

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2015] NZERA Auckland 138
5550004

BETWEEN LEIA CRISTINA DA SILVA
 SALES
 Applicant

A N D REMMER'S CAFÉ LIMITED
 Respondent

Member of Authority: Anna Fitzgibbon

Representatives: Catherine Stewart, Counsel for the Applicant
 Garry Pollak, Counsel for the Respondent

Investigation Meeting: On the papers

Date of Determination: 13 May 2015

DETERMINATION OF THE AUTHORITY ON A PRELIMINARY ISSUE

- A. The clean statement in reply dated 22 April 2015 is in an acceptable format for filing in the Authority. Attachment 18 to the statement in reply requires redaction in accordance with Ms Stewart's memorandum dated 17 April 2015.**
- B. Costs are to lie where they fall.**

Employment relationship problem

[1] The issue before the Authority for preliminary determination concerns whether certain information contained in the respondent's statement in reply is confidential and should be removed.

[2] The applicant filed a statement of problem in the Authority on 30 March 2015. The respondent filed a statement in reply in the Authority on 14 April 2015.

[3] By memorandum dated 17 April 2015, Ms Stewart, counsel for the applicant objected to various paragraphs in the statement in reply and documentation attached

to it. Ms Stewart contended the attached information was confidential information and that discussions referred to in the statement in reply had occurred at mediation, were confidential and should not have been disclosed.

[4] On this basis, Ms Stewart requested that the statement in reply be removed from the Authority's file and replaced with a redacted version. The redacted version amends paragraphs in the statement in reply Ms Stewart claims are objectionable, and redacts documentation attached claimed to be confidential.

[5] By memorandum filed by counsel for the respondent, Mr Pollak submitted it was proper that the respondent be able to leave certain evidence in the statement in reply. This evidence was that a without prejudice meeting had occurred between counsel, that a mediation had also occurred but was unsuccessful and that the respondent had sought to take certain steps as a result of the mediation.

[6] Ms Stewart filed a memorandum in reply on 1 May 2015 further contending that whatever occurred at mediation was confidential and that the outcome of discussions at mediation was also confidential.

The law

[7] Discussions during mediation are confidential¹.

[8] I refer the parties to the decision of Chief Judge Colgan in *Rose v. Order of St John*². His Honour stated:

[25] The evidence that the plaintiff intends to lead relates to the important question under s.103A of how the employer treated the employee. This included a proposal to go to mediation for specified purposes. None of that is made inadmissible by s.148. The plaintiff intends to pick up the story after the end of mediation by complaining that her issues with the employer were not dealt with as a fair and reasonable employer would have done, including by attempting to resolve them in mediation. It will be appropriate to a consideration of the employer's compliance with s.103A as to whether it made good its stated intention of addressing these matters in mediation. How it did so is inadmissible in evidence but whether it did so is not.

[26] Applying a purposive interpretation to s.148 and allowing for public policy exceptions to what might otherwise be a harsh result inconsistent with the spirit of the legislation generally, I consider that s148 does not exclude as inadmissible evidence about the general

¹ *Hamon v Coromandel Independent Living Trust* [2013] NZEmpC 56

² [2010] ERNZ 490 at paras.[25] and [26]

subject matter of the mediation. Statutory confidentiality can and will be protected by making inadmissible any evidence about “any statement, admission, or document created or made for the purposes of the mediation and any information that, for the purposes of the mediation, it disclosed orally in the course of the mediation”.

[9] Mr Pollak has agreed to amend the statement in reply but not to the extent required by Ms Stewart.

[10] The issues between counsel are whether or not the respondent’s amended statement in reply should be further redacted to remove any references to mediation.

[11] I have considered the memoranda filed by counsel and have reviewed the relevant documentation. It is my view that the marked up statement in reply is acceptable for filing. It addresses the concerns raised on behalf of the applicant, in my view. Attachment 18 to the statement in reply requires redaction as it refers to details discussed at mediation.

[12] I accept the submission made by Mr Pollak at paragraph 5 of his memorandum in reply dated 22 April 2015. Mr Pollak submits that it is proper that evidence be led on certain factual events that occurred. Mr Pollak does not intend leading evidence in relation to discussions, including offers and agreements or concessions or offers made during the course of a mediation between the parties. The general subject matter of the mediation and the fact that it occurred, is in my view admissible.

Summary

[13] In summary, the clean statement in reply dated 22 April 2015 is in an acceptable format for filing in the Authority. Attachment 18 to the clean statement in reply requires redaction in accordance with Ms Stewart’s memorandum dated 17 April 2015.

Costs

[14] Costs are to lie where they fall.

Anna Fitzgibbon
Member of the Employment Relations Authority