IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

CA 168/08
5127668

	BETWEEN	JOHN TE AMO Applicant
	AND	BECON LIMITED Respondent

Member of Authority:	James Crichton
Representatives:	John Shingleton, Counsel for Applicant Denis O'Rourke, Advocate for Respondent
Investigation Meeting:	On the papers
Determination:	12 November 2008

INTERIM DETERMINATION OF THE AUTHORITY

Introduction

[1] The substantive matter in the present proceedings has been set down for an investigation meeting before my colleague Member Cheyne commencing 18 November 2008.

[2] During the preparations for the imminent investigation meeting, the Authority received a letter dated 6 November 2008 from Mr Shingleton seeking to strike out certain paragraphs of the evidence tendered on behalf of the respondent (Becon).

[3] In order that the investigation meeting not be compromised by Mr Cheyne having to consider this application, he quite properly referred the matter to me so that the preliminary issue raised by Mr Shingleton could be dealt with, without input from him.

[4] For the sake of completeness, I record that Mr Cheyne has not considered the evidence objected to by Mr Shingleton and will not do so until the outcome of this interim determination is known.

Process

[5] Forthwith on the receipt of Mr Shingleton's communication of 6 November 2008, the Authority encouraged the representatives to discuss the matter between them to see if there could be a resolution by agreement.

[6] By email dated the following day, Mr O'Rourke expressed the view that he and Mr Shingleton had different perspectives on the matter and then advanced a set of numbered propositions responding to Mr Shingleton's letter.

[7] Mr Shingleton was then given an opportunity to respond to Mr O'Rourke's communication and he filed his response by email of 7 November 2008.

The basis for the objection

[8] Mr Shingleton's objection to the evidence in contention is based on the broad confidentiality principle which applies to material generated for the purposes of a mediation or matters orally revealed during the course of the mediation.

[9] Mr Shingleton refers to s.148 of the Employment Relations Act 2000 which contains the general confidentiality provision in respect to mediations provided by Mediation Services under the Act. He also attaches a copy of a letter dated 6 November 2008 from the Department of Labour, Work Place Services which confirms that, in respect of the particular mediation between these parties, the mediator advised the parties of the requirements of s.148, but that there was no consent given by the parties to the release of any information which would otherwise be protected by the general confidentiality requirement of s.148.

[10] In essence, Mr Shingleton alleges that the paragraphs or parts of paragraphs of the evidence of Becon which he specifically identifies are in breach of s.148 in that they are imbued with a confidence from the mediation process and that there has been no consent for the cloak of confidentiality to be lifted.

[11] Mr O'Rourke for Becon has a different view. First he says that the document referred to by Mr Shingleton was not a document created for the purposes of the

mediation at all but a document created independently of the mediation and quite clearly not related in any way to the issue of whether Mr Te Amo is or is not an employee of Becon. Next, Mr O'Rourke claims that the agreement just referred to specifically proceeds on the footing that para.1 is an open communication whereas the subsequent paragraphs are expressed to be *without prejudice*. Mr O'Rourke makes that claim because he says that the document in question has the words *without prejudice* appearing after para.1 but before paras. 2, 3 and 4. He says this placement in the document was deliberate and reflects the intention of the parties.

[12] Finally, Mr O'Rourke relies on the following sentence which he indicates represents the *final words* of the document and reflects *the status of the whole document:*

> *We also confirm that we understand and accept that these terms of agreement are not enforceable through the Employment Relations Authority or the Employment Court nor are they subject to any other provisions of the Employment Relations Act 200.*

[13] Mr O'Rourke says that that statement reflects the intention of the parties concerning the status of the agreement between them and that it precludes Mr Te Amo from relying on the Employment Relations Act 2000 to strike down certain portions of evidence.

[14] Finally, Mr O'Rourke contends that even if the Authority were to reach the conclusion that the relevant evidence offended the general provision in respect to confidentiality in the mediation process, the words just quoted represent a consent for the purposes of s.148(1) of the Employment Relations Act 2000. That sub-section allows for the cloak of confidentiality to be lifted inter alia *with the consent of the parties*.

[15] Mr Shingleton then responded making a number of observations of his own. First he denied that the agreement was made independent of the mediation and contended that it was made at mediation by the mediator. Then he makes the point that, if the material traversed in the document does not relate to Mr Te Amo's employment status then it is irrelevant and ought to be struck out on that ground.

[16] Next, Mr Shingleton denies the distinction which Mr O'Rourke advances between para.1 (which Mr O'Rourke contended was not *without prejudice*) and the

subsequent paragraphs which Mr O'Rourke said were clearly without prejudice. Mr Shingleton's submission is that, during the course of the mediation process, the mediator quite properly obtained the consent of both parties to the mediation being confidential and that that cloak of confidentiality enveloped the whole process and any documents used in that process.

