New Zealand Employment Relations Authority Decisions

Crush v Southern District Health Board (Christchurch) [2016] NZERA 338; [2016] NZERA Christchurch 126 (1 August 2016)

Last Updated: 30 November 2016

Attention is drawn to the order prohibiting publication of certain information

IN THE EMPLOYMENT RELATIONS AUTHORITY CHRISTCHURCH

[2016] NZERA Christchurch 126
5539675

BETWEEN KATE CRUSH Applicant

A N D SOUTHERN DISTRICT HEALTH BOARD Respondent

Member of Authority: Helen Doyle

Representatives: Tim Castle, Counsel for Applicant

Pheroze Jagose, Counsel for Respondent

Investigation Meeting: 26 July 2016 at Wellington

Submissions Received: 14, 25 and 26 July 2016, from the Applicant

22 and 26 July 2016, from the Respondent

Date of Determination: 1 August 2016

DETERMINATION OF THE AUTHORITY ON AN APPLICATION TO REMOVE MATTER TO THE COURT

A The application for removal to the Employment Court is declined.

B. **Costs are reserved until after the substantive matter has been determined.**

Employment relationship problem

[1] This is an application to remove part of a matter to the Employment Court. That part concerns whether the applicant must keep confidential statements before, at or after the 14 April 2016 mediation under s 148 of the Employment Relations Act

2000 (the Act).

[2] The application is opposed by the respondent on the basis that the criteria for removal set out at s 178 of the Act is not established by the application and there is no important question of law likely to arise in the matter other than incidentally and no other circumstances requiring the Court to determine the preliminary matter.

[3] Another member, David Appleton, is dealing with the substantive application which is an unjustified disadvantage personal grievance. It was set down for an investigation meeting on 10 and 11 May 2016 in Queenstown. Before that date, two mediations were held on 9 March 2016 and on 14 April 2016. The application for removal concerns the second mediation only from which no agreement arose.

[4] The employment relationship is ongoing. The applicant is employed as a nurse and clinician by the respondent and Mr

Castle submits highly regarded by those she works with.

[5] The removal application necessitated an adjournment of the substantive investigation meeting in May and it was appropriate because of the nature of the removal application to assign it to another member.

[6] Mr Castle and Mr Jagose were instructed at the time of the application for removal. The Authority was provided with and has heard submissions from both counsel and is appreciative of the assistance it has derived from them. Affidavit evidence in support of the application for removal was provided.

Prohibition from publication

[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 for removal.

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

Removal to the Court

[9] The Authority may, on the application of a party to a matter order the removal of it or any part of it to the Employment Court without investigating it under s 178 of the Act if under s 178(2):

(a) An important question of law is likely to arise in the matter other than incidentally; or

(b) The case is of such a nature and of such urgency that it is in the public interest that it be removed immediately to the Court; or

(c) The Court already has before it proceedings which are between the same parties and which involve the same or similar or related issues; or

(d) The Authority is of the opinion that in all the circumstances the Court should determine the matter.

[10] The grounds in this case for the application for removal are those in s 178(2) (a) and 178 (2)(d) of the Act.

Important question of law

[11] Section 148 of the Act provides for confidentiality of statements, admissions or documents created or made for the purposes of mediation and any information that is disclosed orally in the course of mediation. The relevant parts for present purposes are set out below:

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 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) ----

[12] An important question of law is one that arises other than incidentally. The then Chief Judge Goddard in *Hanlon v International Educational Foundation (NZ) Inc1* stated about the measure of the importance of a question of law:

The importance of a question of law is a relative matter. Its importance has to be measured in relation to the case in which it arises. A question of law arising in a matter will be important if it is decisive of the case or some important aspect of it or strongly influential in bringing about a decision of it or a material part of it.

[13] The evidence which the applicant wishes to bring before the Authority is contained in paragraphs 11 and 12 of the affidavit of Jenny Guthrie dated 26 May

2016. Ms Guthrie is a solicitor who accompanied the applicant to the mediation on

14 April 2016 at which a mediator engaged or employed by the Ministry of Business

Innovation and Employment (MBIE) was present.

[14] Mr Castle submits that what took place on 14 April 2016 was not genuinely called for, or used by one party for the purpose of mediation of issues in the matter before the Authority, but for an improper, illegitimate, even unlawful purpose and/or was not a mediation at all for the purposes of s 148. Generally the concerns were that there was no prior disclosure of the purpose of the mediation meeting, there was effectively an ambush and that various discussions took place during the meeting in the absence of the applicant.

[15] I agree with Mr Castle that the issue of admissibility of evidence is a question of law. I also agree with Mr Jagose that whether the meeting on 14 April 2016 was mediation as defined in the Act or something else is a factual assessment and no

important question of law arises about that particular matter to support removal.

1 [2005] NZEmpC 14; [2005] 1 ERNZ 1 at pg 7

[16] I accept Mr Castle's submission that the issue about admissibility of evidence is an important one to the applicant and he made full and complete submissions about the application for removal to the Employment Court.

[17] The personal grievance of unjustified disadvantage was lodged and set down for investigation before 14 April 2016. The applicant wants to rely on the statements, as the respondent says in its statement in reply, to enlarge or supplement her personal grievance. Three documents about which a further claim may be made are admissible because they exist independently of the process undertaken on 14 April. No issue of law arises therefore about the admissibility of those three pieces of information.

[18] The construction and application of s 148 and the extent to which communication made in mediation about employment problems can subsequently be relied on in personal grievance proceedings has been the subject of several judgments.

