

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI  
ŌTAUTAHI ROHE**

[2019] NZERA 70  
3033216

BETWEEN                      KATE ANN CRUSH  
   Applicant  
  
AND                                SOUTHERN DISTRICT  
   HEALTH BOARD  
   Respondent

Member of Authority:        Helen Doyle

Representatives:              Tim Castle and Michaela Ryan, counsel for the  
   Applicant  
   Janet Copeland, counsel for the Respondent

Telephone conference on      Statement of problem lodged 17 July 2018.  
17 September 2018 and on      Application for orders or declarations lodged 17 July  
the papers:                        2018.  
   Response to respondent's strike out application lodged  
   29 October 2018  
   Applicant's response to redaction request memorandum  
   lodged 22 November 2018.  
   Applicant's application for leave to raise a personal  
   grievance out of time lodged 29 October 2018.  
   Applicant's application as to respondent's admission  
   being placed on record lodged 22 November 2018.  
  
   Statement in reply lodged 6 August 2018  
   Application to strike out and response to further  
   particulars lodged 15 October 2018  
   Respondent's redaction request email dated 23 October  
   2018 and a further email dated 28 November 2018.  
   Respondent's response to applicant's application for  
   leave lodged 14 November 2018.  
   Respondent's response to the application as to the  
   respondent's admission being placed on record and other  
   matters including the redaction request and strike out  
   application lodged 7 December 2018.

Date of Determination:        12 February 2019

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**DETERMINATION OF THE AUTHORITY**

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## **The employment relationship problem**

[1] This determination resolves a dispute about what redactions there should be from the pleadings and attached documents provided before the file is to be given to another Member of the Authority to determine two preliminary matters.

[2] The reason for consideration of redactions is that, depending on the outcome of the preliminary matters, there may need to be a determination about whether the nature of what took place between the parties on 14 April 2016 was mediation. If it is found that what occurred on 14 April 2016 was not mediation there will be no restriction to disclosure about what was said and done. If it is found that what occurred on 14 April 2016 was mediation then, unless public policy considerations permit disclosure, what was discussed at mediation will attract statutory confidentiality under s 148 of the Employment Relations Act 2000 (the Act).

[3] After the redaction issue has been determined the pleadings and attached documents will be given to another Member of the Authority to deal with the two preliminary issues. This is in accordance with what was discussed with Counsel and the Authority at a case management conference on 17 September 2018. The Authority was concerned that if this order was not applied to determining matters, the status of the 14 April 2016 meeting/mediation would be assessed in a vacuum with the jurisdictional issues still to be determined and the final shape of the claim unclear.

[4] It is useful to set out briefly the nature of the employment relationship problem between the parties and some background about earlier determinations to put this matter in context.

### **New proceedings July 2018**

[5] A statement of problem and an application for orders or declarations was lodged with the Employment Relations Authority in July 2018. Broadly the problem was that there were actions on behalf of the respondent that caused disadvantage to the applicant. The application for orders or directions concerned whether what took place on 14 April 2016 was mediation or not.

[6] The respondent in its statement in reply says that some claims have already been disposed of and cannot be re-litigated pursuant to the principle of res judicata. Further that

the claims about the 14 April 2016 mediation are raised in breach of s 148 of the Employment Relations Act 2000 (the Act) and in breach of an earlier non-publication order made by the Authority. The respondent also contends that the applicant's personal grievance claim was raised out of time and the respondent does not consent to it being raised out of time. It noted that there was no application for leave to raise the grievance outside of the timeframe.

[7] Particulars of the application to strike out were subsequently provided by the respondent with a focus on non-publication orders made by the Authority and disparity of treatment. The applicant responded to that strike out application. There was an application for leave to raise the grievance after the expiration of the 90 day statutory period which the respondent responded to.

