

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

[2013] NZERA Christchurch 172  
5416650

BETWEEN                      DAVID RODKISS  
   Applicant  
  
A N D                              CARTER HOLT HARVEY  
   LIMITED  
   Respondent

Member of Authority:        Helen Doyle  
  
Representatives:              Nicole Ironside, Counsel for Applicant  
   Daniel Erickson, Counsel for Respondent  
  
Investigation Meeting:        19 and 20 August 2013  
  
Submissions Received:        On 19 August from both parties and in earlier  
   correspondence  
  
Date of Determination:        23 August 2013

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**PRELIMINARY DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1]     The parties asked at the commencement of a two day investigation meeting for an oral determination as to whether some evidence was admissible or whether it attracted the confidentiality afforded by s 148(1) of the Employment Relations Act 2000. The Authority heard submissions. There was no dispute about the contents of the written statements of evidence that were relevant to the surrounding circumstances that the Authority must have regard to in determining the issue of admissibility.

[2]     Section 148(1) and 148 (3) provides as follows:

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.*

[3] The Authority delivered an oral determination that the evidence was admissible.

[4] A written determination was requested to enable either party if they wished, to challenge the preliminary finding. In light of that possibility the Authority will not set out the exact nature of what was said.

[5] The parties, who were at that time in an ongoing employment relationship, attended mediation in April 2013. Mr Rodkiss in his statement of evidence said that at a point in time he decided to end the mediation and return home. Both parties were in separate rooms. Before Mr Rodkiss left the building in which mediation had been held with his wife and lawyer, he informed the mediator to advise the Site Manager of the respondent's sawmill in Nelson, Darryn Adams and the Human Resources Operation Manager at Carter Holt Harvey Limited, Gary Andrews about his intentions for the future.

[6] Mr Adams, in his statement of evidence, said that the mediator came into the room where he was sitting with Mr Andrews and advised that Mr Rodkiss had left. The mediator then advised of Mr Rodkiss' intentions for the future. Mr Andrews said in his statement of evidence that the mediator advised initially that Mr Rodkiss was leaving and then went on to advise of Mr Rodkiss' intentions for the future. Mr Andrews described in his statement of evidence that he was somewhat surprised by the abrupt end to mediation.

[7] Mr Erickson referred the Authority to the Court of Appeal judgment in *Just Hotels Limited v Jesudhass* [2007] ERNZ 817 where it was stated at [31]; *We do not see any ambiguity in the words of s 148(1). All communications “for the purposes of the mediation” attract the statutory confidentiality....*

[8] The Court of Appeal stated at [32] in *Jesudhass* that *In accordance with the ordinary meaning of the word “purpose” that of the intended object or an activity, a communication (written or oral) is protected unless it is created or made independently of the mediation.* The Court of Appeal stated at [33] that *Documents which are prepared for use in, or in connection with, a mediation therefore come within the ambit of s 148(1) ERA. So do statements and submissions made orally at the mediation, or a record thereof. Only documents which come into existence independently of the mediation are excluded.*

[9] Ms Ironside submits that the evidence is admissible because it was a communication following the end of mediation and therefore does not attract the protection afforded by s 148. She relies on a submission made in correspondence to Mr Erickson and provided to the Authority that the communication sits outside of mediation, is independent of it and is expressly exempted from the confidentiality provision by s 148(6) (a) of the Act.

[10] Mr Erickson does not accept that the statement is admissible. He submits that it was a statement made orally at the mediation and is therefore inadmissible. He does not accept that the mediation had concluded rather Mr Rodkiss had decided to depart. He also relies on the fact that the intention was communicated through the mediator who would be prevented from giving evidence of what was communicated to, and by him, under s 142 of the Employment Relations Act. He submits it would be incongruous for evidence of the same communication to be admissible by one of the parties in view of the significant public policy factors that support the confidentiality of mediation.

[11] Mr Erickson further referred the Authority to two Authority determinations, *Rutledge v Telecom New Zealand Limited*, CA109/04, 31 August 2004 and *Thomas v DRGT Limited*, AA310/88, 28 August 2012.

[12] I find in this case it was relayed to Mr Adams and Mr Andrews by the mediator that Mr Rodkiss had left the building. Effectively in those circumstances mediation was at an end. There is no evidence to support that the mediator had any continued involvement with the parties. If that had occurred then I would have agreed with Mr Erickson that the evidence would be inadmissible.

[13] The mediator after advising that Mr Rodkiss had left then relayed information from Mr Rodkiss as to his intentions for the future to Mr Adams and Mr Andrews. It is somewhat unfortunate that Mr Rodkiss' intentions for the future were not advised to Mr Adams and Mr Andrews by his lawyer or Mr Rodkiss himself.

[14] It was recognised in *Jesudhass* parties to mediation must be able to speak freely and frankly in the knowledge that what was said cannot be used against them at a later date if the matter is not resolved. The protection afforded by s 148(1) is very important.

[15] I find this matter to be distinguishable from *Jesudhass* and the two Authority determinations. In *Jesudhass* there was no dispute that the communication at issue had been made in mediation and the Court of Appeal found that it was not made independently of the mediation. The issue in *Jesudhass* was about the extent, if any that the communication could subsequently be relied on. The statement made about Mr Rodkiss's intentions for the future was after the mediation was at an end.

[16] The Authority determination in *Rutledge* concerned whether information should be disclosed to the Authority about what was said between Mr Rutledge and the mediator, and the mediator and the respondent. The Authority member in that case found that that information was for the purposes of mediation was disclosed orally between the respective people. The Authority member concluded that notwithstanding that the parties did not actually commence mediation because he found there was no doubt that the mediator was providing problem solving support, information and assistance to the parties within the bounds of the mediator's appointment as envisaged by the Act. As I have found that the mediation was at an end in this case before the mediator relayed Mr Rodkiss's intentions I do not reach the same conclusion about the mediator's role as the member did in *Rutledge*.

[17] In *Thomas*, the Authority concluded, that although comments sought to be relied on were made at the conclusion of the meeting, the mediation was afoot and

therefore the comments arose during the mediation and are confidential to that process. Again, I find this matter is distinguishable.

[18] I do not find that the statement made about Mr Rodkiss's intentions for the future was for the purposes of mediation or was disclosed orally in the course of the mediation. It is therefore a statement independent of the mediation

[19] In all the circumstances, therefore, I conclude that what was said by the mediator about Mr Rodkiss' intentions for the future is admissible evidence and does not attract the confidentiality afforded by s 148(1) of the Employment Relations Act 2000.

### **Costs**

[20] Costs are reserved pending final determination of the substantive claim.

**Helen Doyle**  
**Member of the Employment Relations Authority**