

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2018] NZERA Auckland 103  
3024402

BETWEEN                      SEGER ROADING LIMITED  
Applicant

AND                              JACOB PROCTOR  
First Respondent

AND                              JASON MATHER  
CONSTRUCTION LIMITED  
Third Respondent

Member of Authority:      Vicki Campbell

Representatives:           Blair Edwards for Applicant  
Michael Black for First Respondent  
Jeremy Sparrow for Second Respondent

Investigation Meeting:     On the papers dated 21, 26 and 27 March 2018

Determination:              29 March 2018

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**PRELIMINARY DETERMINATION OF THE AUTHORITY**

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**A.      The contested documents came into existence before mediation and were not created or made for the purposes of mediation. They are excluded from the confidentiality provisions of s 148 of the Employment Relations Act 2000 and are admissible.**

**B.      Costs are reserved.**

**Employment relationship problem**

[1]      A preliminary issue has arisen between the parties as to the admissibility of two documents produced during a mediation attended by Seger Roding Limited and Mr Proctor. I have been asked by Member Larmer, who is dealing with the substantive issues, to determine this preliminary matter.

[2] The substantive claims include a claim that Mr Proctor has breached the terms of his employment agreement including the provisions relating to confidentiality, intellectual property and non-solicitation as well as the terms of Seger's Computer and Information Use Policy. Seger claims Mr Proctor downloaded documents belonging to the company from its database.

[3] The parties attended mediation in December 2017. During the mediation Seger's representatives noted two similar documents presented by Mr Proctor. One was on Seger's letterhead the other was on the letterhead of Jason Mather Construction Limited.

[4] Concerns have been raised about whether these documents are admissible due to being subject to the confidentiality of the mediation process.

### **Confidentiality in Mediation**

[5] Section 148 of the Employment Relations Act 2000 requires any documents created or made for the purposes of mediation to be kept confidential and are not admissible.<sup>1</sup> Documents which come into existence independently of mediation are excluded from this confidentiality and are admissible even if they were referred to in mediation.<sup>2</sup>

[6] I am satisfied the contested documents came into existence before the mediation and were not created or made for the purposes of mediation. They are excluded from the confidentiality provisions of s 148 and are admissible.

### **Costs**

[7] The costs associated with this determination will be dealt with at the same time as costs for the substantive matters.

Vicki Campbell  
Member of the Employment Relations Authority

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<sup>1</sup> Employment Relations Act 2000, s (3).

<sup>2</sup> Ibid at s 148(6)(a); *Rose v Order of St John* [2010] NZEmpC 163; [2010] ERNZ 490 at [9].