Employment Court of New Zealand

Rodkiss v Carter Holt Harvey Limited [2014] NZEmpC 77 (19 May 2014)

Last Updated: 13 June 2014

IN THE EMPLOYMENT COURT CHRISTCHURCH

[2014] NZEmpC 77

CRC 52/13

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
AND THE MATTER	of an application for directions regarding admissibility of evidence
BETWEEN	DAVID RODKISS Plaintiff
AND	CARTER HOLT HARVEY LIMITED Defendant

Hearing: (on the papers - submissions received on 28 April 2014 and 5 May 2014)

Judgment: 19 May 2014

INTERLOCUTORY JUDGMENT (NO 2) OF JUDGE B A CORKILL

Introduction

[1] The defendant applies for an order that the intended evidence of the plaintiff relating to communication of his resignation to the defendant's representatives as he was leaving a mediation on 16 April 2013 should be ruled as inadmissible having regard to the provisions of s 148 of the Employment Relations Act 2000 (the Act). This issue was the subject of a preliminary determination of the Employment

Relations Authority (the Authority).1 The Authority concluded that the statement

made was independent of the mediation and was therefore admissible.2

[2] This issue arises in the context of personal grievances where the plaintiff alleges that he was unjustifiably disadvantaged in the course of his employment as an engineering manager at the defendant's Nelson saw mill and that he was unjustifiably constructively dismissed. The Authority concluded that the claim of disadvantage was established, but not the claim of constructive dismissal.3 There is a challenge and a cross-challenge to this determination by the plaintiff and the defendant, respectively.

[3] The application made by the defendant proceeds on the presumption that the plaintiff will give evidence identical or at least similar to the following passage from the brief of evidence he provided to the Authority. It states:

I attended the mediation meeting on the afternoon of 16 April 2013 with my wife and my lawyer. DA and GA attended for the company. The mediation was not successful in resolving my grievances. By 4.30 pm in discussion with my wife I decided to end the mediation and return home. I told Audrey that I could see no way forward for me with CHH and I could not go back and work for them as I could never trust them again and felt my working relationship would never recover. It was an agonising decision for me to make and I told Audrey that it was probably the hardest I had ever had to make. Before I left the building with my wife and lawyer I informed the mediator to tell DA and GA that I was resigning my position and would not be returning to the workplace. I did not return to work.

[4] The defendant does not dispute that evidence can be given to the effect that the parties attended mediation on a certain date, the

identity of the attendees and the fact that mediation was not successful. It submits that this is information which is neither confidential nor inadmissible having regard to s 148 of the Act. It accordingly submits that the first three sentences are admissible as is the final sentence but the balance of the paragraph would be inadmissible.

[5] The plaintiff has filed a notice of opposition and an affidavit which provides evidence describing the background to the mediation. The plaintiff's evidence is that the mediation commenced at 2.00 pm and that by 4.30 pm he concluded the mediation was unsuccessful. It had not resolved the dispute between the parties. He decided to end it by not mediating further and left so as to return home with his wife. He considered that the treatment of him by the defendant had completely destroyed

the relationship of trust and confidence between the parties. He decided to resign from his position and not return to the workplace. He then said:

As I was leaving I told the mediator that I was leaving, that the mediation had been unsuccessful in resolving my grievance and that I did not want to mediate further. I told him that I was resigning from my position and not returning to the workplace. I asked the mediator to pass this information on to Mr Adams and Mr Andrews. I then left the mediation building with my wife and lawyer.

[6] The evidence filed for the defendant confirms that by this stage of the mediation, the parties were in separate rooms. Two representatives of the company were in attendance, Mr G J Andrews and Mr D Adams. The mediator was moving between two rooms discussing issues with the parties. During a break Mr Andrews (the deponent of the affidavit filed in support of the defendant's application) was returning to his room when he saw Mr Rodkiss and Mrs Rodkiss in the corridor. They had their backs to him so they could not see him. They appeared to him to be leaving. Their lawyer saw him and smiled. He concluded from this that Mr Rodkiss and Mrs Rodkiss were leaving the premises. This was a matter of surprise to him and his colleague because they both thought the mediation was carrying on. The mediator then came into their room and said that Mr Rodkiss was leaving and went on to say that Mr Rodkiss said he was resigning and would not be at work the following day.

[7] Correspondence which passed between the parties subsequently has been placed before the Court. It is evident that the next day the defendant wrote to the plaintiff putting forward a proposal for resolution of the employment relationship problem. The lawyer for the plaintiff responded to the letter stating that it had been conveyed to the company on the previous day that the plaintiff was resigning from his position because of the plaintiff's view as to the conduct of the company; details of which were given. Notification was given of an intended application to the Authority relating to the plaintiff's grievances of unjustified disadvantage and unjustified dismissal.