[8] There was also an application by the applicant that the respondent's admission should be placed on the record on the basis that there was a failure to specifically admit or deny paragraph 6 of the statement of problem. The respondent opposed that and does not accept there was an admission. It says to the effect that it would not make sense to expect it to plead to matters that would negate its admissibility argument. That application is a matter that should sensibly remain with me to determine if required.

[9] The respondent also seeks leave to amend the orders sought in the strike out application and I will deal with that request in this determination.

[10] The parties have been involved in earlier proceedings.

#### *Application for removal to the Employment Court*

[11] In a determination dated 1 August 2016<sup>1</sup> the Authority declined an application by the applicant for removal of part of a matter to the Employment Court. The part of the matter that the applicant wished to remove was whether the applicant must keep confidential statements before, at, or after the 14 April 2016 meeting. The applicant's view was that the meeting on 14 April 2016 was not mediation and the respondent was of the view it was mediation.

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<sup>1</sup> *Crush v Southern District Health Board* [2016] NZERA Christchurch 126, Member Doyle

[12] In the determination of the application for removal<sup>2</sup> following an earlier reference to affidavit evidence in support of the application for removal the Authority made the following order prohibiting publication and maintaining the separate nature of the material on the application to remove file from the Member who was to undertake the substantive investigation:

[7] I advised counsel at the conclusion of the investigation meeting that I intended to prohibit the contents of those affidavits from publication. I prohibit from publication under clause 10 (1) of Schedule 2 to the Act the contents of the affidavits of Kate Crush and Jenny Guthrie in support of the application to removal.

[8] The file containing the application for removal, affidavits and submission is held separately from the substantive file and will continue to be treated in that manner by the Authority Officer.

[13] The determination also referred to the Authority being able to determine the issue of admissibility of statements made on 14 April 2016 without delaying the substantive investigation and using another Member for that purpose.<sup>3</sup>

[14] As the Member who determined the application for removal I was approached by an Authority Officer at a later date that was reasonably close to the date the substantive investigation was undertaken. The Authority Officer advised that the applicant may wish to be heard about admissibility of documents tabled at the meeting on 14 April 2016. On asking for further information to deal with that issue I was advised by the Authority Officer that he had received an email from Mr Castle that the admissibility issue was not to be pursued at that time.<sup>4</sup> In a response to the strike out application it was the view of the respondent that the issue of admissibility was not pursued at the time of the first substantive investigation because the parties had been advised by the Member dealing with the substantive matter that the April 2016 mediation/meeting had no relevance to the issues to be determined at that time.<sup>5</sup>

[15] In short therefore there has been no determination about the admissibility of evidence about communications at the 14 April 2016 mediation/meeting.

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<sup>2</sup> Above at n1 at [6], [7] and [8]

<sup>3</sup> Above at n1 at [32]

<sup>4</sup> See emails 30 January 2017 and 3 February 2017 between the Authority and Counsel

<sup>5</sup> Paragraph 6.4 of the applicant's response to respondent's strike out application

*Substantive determination of disadvantage grievances*

[16] In a determination dated 6 July 2017<sup>6</sup> Member David Appleton determined the applicant's substantive application for unjustified actions causing disadvantage.

[17] Neither of the earlier determinations was challenged.

**The Authority's approach to redaction**

[18] The Authority in its Notice of Direction recorded that some paragraphs of the statement of problem, and in particular paragraphs 3 to 12 and some supporting documentation, may need to be redacted before the material is forwarded to the Member determining the first two preliminary matters. The Authority asked that the representatives confer and arrive at an agreed position as to what sections of the statement of problem and supporting documents needed to be redacted and they were to notify the Authority Officer once this had been completed.

[19] Unfortunately, the applicant and respondent have been unable to reach agreement about redactions.

[20] Until the Authority is required to make a determination about admissibility, communication that took place at the 14 April 2016 meeting/mediation is to be withheld from a Member determining substantive matters. The reason for that is apparent from the statutory confidentiality in s 148 of the Act and in particular s 148(3) of the Act if the meeting is found to be mediation.

