

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 319/07
5099194

BETWEEN RICHARD TE AO
 Applicant

AND DEPARTMENT OF LABOUR
 Respondent

Member of Authority: James Wilson

Representatives: Simon Scott for the applicant
 Andrew Gane for the respondent

Investigation Meeting: 1 October at Hamilton

Submissions received: 20 September 2007 from the applicant
 27 September 2007 from the respondent

Determination: 12 October 2007

DETERMINATION OF THE AUTHORITY

Request for Determination

[1] Mr Te Ao is employed by the Department of Labour (the Department) in Hamilton as a mediator. He has asked the Authority to issue a Determination that he *is unable to release information in accordance with section 148 of the Employment Relations Act 2000* (the Act). The Department oppose this request.

Background

[2] In May 2007 the Department of Labour received complaints from both parties to a mediation regarding the behaviour of the mediator, Mr Te Ao. On 21 May 2007 Mr Te Ao's manager met with him and his representative and advised him of the complaints. Following further investigations, including meeting with the complainants to discuss the nature of the allegations, the Department wrote to Mr Te Ao requesting that he attend a meeting on 15 June 2007 to discuss the allegations. On

13 June 2007 Mr Te Ao's representative, Simon Scott, advised that he believed that Mr Te Ao was *statute barred from discussing anything to do with (the) mediation by way of an employment procedure against him*. Also in that letter Mr Scott advised that *Mr Te Ao will not be able to make any statement whatsoever at the meeting proposed for 15 June*. He went on to suggest that *in the absence of any authority, it may well be a matter of law for the Employment Court to determine*. The meeting of 15 June did not go ahead.

[3] The Department responded to Mr Scott's letter on 29 June 2007 advising that both parties to the mediation had (in terms of s.148(1) of the Act) given their approval for the mediation service to *release information and statements in relation to the mediation* and advising that the Department did not believe that Mr Te Ao was statute barred from attending the proposed disciplinary meeting. The Department again requested that Mr Te Ao attend a meeting to respond to the complaints.

[4] It is this *matter of law* i.e. whether he is statute barred from answering questions regarding what occurred during the mediation, that Mr Te Ao has asked the Authority to determine.

The Law

[5] In determining this matter it is necessary to interpret the relevant sections of the Employment Relations Act (the Act). The Interpretation Act 1999 provides, at section 5:

(1) The meaning of an enactment must be ascertained from its text and in the light of its purpose.

(2) The matters that may be considered in ascertaining the meaning of an enactment include the indications provided in the enactment.

(3) Examples of those indications are preambles, the analysis, a table of contents, headings to Parts and sections, marginal notes, diagrams, graphics, examples and explanatory material, and the organisation and format of the enactment.

[6] The Employment Relations Act sets out, at part 10, how mediation services are to be provided. The relevant sections are set out below:

PART 10 - INSTITUTIONS

143 Object of this Part

The object of this Part is to establish procedures and institutions that—

...

...

(c) recognise that, if problems in employment relationships are to be resolved promptly, expert problem-solving support, information, and assistance needs to be available at short notice to the parties to those relationships; and

(d) recognise that the procedures for problem-solving need to be flexible; and

(da) recognise that the person who provides mediation services can manage any mediation process actively; and

(e) ...

Mediation services

144 Mediation services

(1) The chief executive must employ or engage persons to provide mediation services to support all employment relationships.

(2) ...

...

145 Provision of mediation services

(1) The chief executive, by way of general instructions under section 153(2) and (3),---

(a) may decide how the mediation services required by section 144 are to be provided; and

(b) may, in order to promote fast and effective resolutions, treat matters presented for mediation in different ways.

(2) ...

(3) Any of the mediation services may be provided—

(a) by a combination of the ways described in subsection (2); or

(b) in such other ways as the chief executive thinks fit to best support the object of this Act.

(4) ...

146 Access to mediation services

...

147 Procedure in relation to mediation services

(1) Where mediation services are provided, the person who provides the services decides what services are appropriate to the particular case.

(2) That person, in providing those services,—

(a) may, having regard to the object of this Act and the needs of the parties, follow such procedures, whether structured or unstructured, or do such things as he or she considers appropriate to resolve the problem or dispute promptly and effectively; and

(ab)

...

(3) To avoid doubt, the person who provides the services also decides the procedures that will be followed, which may include---

(a)...

(b)...

(c) ...

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)...

(5)

(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).

...

153 Independence of mediation personnel

(1) *The chief executive must ensure that any person employed or engaged to provide mediation services under section 144—*

(a) is, in deciding how to handle or deal with any particular problem or aspect of it, able to act independently; and

(b) is independent of any of the parties to whom mediation services are being provided in a particular case.

(2) *The chief executive, in managing the overall provision of mediation services, is not prevented by subsection (1) from giving general instructions about the manner in which, and the times and places at which, mediation services are to be provided.*

(3) *Any such general instructions may include general instructions about the manner in which mediation services are to be provided in relation to particular types of matters or particular types of situations or both.*

(4) ...

The parties submissions

[7] Mr Scott's argument is that Mr Te Ao is precluded by section 148(2) of the Act from attending a disciplinary meeting and *giving evidence* in respect of mediation services provided by him. In support of his submission he quotes the full bench of Employment Court in *Jesudhass v Just Hotels Ltd* [2006] 1 ERNZ 173, at paragraph 69:

It is true, as Mr Gilkison submitted, that if evidence of a dismissal at mediation were to be admissible, s 148(2) would deprive a party of the potentially corroborative evidence of the mediator. While that is so, we think the problem the primary object of the Legislature in enacting that subsection was to ensure that mediators would not be placed in the potentially invidious position of being witnesses before the Authority or the Court to corroborate the version of events advanced by one party or the other in circumstances where the mediator's task is not to gather or record evidence of what is said

but rather, to assist the parties to resolve their differences. The statutory exclusion of mediators as witnesses does not necessarily mean that evidence of what appeared in the presence of the mediator is deficient. There would usually be other witnesses, often several.