[17] Next, Mr Shingleton quite properly concedes that the final words of the document quoted in full by Mr O'Rourke could be construed as Mr Te Amo waiving the protection of the Employment Relations Act.

[18] Mr Shingleton concludes with three succinct points contending that the proposed evidence is irrelevant, that the entire agreement was without prejudice and that s.148 of the Act *probably does not apply*.

Conclusions

[19] I have reviewed the paragraphs Mr Shingleton objects to. I agree that two out of three of those paragraphs refer to the mediation, the third in my opinion does not. Mr Shingleton seeks to have para.10 of Mr Stent's statement of evidence struck out, part of para.10 of Mr Lloyd's statement of evidence struck out and para.24 of Mr O'Rourke's statement of evidence struck out.

[20] I am satisfied that para.10 of Mr Stent's evidence refers to the mediation but I do not accept that para.10 of Mr Lloyd's statement of evidence offends in the same way. There is no reference in Mr Lloyd's para.10 to the mediation that I can find. Para.24 of Mr O'Rourke's brief of evidence clearly refers to the mediation process and so offends in the same way as Mr Stent's para.10.

[21] However, matters cannot rest there because Mr O'Rourke argues that the matters referred to in the offending paragraphs of evidence, in so far as they relate to the mediation, are not imbued with a confidence for reasons which I have set out fully in the previous section.

[22] In the normal course of events, a mediation process conducted under the aegis of the Mediation Service of the Department of Labour will, as a general principle, be subject to confidentiality. Broadly that is the effect of s.148.

[23] However, this is a complex dispute. The substantive issue between the parties in terms of the employment jurisdiction and a fundamental preliminary matter to be investigated by my colleague Member Cheyne in the forthcoming investigation meeting is the question of whether Mr Te Amo was in truth an employee of Becon or a contractor to Becon.

[24] However, by all accounts, the mediation process which the parties embarked upon prior to the present proceedings was a mediation process which involved both employment issues (in so far as it could be contended that Mr Te Amo was an employee of Becon) and issues which are plainly contractual in nature.

[25] The Authority is being asked to exclude evidence which refers to a mediated agreement which by common consent seems to contain a clear agreement of the parties intention that the terms of the agreement are *not enforceable through the Employment Relations Authority or the Employment Court, nor are they subject to any other provisions of the Employment Relations Act 2000.* The Authority is not provided with the full text of the mediated agreement but is asked to exclude some evidence because it refers to a previous mediation. Obviously it is more difficult than usual to make determinations in those circumstances.

[26] However, it is common ground that the parties agreed to the terms of agreement (whatever they were) not being enforceable in either the Authority or the Court nor being subject to the Employment Relations Act 200.

[27] Mr Shingleton contends that, because the mediator imposed or proposed or obtained agreement that there should be confidentiality between the parties, then that verbal agreement or understanding ought to prevail in effect over the clear words of the parties' agreement, the terms of which I have just recited. I do not agree.

[28] The only part of the document which I have before me and which assists me is the concluding provision I have just recited. It seems to me axiomatic that the parties' intention in agreeing to that provision was to allow them the scope to bring the agreement or parts of it before appropriate Courts or Tribunals. Given that the subject matter is partly within the aegis of the employment institutions and partly (it seems) within the aegis of the ordinary Courts, it is difficult to escape the conclusion that that must have been a deliberate intention.

[29] I cannot see how the Authority can prefer a submission by counsel that a mediator invoked confidentiality provisions in preference to a clear written provision which on the face of it excludes enforcement of the terms the agreement by the Authority. That suggests that the terms of the agreement are not about matters to do with an employment relationship, which may raise questions of relevance for the Authority, but that is not part of my brief in this interim determination.

Determination

[30] I am satisfied on the balance of probabilities that the proper course of action is for the Authority not to strike out the provisions which Mr Shingleton complains about and in making that determination, I place my reliance on the explicit agreement reached between the parties that *these terms of agreement are not enforceable through the Employment Relations Authority … nor are they subject to any other provisions of the Employment Relations Act 2000.* I hold that the application made by Mr Te Amo is analogous to an application to enforce the agreement and that the exclusion, in the clearest terms, of the force and effect of the Employment Relations Act 2000 must be taken to mean that the parties wished, for their own reasons, that the Act included s.148 ought not to apply.

[31] It follows that my determination is that the evidence which Mr Shingleton complains about is, or ought to be, available to my colleague Member Cheyne to hear and review as part of his investigation of the employment relationship problem between these parties.

Costs

[32] Costs are reserved.

James Crichton
Member of the Employment Relations Authority