

*Under the Employment Relations Act 2000*

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH OFFICE**

**BETWEEN** Brian McGillivray (Applicant)  
**AND** Godfreys Bakery (Respondent)  
**REPRESENTATIVES** Jenny Guthrie, Counsel for Applicant  
Rachel Brazil, Counsel for Respondents  
**MEMBER OF AUTHORITY** James Crichton  
**SUBMISSIONS** 7 May 2007 (Applicant)  
2 May 2007 (Respondent)  
**DATE OF DETERMINATION** 14 May 2007

INTERIM DETERMINATION OF THE AUTHORITY

***Employment relationship problem***

[1] By statement of problem filed in the Authority on 15 January 2007, the applicant (Mr McGillivray) brought a claim for a personal grievance both on the grounds of an unjustified disadvantage and on the grounds of an unjustified constructive dismissal.

[2] A statement in reply was filed on 1 February 2007 which responded only to a part of the statement of problem. The statement in reply filed by the respondent (Godfreys Bakery) contended that two paragraphs of the statement of problem constituted a breach of s.148(1) of the Employment Relations Act 2000. This is the section which confers a privilege on matters and documents created *for the purposes of mediation*. It is contended that the two paragraphs in dispute in the statement of problem refer to matters raised in a mediation between the parties *for the purposes of mediation*.

[3] The matter came before the Authority by way of a telephone conference on 12 April 2007 at which there were timetabling orders made for the hearing of the claim for disadvantage by Mr McGillivray.

[4] In addition, the Authority directed that the parties' counsel were to make submissions in respect of the alleged breach of s.148 such that the Authority could consider those submissions and make an interim determination about whether the investigation meeting set down for Wednesday, 20 June 2007 was to be concerned only with issues pertaining to the alleged unjustified disadvantage or that matter together with the alleged constructive dismissal.

[5] The factual position may be briefly set out. Mr McGillivray was at the relevant time a baker employed by Godfreys Bakery. In his statement of problem, Mr McGillivray says that he had worked for Godfreys Bakery for *the best part of 20 years* but that in September 2005 the bakery had been sold to new owners.

[6] Mr McGillivray then records how the employment relationship commenced to deteriorate and on 9 October 2006, Mr McGillivray records that his counsel raised a personal grievance and sought mediation. That personal grievance was raised exclusively on the footing that there was an unjustified disadvantage claim on foot.

[7] The matter went to mediation and in the result, as part of the mediation process and indeed generated during the mediation process, Godfreys Bakery produced a list of matters which Mr McGillivray describes as *a list of expectations* of him.

[8] Mr McGillivray regarded this list as confrontational and designed to *make me look bad*. He regarded the list as evidence of the view that Godfreys Bakery wanted him to leave.

[9] The mediation took place on Friday, 17 November 2006 and Mr McGillivray felt that he was in an even worse position after the mediation than he had been before it. He could not see his doctor until first thing on the following Monday morning, 20 November 2006. His doctor gave him a medical certificate to excuse him from work. He went back to Godfreys Bakery, handed in his notice and his keys at the same time. He felt that he had no choice but to leave.

### ***The submissions***

[10] Godfreys Bakery argue that the two paragraphs in question in the statement of problem breach s.148 of the Employment Relations Act 2000 in that they refer to matters generated *for the purposes of mediation*.

[11] Mr McGillivray says that in agreeing to mediation, Godfreys Bakery *did not raise any specific matters in response*. However, it is clear that, in the course of the mediation, Godfreys Bakery prepared the list which Mr McGillivray complains about.

[12] I am absolutely satisfied that the list in question was prepared in the course of mediation. It is plain from the submissions of both counsel that the list complained about by Mr McGillivray was actually prepared during the mediation.

[13] The fact that Mr McGillivray says that Godfreys Bakery had no specific matters to raise in respect of the mediation is neither here nor there.

[14] I accept the submission of Godfreys Bakery to the effect that Godfreys Bakery participated in mediation for the purposes of making a genuine contribution to a continuing employment relationship. It was not, it seems, a situation where Godfreys Bakery participated in the mediation simply because they felt constrained to. They had a continuing employment relationship with Mr McGillivray, they sought to resolve the difficulties that evidently existed in that relationship, and they used the mediation process as a tool to address the issues in the relationship. The list that Mr McGillivray complains about comes, I find, in that context.

[15] While I accept Mr McGillivray's distress at the pressure that he felt under as a consequence of the change of ownership of Godfreys Bakery, it is frankly unreasonable of him to expect that the mediation process should be a completely one-sided affair dealing only with his issues in respect of his employment and not his employer's issues as well. Mediation is a bilateral process and parties must assume that their participation in the mediation process is going to be matched by equal and active participation from the other side. The fact that one party initiates mediation does not, of itself, give that party any particular rights to, as it were, *drive* the process.

***Determination***

[16] I find that Mr McGillivray is not entitled to plead paras.(p) and (q) of the statement of problem as those two paragraphs traversed matters which were confidential by reason of s.148 of the Employment Relations Act 2000 and therefore are not matters on which Mr McGillivray may rely to advance his personal grievance claim of constructive dismissal.

[17] It follows that I direct that the matter now set down for investigation meeting on 20 June 2007 between these parties will proceed exclusively on the footing that the claim is one of unjustified disadvantage unless Mr McGillivray is capable of reformatting his constructive dismissal claim without recourse to the material which I find is unable to be disclosed and thus relied upon for the purposes of an open hearing.

[18] In the event that Mr McGillivray does choose to attempt to reformat his claim for constructive dismissal, Mr McGillivray's counsel is directed to, as soon as practicable, contact the Authority with a view to the Authority convening an urgent telephone conference to timetable the resultant change.

James Crichton  
Member of Employment Relations Authority