[21] Section 148 of the Act provides:

**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.

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<sup>6</sup> *Crush v Southern District Health Board* [2017] NZERA Christchurch 117, Member Appleton

- (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) ...

[22] The respondent set out after the case management conference the redactions it wanted in an email dated 23 October 2018. Subsequently the applicant lodged other applications and responses. Ms Copeland also says that aspects of those should be redacted. The respondent has objected to most of the suggested redactions.

[23] The Authority has assigned two Members' to this matter. I am to consider if required whether communication at the 14 April 2016 meeting/mediation is admissible. Before doing that another Member, Member van Keulen, will determine the two jurisdictional matters of strike out and whether the grievance was raised within the statutory timeframe and/or leave is to be given to raise a grievance outside of the timeframe.

[24] I accept that what occurred at the meeting/mediation on 14 April 2016 is very important to the applicant. In this determination I am simply considering redaction before the file is handed onto Member van Keulen. For completeness I am not determining admissibility or anything about non publication or res judicata. There is a dispute about whether the meeting on 14 April 2016 was mediation and there is disclosure of what occurred at the 14 April 2016 mediation/meeting in the applicant's pleadings and documents. If what occurred on 14 April 2016 was subsequently found to be mediation and there was no basis found for a public policy exception to s 148 then the protections that the section provides to mediation would be defeated if redactions were not made.

[25] I have given the parties an opportunity to consider whether agreement can be reached about redaction. Given the further reference to 14 April 2016 communications in pleadings and documents lodged by the applicant after the case management conference, the Authority will not give a further opportunity for agreement about redactions. The Authority Officer in consultation with me will remove material about 14 April 2016 and advise the parties it has been done before it is shown to Member van Keulen. Ultimately the decision of

redaction is for the Authority with reasons in appropriate cases. This matter involved senior Counsel and some indulgence was given in the first instance.

[26] Ms Ryan referred to the impact of redactions on Member van Keulen being able to determine the preliminary issues. Objectively assessed I am not satisfied that any of the redactions I intend to make will impact on determination of the two preliminary matters. In any event where the statutory confidentiality under s 148 of the Act may apply to what occurred on 14 April 2016 difficulties do not suffice as a reason not to redact.

### **Redactions from the statement of problem**

[27] Under the heading *14 April 2016 meeting* the Authority considers the following paragraphs should be redacted. These are referred to in the 23 October 2018 email and responded to in detail by Ms Ryan. I recently advised Counsel about some earlier passages in the statement of problem but there was no agreement about those.

[28] Paragraphs 3, 4 and 5 refer to preparatory discussions about the mediation/meeting on 14 April 2016, how it should take place and what was to be discussed. I find that these paragraphs should be redacted pending the determination of the admissibility issue. They could be found to be admissible or potentially could be statements made for the purposes of mediation.

[29] Paragraph 6 from *The SDHB....* to the end of the paragraph. Ms Ryan submits that the written documents referred to in paragraph 6 were prepared independently to and were unrelated to the mediation. I agree that the documents referred to existed outside of mediation. Paragraph 6 on its face discloses what was said or done orally on 4 April 2016 and that is why that part of the paragraph is to be redacted.

[30] The same reasoning applies to paragraph 7 because it is made in the context of what was disclosed at the meeting on 14 April 2016 following on from paragraph 6.

[31] The same reasoning applies to paragraph 9. I do not find Ms Ryan's argument that this paragraph states what was not disclosed on 14 April 2016 persuasive. If the Authority gets to the point of determining that what occurred was mediation then whether or not there are public policy exceptions to the statutory confidentiality is a high rather than a technical threshold.

[32] The same reasoning applies for the whole of paragraph 12 – including the particulars in 12.1 – 12.4. They refer to communications during the 14 April 2016 meeting/mediation.

[33] Paragraph 17.1 and 17.1 (a) (b) and (c) for the reasons that they are about oral communications on 14 April 2016.

[34] Paragraph 17.2 which is clearly about a disclosure made on 14 April 2016 and detail about what was communicated.