[8] The company responded by inviting the plaintiff "to reconsider his stated intention to resign". It was also stated that written notice had not been given pursuant to the provisions of the plaintiff's individual employment agreement and

that notice given verbally "in the course of mediation does not amount to proper

notice of resignation particularly in view of s 148 of the Employment Relations Act

2000 as interpreted by the Court of Appeal in the *Just Hotel* case". The plaintiff's lawyer responded immediately by stating that at the conclusion of the failed mediation the mediator was asked to convey to the employer's representatives that the plaintiff was resigning and would not be returning to the workplace. It was stated that the employer could have been left in no doubt as to the plaintiff's resignation.

[9] Both counsel have provided submissions as to the relevant legal principles and their application:

(a) The defendant referred to the consideration of s 148 by the Court of Appeal in *Just Hotel Ltd v Jesudhass*, where the Court held that there was not "any ambiguity" in the requirement in s 148(1) of the Act that all communications "for the purposes of the mediation" are confidential except perhaps where narrow public policy exceptions apply.4

The defendant also made reference to *Rose v Order of St John*5 which emphasised the purpose of s 148, which is to permit the parties to mediation to speak freely in a confidential environment in an attempt to resolve their differences; *George v Auckland Council* is to similar effect.6

Counsel for the defendant submitted that at the relevant time the mediation had not ended, because as far the defendant's representatives were concerned the plaintiff was considering a proposal for resolution. Further, pursuant to s 147(3) of the Act it is the mediator providing the mediation services who determines the procedures that will be followed. It was submitted that the dicta of the Authority in *Rutledge v*

*Telecom New Zealand Ltd*7 was of assistance because it emphasised that

communications between the mediator and the parties were protected

4 *Just Hotel Ltd v Jesudhass* [2007] NZCA 582, [2008] 2 NZLR 210 at [31].

5 *Rose v Order of St John* [2010] NZEmpC 163, [2010] ERNZ 490 at [21].

6 *George v Auckland Council* [2013] NZEmpC 76 at [17].

7 *Rutledge v Telecom New Zealand Limited* ERA Christchurch CA109/04, 31 August 2004 at [10].

because the mediator was acting within the bounds of ss 144 to 147 of the Act.

On the issue of whether the communication of resignation was "for the purposes of the mediation", the defendant submitted that the statement made by the plaintiff that his act of resignation was not said and done for the purposes of the mediation to facilitate conciliation or achieve a settlement resolution was effectively the same proposition as was rejected by the Court of Appeal in *Just Hotel*. A submission of this kind was undesirable because the Authority or Court would then be placed in the position of having to undertake the difficult task of determining the reason for a statement being made in a mediation context.

Further, there was no evidence that the plaintiff's resignation "existed independently of the mediation process" (being a reference to s 148(6)(a) of the Act).

Finally, there was no evidence that the circumstances of this case could fall within the possible ground of public policy referred to by the Court of Appeal in *Just Hotel*.

(b) Counsel for the plaintiff submitted that *Rose v Order of St John* was of assistance in distilling the relevant principles from previous interpretations of s 148 by the Court.8

Counsel also referred to *Director of Proceedings v O'Malley*, where the Human Rights Review Tribunal held that confidentiality attaches to the mediation not an event giving rise to it.9

It was submitted that on the facts of the present case, the defendant was aware mediation had ended and that the plaintiff was leaving or had left, that the resignation and advice of it was not done or said for the

purposes of mediation and that it was irrelevant that the advice of the

8 *Rose*, above n 5.

9 *Director of Proceedings v O'Malley* [2008] NZHRRT 23 at [19].

plaintiff's resignation was conveyed to the company representatives by the mediator. Accordingly, evidence of the resignation and advice of it was not made inadmissible by s 148 of the Act.

Legal analysis

[10] Section 148 provides as follows:

148 Confidentiality

(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.

(2) No person who provides mediation services may give evidence in any proceedings, whether under this Act or any other Act, about —

(a) the provision of the services; or

(b) anything, related to the provision of the services, that comes to his or her knowledge in the course of the provision of the

services.

(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.

(4) Nothing in the Official Information Act 1982 applies to any statement, admission, document, or information disclosed or made in the course of the provision of mediation services to the person providing those services.

(5) Where mediation services are provided for the purpose of assisting persons to resolve any problem in determining or agreeing on new collective terms and conditions of employment, subsections (1) and (3) do not apply to any statement, admission, document, or information disclosed or made in the course of the provision of any such mediation services.