[19] The Court of Appeal judgment in *Just Hotel Ltd v. Jesudhass*2 is an appropriate starting point. The Court of Appeal stated at [31]:

We do not see any ambiguity in the words of section 148(1). All communications "for the purposes of the mediation" attract the statutory confidentiality, except possibly (as we discuss later in this judgment at [41]-[43]) where public policy dictates otherwise.

[20] At para.[34] the Court of Appeal stated:

There is nothing surprising in this conclusion. To the contrary, it reflects the desirability of encouraging the parties to a mediation to speak freely and frankly, safe in the knowledge that their words cannot be used against them in subsequent litigation if the dispute does not prove capable of resolution at mediation.

[21] The Court of Appeal did not agree with the judgment of the Employment Court that s 148(1) only protected communications that were *"genuinely for the purposes of settling an employment dispute or for the legitimate purposes of mediation"*. It was stated that such a retrospective examination, based on a mere allegation of illegitimate or improper purpose or of non-genuine use, would effectively defeat the protection that s 148(1) seeks to provide.

[22] The Court of Appeal did refer to the question of public policy considerations with a focus on whether evidence of serious criminal conduct during mediation could

2 [2007] NZCA 582; [2007] ERNZ 817; [2008] 2 NZLR 210

be permitted although it was not necessary in that case to decide whether there should be such an exception.

[23] I accept Mr Castle's submission that since *Just Hotel Limited* there have been circumstances where public policy has been a ground for non-compliance with s 148 of the Act.

[24] Chief Judge Colgan in *Richard Te Ao v Chief Executive of the Department of Labour*3 referred to the hypothetical example given by the Court of Appeal of the commission of a serious criminal offence during the provision of mediation services and stated that is unlikely to be the only circumstances in which *public policy* may permit the statute to be overridden. The Chief Judge stated "On the other hand, given the counter-intuitive propriety of a court effectively ignoring a statutory provision, the

occasion on which this might occur must be rare and the circumstances for doing so compelling."4 In *Te Ao* it was found that the circumstances of the case did constitute grounds for a public policy waiver of statutory confidentiality. The circumstances were different from this matter. It is clear from a reading of the judgment that the grounds for public policy exceptions to the application of s 148(2) must be both compelling and the departure from the requirements under that Act no more than as necessary to right a "manifest injustice that might otherwise occur."5

[25] Issues about robust, bullying and even threatening statements at mediation have been the subject of other Employment Court judgments and have been found to have been for the purposes of mediation and not to have met the threshold required to provide a public policy ground exception to the statutory confidentiality in s 148.6

[26] In *Hamon v Coromandel Independent Living Trust*7 Judge Travis stated that the public policy exception in *Just Hotels* should only be used for the clearest of cases and where it has the most important consequences for the parties to the litigation in the Authority or the Employment Court if the evidence was to be excluded. He did not accept a submission that "there is an overarching requirement for legitimacy that

is implied into the Act to support the obligation of good faith found in s 4 and

3 [2008] ERNZ at [65]

4 Ibid at [65]

5 Ibid at [43]

6 George v Auckland Council [2104] ERNZ 492

7 [2013] NZEmpC 56 at [37]

elsewhere in the Act."8 Judge Travis found the difficulty with that submission was that a similar argument had been rejected in *Just Hotels.*

[27] I agree with Mr Jagose's submission that in terms of the importance of an issue of law this matter is not the "clearest of cases" with the exclusion of evidence having the "most important consequences for the parties" for a public policy exception.

[28] During submissions, Mr Castle raised the right to justice under s 27 of the New Zealand Bill of Rights Act 1990 as an important issue of law. Mr Jagose submits correctly that in terms of that section the mediation service does not have the power to make a determination in respect of a person's rights, obligations or interests. I do not find in all the circumstances the right to justice gives rise to an important question of law in this matter.

[29] Mr Jagose makes a persuasive submission that the respondent's conduct is already an issue before the Authority and in those circumstances any issue of law about the admissibility of statements is confined to supplementing what is already before the Authority.

[30] In all the circumstances set out above I do not find that there is an important question of law that arises about admissibility of evidence other than incidentally. The ground under s 178(2) (a) is not made out.

Discretionary considerations – s 178(2)(d)

[31] I now turn to whether this is a proper case to exercise my discretion and otherwise remove the admissibility of evidence matter to the Employment Court at first instance.

[32] The parties are in an ongoing employment relationship and they would benefit from timely investigation and determination of the substantive issue between them. It is intended under the Act that the Authority, except perhaps in a very few cases where the grounds in s 178(2) are established, investigate personal grievances at first instance. Preliminary issues arise in the course of such investigations from time to time and are usually determined by the Authority. The Authority is able to determine

the issue of admissibility of statements made on 14 April 2016 without delaying the

8 Ibid at [36]

substantive investigation. It can use another member for that purpose without difficulty.

[33] I am not otherwise under s 178(2)(d) of the Act minded to remove the matter to the Employment Court. I find that, in the exercise of my discretion, the matter should remain in the Authority for it to address issues about the admissibility of evidence and proceed to investigation of the substantive issue without further delay.

Determination

[34] The application for removal to the Employment Court is declined.

Further Steps

[35] Member Appleton advises dates are available to deal with the substantive matter either later this year or early next year and in due course a telephone conference may be arranged.

Costs

[36] I reserve the issue of costs and these will no doubt be dealt with at the conclusion of the substantive matter.

Helen Doyle

Member of the Employment Relations Authority
