

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2019] NZERA 134
3024472

BETWEEN

CLEMENT BRIAN
LIVINGSTONE
Applicant

AND

DOWNER NEW ZEALAND
LIMITED
Respondent

Member of Authority: Vicki Campbell

Representatives: Applicant in Person
Anthony Russell for the Respondent

Investigation Meeting: On the papers

Determination: 7 March 2019

DETERMINATION OF THE AUTHORITY

A. The 16 October and 13 November 2017 emails are admissible.

Employment relationship problem

[1] I have been asked to determine a question of admissibility of two documents upon which the applicant wishes to rely to show he raised a personal grievance within the statutory 90 day period.

[2] The respondent resists the application on the grounds that it is protected by the confidentiality provisions of the Act relating to mediation.

[3] As permitted by s 174E of the Act this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and

specified orders made as a result. It has not recorded all evidence and submissions received.

2017 Mediation

[4] In September 2017 the parties were directed to attend mediation and to attempt to resolve matters raised in an earlier application between the same parties.

[5] In October the mediation service communicated with the parties about suitable mediation dates. On 16 October 2017 Mr Livingstone confirmed he was available to attend mediation on 21 November. In that same email, addressed to both Downer and the Mediation Service, Mr Livingstone advised that he wished to have two other matters addressed at mediation.

[6] Downer requested the mediation service have Mr Livingstone provide full details of his further claims otherwise Downer would attend mediation purely to respond to the matters lodged in the ERA.

[7] The mediation service advised Downer it could not provide advice and left it to Mr Livingstone to respond to Downer and asked Mr Livingstone to send a copy of the communication to the mediation service.

[8] On 13 November Mr Livingstone emailed Downer and the mediation service setting out fuller details of his issues including concerns he held about the termination of his employment.

Admissibility of the email trail

[9] Downer says the 16 October and 13 November emails are subject to confidentiality because they were created for the purpose of mediation.

[10] Section 148 of the Act governs confidentiality in the mediation process. In particular the section requires any person participating in the mediation process to maintain confidentiality of 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 except with the consent of the parties. No evidence is admissible if that information is required to be kept confidential under s 148 of the Act.

[11] Mr Livingstone's email on 16 October was addressed to Ms Garland an HR Business Partner for Downer and the mediation service. The purpose of the email was two-fold. First it confirms Mr Livingstone's availability for mediation on 21 November and secondly, it identifies two additional issues Mr Livingstone wanted to have addressed at mediation.

[12] The question for this determination is whether the emails were created "for the purpose" of mediation. The Court of Appeal considered this issue in *Just Hotel Ltd v Jesudhass* and confirmed that the offending document is protected unless it is created or made independently of mediation.¹ Documents created for use in or in connection with a mediation will come within the ambit of s 148(1).

[13] I am satisfied it is more likely than not that the purpose of Mr Livingstone's emails were to put Downer on notice that apart from the issues raised in his application to the Authority he wished to have two other matters discussed at mediation. While this is arguably "in connection with a mediation" I find it is likely the documents were created to be used in the wider context of matters he wished to have addressed including outside of mediation if matters did not resolve.

[14] In response to his 16 October email Downer correctly requested more information about his further claims and the mediation service correctly asked for a copy of his response, in all likelihood so that the Mediator would have full information to assist during the mediation process.

[15] The 16 October and 13 November emails are admissible.

Costs

[16] Costs are reserved to be dealt with once the substantive matters have been investigated and determined.

Vicki Campbell
Member of the Employment Relations Authority

¹ [2007] NZCA 582, [2008] 2 NZLR 210, [2007] ERNZ 817.