

*Under the Employment Relations Act 2000*

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON OFFICE**

**BETWEEN** Bernard Laurence Lauchlan (Applicant)  
**AND** Keegan Contractors Limited (Respondent)  
**REPRESENTATIVES** Alan Millar for Applicant  
Phillip Drummond for Respondent  
**MEMBER OF AUTHORITY** G J Wood  
**INVESTIGATION  
MEETING** 26 January 2007  
**FURTHER SUBMISSIONS** Due 6 March 2007  
**DATE OF  
DETERMINATION** 15 March 2007

**DETERMINATION OF THE AUTHORITY**

**Employment Relationship Problem**

1. This problem relates solely to the admissibility of evidence about what took place in mediation provided by the Department of Labour's Mediation Services. The mediation was attended by both the applicant, Mr Lauchlan, and the respondent's (Keegan's) managing director, Mr Malcolm Keegan, together with their respective representatives.
2. Perhaps uniquely, the wider employment relationship problems between the parties (including Mr Lauchlan's claim for unjustified dismissal and Keegan's claim for damages for breach of contract) now has to be dealt with by three separate Authority members. One member was unable to continue investigating the matter because of potentially unfair information coming to his attention. I am to determine this preliminary issue over the admissibility of evidence and a third member will be required to actually investigate the problems fully.

3. To me, this is a clear sign that this is the sort of case (because of the mounting costs of representation and the range of legal issues, amongst other things) that ought to have been, and still should be, resolved directly between the parties, or with the assistance of a neutral third party. In the absence of a commitment by the parties to resolve this matter, I am bound to conclude my determination, but nonetheless feel obliged to remind the parties that their interests would be best served by resolution. In any event, I know that my colleague who will deal with the case in future will be reassessing that matter continually.
4. The Authority has a broad mandate to investigate employment relationship problems in any way that it determines, provided that the parties are accorded natural justice. In this case, following submissions by the parties on the process to be followed, I determined to first make findings of fact as to whether what was claimed to have been said in mediation was in fact said, and, if so, then to determine whether it was for the purposes of mediation. I determined to do so by hearing evidence from those who were at the mediation, excluding of course the mediator. The parties' representatives elected not to give evidence, a decision I concur with, given clear cost and professional obligation concerns.

### **The Facts**

5. The issues in this case first arose in late 2005. Mr Lauchlan believed that his 3½ years of employment with Keegans was going well and that he was on good personal terms, even friendship, with Mr Keegan. By contrast, Mr Keegan felt that Mr Lauchlan's attitude and approach to his work had tailed off badly in the last half of the year. Mr Keegan claims that he had raised, in a general way, his concerns about Mr Lauchlan's attitude with him, although Mr Lauchlan denies that. That is a matter that can be determined in a subsequent investigation.
6. Whatever was the case, Mr Keegan was sufficiently concerned to take matters up with his lawyer, Mr Drummond. As a result, Mr Keegan decided that he would like to meet Mr Lauchlan in mediation to discuss his concerns.

7. Accordingly, Mr Keegan wrote Mr Lauchlan a memorandum dated 18 November 2005, entitled “Employment Problem”, setting out the process he wished Mr Lauchlan to take part in, as set out below:

*“There are a number of issues which have arisen (more particularly in recent times) which in my view is indicative of an employment problem. My practice is to address any employment problem in order to prevent ongoing damage occurring to the employment relationship.*

*So that we can discuss the problem in an open and frank environment with the benefit of a mediator I have referred the matter to the local Mediation Service to provide professional mediation assistance for us. While mediation is a voluntary process I think it desirable that we take advantage of the service provided in order to assist in resolving these issues. Accordingly I have arranged for a mediator to be available at 9:30am on Friday 25 November 2005 (7th Floor, Farmers Mutual Building, The Square, Palmerston North).*

*I consider that it would be desirable if you were represented by a solicitor or employment representative and in that regard if you do not have somebody in mind I will be able to assist in putting you in contact with a representative. The company may be prepared to make a reasonable contribution towards the representative’s costs. We think it important that you are represented.*

*If you want some time off during the week to organise and meet with your appointed representative then that can be arranged upon request.*

*Could you please confirm that you are prepared to attend mediation and if so we will then confirm the necessary arrangements with the Mediation Service.”*

8. Mr Lauchlan contacted the Mediation Service and received advice that it would be prudent, if attending such a meeting, to have a representative. As a result of the memo and his discussions with Mediation Service staff Mr Lauchlan was aware that there was a problem with his employment, but he did not know what it was.
9. Mr Lauchlan then approached his present representative, Mr Millar, and they determined that the appropriate response was to attend mediation, find out what the problems were and try and sort them out. Accordingly Mr Lauchlan told Mr Keegan that he would attend the mediation and that Mr Millar would be there to represent him.
10. For reasons given below, I do not set out what occurred in the mediation, but it is sufficient to note that Mr Lauchlan’s serious claims about what happened in mediation did not occur, I find, as a matter of fact.

