IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH OFFICE

[2012] NZERA Christchurch 192
5325544

	BETWEEN	KERRI GRAY Applicant
	AND	MURRAYS VETERINARY CLINIC LIMITED Respondent

Member of Authority:	Helen Doyle
Representatives:	Benjamin Nevell, Counsel for Applicant John Farrow, Counsel for Respondent
Investigation Meeting:	Determined on the papers by consent of the parties
Submissions received:	Applicant: 1 August and 17 August 2012 Affidavit from Janie Grant Helena Kilkelly sworn at Dunedin 26 July 2012 Respondnet: 13 August 2012
Determination:	3 September 2012

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] My colleague, David Appleton, will hold a substantive investigation of this employment relationship problem in Dunedin commencing on 13 November 2012.

[2] He has asked that I determine a preliminary issue on the papers before the substantive investigation.

The Issue

[3] The issue for the Authority to determine is the admissibility of a letter dated 23 May 2011 from Mr Farrow to the applicant's previous counsel, Janie Kilkelly.

Submissions were received from Mr Nevell and Mr Farrow and an affidavit from Ms Kilkelly.

[4] The respondent says that the letter of 23 May 2011 is not admissible under s.148 (3) of the Employment Relations Act 2000 as it is a document created for the purposes of mediation.

[5] The applicant says that the letter existed independently of the mediation process and is admissible.

Was the letter of 23 March 2011 a document created for the purpose of mediation?

[6] Ms Kilkelly is a Dunedin barrister. In or about April 2011 she was instructed by a solicitor to represent the applicant. On behalf of the applicant she raised a personal grievance with the respondent company in a letter dated 23 April 2011. There was a suggestion in the letter that the parties should attend mediation if the remedies requested were not agreed to. Ms Kilkelly asked for a response within 21 days after receipt of the letter.

[7] Mr Farrow on behalf of the respondent wrote to Ms Kilkelly by letter dated 4 May 2011 and advised her that his client was willing to attend mediation with a preference that he represented it *given my historic involvement with matters germane to this dispute*. One of the issues he explained in his letter was that he was to be overseas on extended leave from 24 May until 2 July 2011. He wanted Ms Kilkelly to confirm that the applicant was agreeable to waiting for mediation until his return. Mr Farrow also said that it was his intention to provide Ms Kilkelly with a comprehensive response detailing the employer's perspective on matters raised in her correspondence and that he intended to provide that prior to his departure.

[8] The applicant agreed to wait for mediation until Mr Farrow's return. By 8 May 2011 a date was confirmed by the Mediation Service of Department of Labour for mediation on 8 July 2011.

[9] Mr Farrow sent his letter of 23 May 2011 to Ms Kilkelly. It was a long letter, almost six full pages. In paragraph 2 of the letter Mr Farrow confirmed that the matter was scheduled for mediation on Friday 8 July 2011. In paragraph 3 Mr Farrow said that the purpose of the letter *is to provide you with background from the Employer's perspective.*

[10] Mr Farrow then sets out the history of the employment relationship in his letter referring to various dates as he does so. Attached to the letter are relevant notes, minutes, letters, forms and emails and some earlier without prejudice correspondence between Mr Farrow and the applicant's previous counsel. Appropriately that correspondence has not been attached to the letter provided to the Authority.

[11] At the end of para.62 of the letter there is a heading **Substantive Response** and then a further 14 paragraphs. Although not accepted by Mr Farrow, I conclude that part of the 23 May letter provided a response to some of the matters raised in Ms Kilkelly's letter of 23 April 2011. In paragraph 70 Mr Farrow sets out an extract from Ms Kilkelly's letter and advises that its contents are not accepted. In paragraph 73 he states amongst other matters *your client's interpretation of events is not accepted.* The penultimate paragraph of the letter confirms the time and date of mediation. The final paragraph asks Ms Kilkelly to confirm whether the applicant is successful in her legal aid application. The letter is not marked without prejudice and for completeness does not contain an offer or concessions.

[12] There was a further email of Ms Kilkelly dated 2 July 2011 to Mr Farrow before the Authority. Ms Kilkelly in that email asks Mr Farrow if there is a settlement option short of mediation. She explains then in her email that she would not be doing her preparation for mediation until 6 July because she was busy. Ms Kilkelly then says – *At this point I have not even read your letter for mediation.*

Is the letter of 23 March 2011 admissible?