[8] Mr Scott submits that, in the absence of further judicial assistance, s. 148(2) is clear and self-explanatory. He argues that the Department's disciplinary process could lead to subsequent action in the Authority or the Court (should the Department take disciplinary action against Mr Te Ao) and is therefore part of *proceedings under this Act*.... He says that on that basis Mr Te Ao is barred by s.148(2) from *giving evidence in (these) proceedings* about *the provision of the services* he provided at the mediation in question. Mr Scott also suggests that the agreements to waive confidentiality provided by the complainants could only apply to s.148(1) (i.e. *information created or made for the purpose of the mediation*), and not to section 148(2) (*...about the provision of the services*).

[9] Mr Gane, for the Department, points out that section 148(1) is qualified by the ability of the parties to consent to the confidentiality of mediation being waived and they have done so in this case. He submits that the fact that the parties have consented to confidentiality being waived in terms of section 148(1) must be relevant to the application of s.148(2). In any event, Mr Gane says, the Department's disciplinary process is not a *proceeding under this Act or any other Act* and the *evidence* referred to must relate to proceedings in a Court or Tribunal or some judicial body and not to the questioning of an employee in an employment investigation. He also submits that s.148(6) specifically allows the disclosure *by any person employed ...by the Department to any other person employed...by the Department...for the purposes of giving effect to this Act*. In Mr Gane's submission the Department's investigation of complaints against employees (in this case a mediator) is necessary to preserve the integrity of the mediation process and that the integrity of the mediation process is necessary for *giving effect* to the Act.

Discussion

[10] I am required to interpret the Act *from its text and in the light of its purpose*. (Interpretation Act 1999, s.5) Reading the Act as a whole and in particular the various relevant sections of part 10, I have reached a clear conclusion in respect to Mr Te Ao's assertion that he is statute barred from being required to answer questions as part of his employer's disciplinary process.

[11] Firstly I do not accept Mr Scott's submission that the Department's disciplinary investigation can be considered *proceedings ... under this Act*. While Mr Te Ao may be expected to answer questions as part of the Department's investigation he will not be under oath i.e. he will not be *giving evidence* and the process cannot be considered *proceedings under (the Employment Relations Act) or any other Act*.

[12] Secondly, the purpose of the disciplinary process is clearly *for the purposes of giving effect to this Act*. The responsibility for providing mediation services falls to the Chief Executive who must *employ or engage persons to provide mediation services... [s.44(1)]*. The Chief Executive *may decide how the mediation services required ...are to be provided [s.145(1)(a)]* and is able *to give general instructions about the manner in which, and the times and places at which, mediation services are to be provided [s.153(2)]*. Mr Te Ao is an employee of the Department and the regional manager of the Department of Labour is both *another employee of the Department [s.148(6)(c)]* and for, the purposes of employment, carries the delegated powers of the Chief Executive. While s.153 requires the Chief Executive to ensure that the mediator is able to *act independently*, that independence is *(independent) of any of the parties to whom the mediation services are being provided in a particular case*, and does not, for example, mandate a mediator to act outside of the general instructions given by the Chief Executive in terms of section 153(2).

[13] The purpose of section 148 is clearly to protect the confidentiality and integrity of the mediation services provided by the Department. To apply the interpretation suggested by Mr Scott (i.e. that a mediator is statute barred from answering questions as part of an employment disciplinary investigation) would go well beyond that purpose and mitigate against the requirement in the Act that the

Chief Executive provide mediation services which *promote fast and effective resolution* [s.145(1)(b)] of employment relationship problems.

[14] I accept that should the Department, having completed a proper disciplinary enquiry, take disciplinary action against Mr Te Ao, he would then be entitled to bring personal grievance proceedings against his employer. Such proceedings could result in Mr Te Ao wishing to bring evidence in support of his claim in the Authority and, potentially, in the Employment Court. Should such proceedings be instigated it is possible, as alluded to by the Court in the *Just Hotel* case, that Mr Te Ao would be faced with the apparent statutory bar contained in s.148(2) from giving evidence in support of his claim. Because I have come to the conclusion that the Department's disciplinary investigation is not *proceedings* and Mr Te Ao is not required to *give evidence* this is not a question that I am required to address at this point. However should such circumstances occur I have no doubt that the *mischief rule* would have some bearing on the correct interpretation of section 148(2) to be applied. Should Mr Te Ao be statute barred from giving evidence in support of his claim this would not only be against the principles of natural justice but in my preliminary assessment, would not be consistent with the objects or purpose of the Act. An alternative interpretation of *the text and in the light of the purpose* of Part 10 of the Act would suggest that, with the approval of the parties to the mediation, s.148(2) does not bar Mr Te Ao from giving evidence regarding his own actions. Such an interpretation does not, in my assessment, unduly strain the plain meaning of the words of the section to give effect to the purpose. It may also be appropriate to consider what, if any, impact the Bill of Rights Act might have on the appropriate interpretation of this section.

Determination

[15] For the reasons set out above, the determination sought by Mr Te Ao is declined. For the sake of clarity: Mr Te Ao is not barred by s.148 of the Act from attending a disciplinary investigation meeting convened by his employer to respond to complaints made about the way he provided mediation services or from answering questions regarding those complaints.

Costs

[16] Costs are reserved on the assumption that the parties will wish to settle the question of costs between themselves. If they are unable to do so the Department may file and served a submission within 28 days of the date of this determination. Mr Te Ao will then have 14 days in which to respond.

James Wilson

Member of the Employment Relations Authority