(6) 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; or

(b) prevents the gathering of information by the Department for research or educational purposes so long as the parties and the specific matters in issue between them are not identifiable; or

(c) prevents the disclosure by any person employed or engaged by the Department to any other person employed or engaged by the

Department of matters that need to be disclosed for the purposes of giving effect to this Act; or

(d) applies in relation to the functions performed, or powers exercised, by any person under section 149(2) or section 150(2).

[11] The following dicta in *Rose v Order of St John* provides a convenient summary of interpretations of the section:10

[8] This section has been interpreted on a number of occasions by this Court and the Court of Appeal. The first case in this Court was *Shepherd v Glenview Electrical Services Limited*. Next was *Jesudhass v Just Hotel Ltd* at both first instance in the Employment Court and on appeal. The latest case was *Te Ao v Chief Executive of the Department of Labour*, another judgment of this Court.

[9] The principles distilled from these cases are as follows. All communications in mediation "for the purposes of the mediation" attract the statutory confidentiality except possibly where public policy dictates otherwise. Documents which are prepared for use in, or in connection with, a mediation come within the ambit of s 148(1) as do statements and submissions made orally at the mediation or a record thereof. Only documents which come into existence independently of mediation are excluded from this confidentiality. The important distinction is that documents or other communications that exist independently of mediation may be admissible or discoverable even if they were referred to or even had their genesis in mediation. The *Te Ao* case illustrates one exception to confidentiality on the public policy basis enunciated by the Court of Appeal in *Jesudhass*. That concerned the entitlement in law of the mediator to give evidence at what had occurred in a mediation chaired by him as a result of which he was himself dismissed and subsequently challenged this by personal grievance.

[12] I agree with and adopt the foregoing principles.

[13] Although previous decisions clarify the applicable principles, the Court has not had to consider a situation identical to that which arises in the present instance. Previous cases have considered statements made either at the commencement or during mediation.

[14] The key provisions for present purposes are ss 148(1) and 148(3). The effect of those provisions is that no evidence is admissible in any court of any statement admission document or information that by subs (1) is required to be kept confidential. Accordingly, the issue here is whether the statement proposed be admitted was made "for the purposes of the mediation" and was "disclosed orally in

the course of the mediation".

10 *Rose*, above n 5. (Footnotes omitted).

[15] This is a factual issue which has to be assessed on the affidavit evidence. Although such an assessment can be very difficult,11 it is not particularly difficult in this instance because the circumstances relate to what happened at the point where the plaintiff had decided to leave the mediation premises, and not during the course of the mediation.

[16] In this instance, however, I readily conclude that by the time the plaintiff made the statement to the mediator he had decided that the mediation had been unsuccessful in resolving his grievance and that he did not want to mediate further.

[17] The plaintiff informed the mediator that he was resigning, and that he was not returning to the workplace; he then asked the mediator to pass this information to company representatives who were in another room. He and his wife then left the premises. I find the statement was not made for the purposes of the mediation.

[18] On the evidence placed before the Court this was not a purported resignation undertaken as part of a negotiation ploy or a form of brinkmanship. Furthermore by the time the information was conveyed by Mr Andrews and his colleague, they knew that Mr Rodkiss and Mrs Rodkiss were in the process of leaving the premises.

[19] It might well have been desirable for the plaintiff's lawyer to convey that information to the company's representatives, since that would have avoided placing the mediator in a difficult position where he was asked to convey information that was not for the purposes of the mediation.

[20] I do not consider that evidence to the effect that the plaintiff was resigning from his position and not returning to the workplace, and that the mediator was asked to convey this information to the company representatives together with the fact that this happened, is rendered inadmissible by the provisions of ss 148(1) and (3). What happened was independent of the mediation.

[21] The question of whether the individual employment agreement was validly terminated by the statement conveyed after the mediation concluded – a point raised

in correspondence from the defendant the next day – is a separate issue which may

11 As the Court of Appeal observed in *Just Hotel* at [39].

have to be considered at the hearing of the challenge and cross-challenge. I express no view on that point.

Conclusion

[22] The Court rules that evidence relating to the facts that the plaintiff told the mediator he was resigning from his position and would not be returning to the workplace, that he asked the mediator to pass this information on to the company's representatives, that the plaintiff and his wife then left the building and that the mediator conveyed this information to the company's representatives are not inadmissible under s 148 of the Act. For the avoidance of doubt, evidence of any statements made during the mediation and for its purposes that may have been relevant to the plaintiff's decision to resign is inadmissible. The defendant's application is accordingly dismissed.

[23] Costs are reserved.

B A Corkill

Judge

Judgment signed at 4.00 pm on 19 May 2014
