to be established and maintained by s 148. Mr Drake submitted, nevertheless, that if parties' representatives are permitted to act as the Council's solicitor is said to have

acted in this case at mediation, and with the impunity afforded by a completely watertight s 148, then the objectives of settling litigation would be defeated by such intimidatory tactics.

[42] I think this overstates the position. Whilst I agree that parties or their representatives should not intimidate or bully others in mediation, mediators have the control of the process including establishing the ground rules for conduct, not only the mediator's own ethical conduct but how parties and their representatives are to conduct themselves in mediation. It may be that mediators will need to consider the extent and strength of control that they exert over the conduct of parties and their representatives in mediation as a result of these and similar issues being raised in court cases. However I do not think that allowing such tactics to be examined subsequently in evidence will be the best way to ensure conciliatory conduct in mediations.

[43] There is also the difficult question, which it would be inappropriate to examine or expound upon in this case, of the way in which such messages can be conveyed. If this is an example of a frankly expressed or even brutal ultimatum, it is not difficult to imagine how the same message could be conveyed more subtly and softly, but as effectively. Where to draw the line would not be an easy exercise but would, in any event, be a matter for the mediators and for practitioners to consider and determine rather than for this Court to rule on in a vacuum.

[44] Mr Drake next argued that s 148(6) is applicable in the circumstances of this case and allows the admission of the statement and the document, which was referred to in it or at least accompanied it, in mediation. Section 148(6)(a) negates the other provisions of the section where any evidence which would be otherwise discoverable or admissible existed independently of the mediation process even although the evidence may have been presented in the course of the provision of mediation services. Mr Drake's argument was that the unsigned draft 2007 letter is evidence which is otherwise discoverable and/or admissible and which existed independently of the mediation process. I accept that submission, so far as it goes, for the purpose of this issue.

[45] From this, however, Mr Drake attempted to produce a subtle argument for the admission in evidence not only of the document, but of the statement or statements of the Council's solicitor which were said to have been made in conjunction with its production at the mediation.

[46] I consider that the draft unsigned 2007 letter (which I have not seen and about which there has been no argument as to relevance or admissibility) is probably both relevant and admissible in the substantive proceedings between these parties. It follows that there can be no objection to its admissibility simply because it was produced at the mediation.

[47] I do not agree, however, with Mr Drake's further submissions by which he seeks to have declared admissible the solicitor's associated statement or statements. Whilst it may be unobjectionable for evidence to be explored at the trial (for what it is worth) about the person who located the document from the ARC's files, or even perhaps that person's objective or intention in doing so, I would draw the line at the next steps that counsel seeks to take to introduce the impugned evidence in the statement.

[48] Mr Drake submitted that the Court ought to allow evidence of "the nature of the oral statement which that person had formulated prior to the mediation and intended to have made during the mediation at the point when the document was to be produced to the plaintiff during mediation ...". Not only is this speculative in the sense that there is no evidence at all about what may or may not have been in the mind or minds of the Council's representatives, but it would seem that any things done by parties in preparation for a mediation could not be said to have "existed independently of the mediation process" under subs (6)(a).

[49] Whilst the creation of a document long before proceedings were initiated can be said safely to be independent of the mediation process, a person's thoughts 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" in

s 148(1). I consider that 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.

[50] So, therefore, it will be likewise inadmissible and contrary to Mr Drake's submission that the final step of his argument will allow the statement to be admissible. To use counsel's words, that would have been to make admissible evidence about "whether the oral statement which had been formulated or prepared by the person before the mediation was then in fact made during the mediation in accordance with the objective or intention he had prior to the mediation ...".

[51] It is an ingenious but fundamentally flawed argument for the admissibility of something that Parliament clearly intended be inadmissible in all but very rare cases of extraordinary circumstances, of which this is not an example.

[52] Penultimately, Mr Drake advanced the argument that, by bringing the unsigned draft 2007 document to the mediation, the Council sought to defeat its objective of frank discussion as elaborated on by the Court of Appeal in *Jesudhass*, referring in particular to the judgment of the same Court in *Carter Holt Harvey*

Forests Ltd v Sunnex Logging Ltd.[8] Mr Drake's submission was that the Council's

purpose was not to conciliate or resolve the plaintiff's claim but to intimidate her

into submission and abandonment of it.

[53] Whilst that argument might apply to a threat or coercion or other similar tactic using extraneous material, the statement made was quite particular and related to the performance by Ms George of her employment agreement with the Council, the same relationship as forms the basis of her personal grievance. Whilst the Council's objective in making the statement was no doubt to seek to persuade Ms George to abandon her personal grievance, that was a legitimate outcome for which the employer could contend, and the information disclosed by the Council to that end was relevant and legitimate in view of the Council's pursuit of its counterclaim to

trial, as will occur shortly.

[54] It cannot be that the only legitimate objective of a mediation of a personal grievance is, as counsel argued, a compromise or settlement of a grievant's claim to the grievant's advantage even if that advantage may be less than the grievant had wished. An equally legitimate outcome of frank discussions conducted in good faith may be that a grievant will be persuaded to abandon the personal grievance claim when broader considerations of the advisability of its pursuit are reflected upon. That is, of course, the other side of the same coin by which grievants in mediation will seek to persuade employers to settle on terms that they might otherwise be unprepared to for extraneous reasons such as the publicity attaching to a trial, the uneconomic nature of going to trial, the grievant's impecuniosity when it comes to costs, and a variety of other litigation realities.

Decision

[55] The evidence proposed to be called by Ms George does not meet the threshold required to provide a public policy exception to the constraints of inadmissibility imposed by s 148 of the Act.

[56] For those reasons, the Council is entitled to the interlocutory orders it seeks as follows.

[57] The intended evidence-in-chief at paras 83-85 and 102(b) of the brief of evidence of Laura George filed on 19 April 2013, para 13(d) of the brief of evidence of Graeme Lynch filed on 19 April 2013, and para 19 of the brief of evidence of Anthony Weber filed on 19 April 2013, is inadmissible.

[58] It follows that references to any statements made at mediation in para 57 of the amended statement of defence to the statement of counterclaim dated 1 October

2012, are to be deleted from that pleading.

GL Colgan
Chief Judge

Judgment signed at 1 pm on Tuesday 7 May 2013

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[1] The Auckland Council is the successor to the former Auckland Regional Council.

[2] In *Shepherd v Glenview Electrical Services Ltd* [2004] NZEmpC 82; [2004] 2 ERNZ 118 and in subsequent cases.

[3] [2013] NZEmpC 56.

[4] [2007] NZCA 582, [2007] ERNZ 817.
[5] *Maritime Union of New Zealand Inc v TLNZ Ltd* [2007] ERNZ 593 at [14].

[6] [1987] NZHC 1346; (1987) 2 FRNZ 693; (1987) 4 NZFLR 424.

[7] See s 189(1).

[8] [2001] 3 NZLR 343; (209)15 PRNZ 379 (CA).
