

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON OFFICE**

BETWEEN James Jesudhass (Applicant)

AND Just Hotel Limited (Respondent)

REPRESENTATIVES Bruce Corkill and Alan Cressey for Applicant
Matthew Gilkison for Respondent

MEMBER OF AUTHORITY P R Stapp

ON THE PAPERS 8 August and 23 August 2005

DATE OF DETERMINATION 9 September 2005

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] This application has been made on the grounds that there is an important question of law likely to arise in the matter other than incidentally that relates to the nature and scope of the confidentiality of mediation set out in section 148 of the Act. Furthermore it has been suggested that the matter is of such nature and urgency that it is in the public interest that it be removed.

[2] The application has been opposed by the respondent on the grounds that the issues are within the scope of the decision of *Shepherd v Glenview Electrical Services Limited* (unreported) Colgan G L 19 August 2004 AC 47/04.

[3] One of the allegations is that the applicant was dismissed during a mediation held on 18 May 2005. The respondent denies this claim and says that the applicant was dismissed by facsimile dated 18 May 2005 sent to the applicant on 20 May 2005.

[4] The issue likely to arise relates to an employee allegedly being dismissed at mediation. Alternatively, if it is found that the applicant's dismissal occurred immediately after mediation there may be issues about the employer's conduct and statements made at mediation that will give rise to questions about the admissibility of evidence.

[5] The issue would appear to come within the scope of *Shepherd*. However, Judge Colgan referred to the confidentiality of mediation and the admissibility of evidence being desirable but sections 148 (1) and (3) are clear absolute and draconian having the effect of disallowing any opportunity for statements made in mediation to be admissible. He stated that: *While I respectfully agree with the Court's approach in Crummer which both allowed for the maintenance of the integrity of mediation and, in rare and exceptional cases, to also set right injustices, Parliament has rejected that balanced approach and has opted for an absolute maintenance of mediation integrity at the expense of achieving justice, albeit in rare and exceptional cases*" [40 at page 11]. The power of the Court and Authority to permit the admissibility of evidence arising from mediation in rare and exceptional circumstances in the pursuit of justice has been removed.

[6] There are two issues that seem likely to give rise to an important question of law in the matter other than incidentally. First, how can it be established that there was in fact a dismissal if it occurred at mediation? Second, how does an employer justify its actions and steps if they were taken or occurred in mediation if the information and evidence is not admissible?

[7] No information has been provided that this matter is urgent and in the public interest.

[8] One ground for removal has been made out. There are no reasons apparent to me that would lead me to exercise my residual discretion against removal.

[9] Therefore, I determine that this matter should be removed in its entirety under section 178 (2) (a) of the Act.

[10] Costs are reserved.

P R Stapp
Member of the Authority