[13] Section 148 (1) provides:

> *(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.*

[14] Section 148 (6) provides *Nothing in this section –*

: *(a) prevents the discovery or affects the admissibility of any evidence (being evidence which is otherwise discoverable or admissible and which existed independently of the mediation process) merely because the evidence was presented in the course of the provision of mediation services;*

[15] The Court of Appeal in *Just Hotel Limited v Jesudhass* [2007] 2 NZLR 210, [2007] ERNZ 817 considered the construction and application of s 148(1) of the Employment Relations Act 2000. The Court of Appeal found that s 148(1) should be construed as applying to all documents prepared for use in or in connection with a mediation and to all statements or submissions made at a mediation (or a record therefore), unless they have come into existence independently of the mediation.

[16] I have read the submissions of counsel. They have assisted me in determining this matter. I do not intend to set them out in full and mean no disrespect in not doing so.

[17] Section 148(1) describes those who must keep confidential any statement or admission or document created or made for the purposes of mediation. These include a person to whom mediation services are provided, a mediator and representatives. In order for confidentiality to attach to the letter of 23 May 2011 and for it to be inadmissible it must have been created or made for the purposes of mediation. If it came into existence independently of the mediation process then it is admissible – s 148(6)(a).

[18] The mediation process involves more than simply the mediation itself. It can include statements made, and documents supplied, in the setting up of mediation as well as documents created for the purposes of mediation. In this case the letter of 23 May 2011 was sent some weeks before the mediation on 8 July 2012 although, after the date for mediation had been advised to counsel. Mr Farrow wanted the letter to be sent before he left for the overseas trip. It would not usually be the case that an employer's response to the raising of a personal grievance would be a document created for the purposes of mediation to which confidentiality in s 148(1) of the Act would apply.

[19] Mr Farrow submits that it is implicit from the letter of 23 May 2011 it is created for the purposes of the mediation and is not simply a response to the raising of a personal grievance as Mr Nevell says in his submission. It is not expressed in the letter itself that it is created for the purposes of mediation or is confidential.

[19] I have firstly considered whether it is clear from a reading of the letter of 23 May that its purpose was different to that set out by Mr Farrow in his letter of 4 May 2011 which was to be a comprehensive response detailing the employer's perspective on matters raised. The letter of 23 May 2011 does include some historical context from the respondent's perspective as it had been an ongoing issue with the applicant having other representatives before Ms Kilkelly. The letter also provides what could be seen as a substantive response to the raising of a personal grievance on behalf of the applicant in the letter of 23 April 2011. Little assistance is gleaned by an analysis of what was and what was not responded to in the letter. There was no mention in the letter itself that it was written for a different purpose to that intended on 4 May 2011 or that it was written for the purposes of mediation. It could fairly be described as a robust letter but that is not unusual in the employment area. I do not find from an objective consideration of the letter that it is implicit it is provided/ written for mediation purposes.

[20] Ms Kilkelly stated in her email sent to Mr Farrow on 2 July 2011 – *At this point I have not even read your letter for mediation.* Mr Farrow submits that this shows Ms Kilkelly knew the letter of 23 May 2011 was for mediation. Ms Kilkelly did not provide any further affidavit evidence in response to this. No criticism is

intended. In her affidavit she deposed to the fact that there was nothing about the letter of 23 May that gave her any reason in respect of it to consider privilege or confidentiality. She described the letter as usual and normal practise when a personal grievance is sent and that in the normal course of events letters like that are not subject to privilege. I would accept that is generally the situation and that being the case there would be an expectation that it is made clear on the face of such a letter it is written for mediation purposes.

[21] Ms Kilkelly's email has to be read as a whole. In the sentence immediately preceding the one relied on, Ms Kilkelly writes about a very busy schedule she has coming up and when she will be doing her preparation for the mediation. In that context it could mean that she had not had the time to read Mr Farrow's letter for mediation. It is an ambiguous sentence and limited weight can be placed on that email to establish that the letter of 23 May 2011 was prepared for the purpose of mediation and Ms Kilkelly knew about that.

[22] I do not find that the letter was created for the mediation purposes and it is not confidential by virtue of s 148 (1) of the Employment Relations Act 2000. It existed independently of the mediation process. The letter of 23 May 2011 is admissible subject to what I shall go on to say.

[23] Notwithstanding my finding about admissibility of the letter the following paragraphs of the letter should not be shown to Mr Appleton. Paragraphs 36 and 37 refer to an earlier mediation between the parties and should be blanked out. Paragraph 51 touches briefly on the nature of without prejudice discussions and should be blanked out. Paragraphs 52 and 53 refer to dates of other correspondence and letters following on from paragraph 51 and for completeness they should also be blanked out. The letter is to be returned to Mr Nevell who supplied the letter for my purposes to attend to this.

[24] I shall advise the support officer that Mr Appleton is not to be shown the letter of 23 May 2011 until the period for a challenge to this determination has expired and only then if no challenge had been filed.

[25] I reserve the issue of costs and no doubt these will be dealt with after determination of the substantive matter.

Helen Doyle
Member of the Employment Relations Authority