[35] Paragraph 17.3 and particulars (i) and (iii) because they refer to oral communication during the 14 April 2016 meeting.

[36] Paragraph 17.6 in its entirety because it discloses what was said at the meeting on 14 April 2016.

[37] Paragraph 42 from *The manner to 2015 Proceeding*. That is because it concerns statements made at the meeting on 14 April 2016.

[38] Paragraph 47 for the same reason as 42.

#### **Attachments to the statement of problem**

[39] The following matters are redacted from the attachments

*Annexure 1 to the Statement of problem- Letter raising personal grievances dated 13 April 2017*

[40] Paragraph 3 - the second sentence only. It clearly discloses an oral discussion on 14 April 2016. Ms Ryan refers to the letter being between the parties but it has not remained that way as it has been lodged with the Authority.

[41] Paragraph 5 for the reason paragraphs 3-5 of the statement of problem have been redacted.

[42] Paragraph 6 which refers to oral disclosures during the meeting on 4 April 2016.

[43] Paragraphs 8, 9, 13.1, 13.3 and 37 for the same reasons.

*Applications for removal to the Employment Court (annexure 2)*

[44] There are two applications. One is dated 6 May 2016 and the second 26 May 2016. The Authority has determined the application for removal and that determination is available for the Member who deals with the preliminary matters if required.

[45] Both applications were held separately from the Member who determined the earlier substantive matters. I find they should continue to be so. Ms Ryan accepts that the first application can be withheld on the basis that the second essentially replaces it.

[46] I find that both applications for removal to the Employment Court should continue to be held separately from the Member who will determine the two preliminary issues.

*Affidavits in support of application for removal*

[47] The affidavit in support of the application for removal of Jenny Guthrie is to continue to be held separately from Member van Keulen determining the preliminary issue. It contains reference to the April 2016 communications.

**Applicant's response to respondent's strike out application**

[48] Paragraph 10.1 of this response because it refers to communication on 14 April 2016.

**Application for leave to raise personal grievance outside of the statutory timeframe**

[49] Paragraph 3.5 as it refers to communications on 14 April 2016.

[50] The following attachments are to be removed from this application. Letter from Mr Castle to Copeland Ashcroft dated 29 April 2016 in its entirety. Paragraph 7.3 which is the only un-redacted part of that letter except for an introductory passage. Para 7.3 clearly refers to communication on 14 April 2016 and there appear to be other concerns about whether privilege attaches to this letter.

[51] The application for removal to the Employment Court which has already been dealt with above.

[52] Paragraph 2.1, 2.2 and 2.3 of the letter from Wilkinson Rodgers to Copeland Ashcroft dated 14 July 2016 to be redacted. I do not redact paragraph 2 but only the subsections.

### **Scope of the strikeout application and leave to amend the orders sought**

[53] Ms Copeland seeks leave to amend the orders in the Strike Out application as follows:

- 23 A determination that any documents or information that refers to matters that were covered in either of the Applications for Removal dated 6 May 2016 and 25 May 2016, affidavits of Kate Crush and Jenny Guthrie in support of the Application for Removal and the submissions are subject to a non-publication order;
- 24 A determination that any documents or information that has been filed with the Authority that refers to the matters covered in the documents that are subject to a non-publication order amounts to a breach of the non-publication order;
- 25 A determination that any documents or information that have been filed with the Authority that refer to the matters covered in the documents that are subject to a non-publication order are to be struck out.

[54] Leave is granted to amend the orders sought.

### **Application for orders or declarations**

[55] The Application for orders or declarations is to be held separately for further determination if necessary about the question of admissibility of communications on 14 April 2016.

### **Next Steps**

[56] The Authority Officer is to make the redactions and removals before the file is to be given to Member van Keulen for determination of the preliminary issues. A case management conference will be held in due course.

### **Costs**

[57] The issue of costs is reserved.

**Helen Doyle**  
**Member of the Employment Relations Authority**