## Determination

11. The above finding is not one that ought to impugn the credibility of Mr Lauchlan vis-à-vis Mr Keegan in any subsequent investigation, even although those two were the only witnesses I heard from. Rather, my determination follows from a flaw in the internal logic of Mr Lauchlan's claims against the treatment said to have been meted out to him by Keegans at the mediation.
12. Essentially, I find that if the allegations as made by Mr Lauchlan about what Mr Keegan said to him at mediation were true, then Mr Lauchlan's own later evidence (about the advice he sought from Mr Millar about what Mr Keegan was on about) would simply have not occurred, because it would have been obvious from the words Mr Keegan was alleged to have used. Therefore I prefer Mr Keegan's evidence that he said nothing at the mediation that would constitute grounds for breaching the confidentiality usually accorded to mediation, consistent with *Jesudhass v. Just Hotel Ltd* unreported, Colgan CJ, Shaw and Couch JJ, WC3/06, 21 March 2006.
13. In any event, the other matters that Mr Lauchlan wishes to give evidence about that occurred in the mediation can be established (at least by implication) from Mr Keegan's behaviour leading up to the mediation (including his memo of 18 November), the fact that there was a mediation and events that occurred subsequent to the mediation.
14. While these findings should resolve this aspect of the employment relationship problems between the parties, I intend to address the issue of whether what generally occurred in the mediation here was not genuinely for the purposes of mediation and/or for the purposes of settling litigation or potential litigation.
15. I accept that it is unusual for an employer to formally address employment issues it has with an employee through mediation. After all, the Act recognises that employment relationships are more likely to be successful if problems in those relationships are resolved promptly by the parties themselves (s.143(b)).
16. The Act also recognises, however, that expert problem solving assistance (particularly mediation) needs to be available at short notice and that problem solving procedures

need to be flexible (s.143(c)&(d)). The legislature must have been taken to have understood that mediation could, on occasion, be used to deal with ongoing employment relationship issues, and that unless the privilege attached to mediation was abused, anything said by the parties at such a mediation would remain confidential. In essence, this creates just one more lever to help parties facing problems in their employment relationships and thus helps meet the overarching objective of the Act to build productive employment relationships.

17. These provisions show that just because an initiative such as that undertaken by Keegans is unusual, it does not mean that it is unacceptable per se, and that any protections that flow from the mediation process should be disregarded accordingly.
18. I conclude that had the events in question taken place outside of mediation, no privilege by recourse to the without prejudice rule could have applied, on the basis that to claim the common law privilege a dispute must exist. Such a dispute must involve a significant difference between the expressed views of the parties about a matter concerning them both. In the absence of evidence of an explanation of the views of the employer and a rejection of those views by the employee there can be no common law privilege (*Bayliss, Shar and Hansen v. McDonald* unreported, Couch J, CC12/06, 7 December 2006, applied).
19. The matter may be different when it comes to mediation, as noted by the Court in *Just Hotel*. As the Court makes clear in paragraph [65], however, actions taken which were not for the purposes of mediation are not subject to confidentiality and inadmissibility.
20. I find that where the Court held at paragraph [56] that the phrase “for the purposes of mediation” reflects the common law requirement that such communications must genuinely be for the purpose of settling litigation or potential litigation, the Court was not holding that there has to be litigation or potential litigation before confidentiality can apply. The Court specifically used the word “reflects”. The statutory protection is thus akin to the common law requirement (i.e. comparable with it); but not that the prerequisites are exactly the same. This conclusion is reinforced by the Court’s statement in paragraph [59] that if information is provided that is not for the legitimate purposes of the mediation then it is not entitled to the protections of confidentiality

and inadmissibility, as the corollary is that if information is provided for the legitimate purposes of mediation, then it will be confidential and inadmissible.

21. I also note that in paragraph [52] the Court refers to parties to an employment relationship engaging in mediation with a view to sustaining and improving that relationship. I therefore consider that the Court concluded that parties engaging in mediation to deal with issues in their employment relationship (and to try and improve them or resolve them) are acting for the purposes of mediation.
22. There is no evidence about what occurred in mediation in this case, other than that I have ruled did not occur as a matter of fact, that could be construed as actions other than ones where the parties were trying to identify and explain issues in the relationship, resolve them and improve the relationship. It therefore follows that all the other matters given in evidence during my part of the investigation were actions taken for the purposes of mediation. They must therefore be kept confidential and are inadmissible in any further investigation meetings.
23. For the above reasons, therefore, I conclude that paragraphs 21-27 of Mr Lauchlan's brief of evidence and Mr Keegan's brief of evidence prepared for the investigation meeting of 26 January are inadmissible and order that all documents in these proceedings be altered to reflect that.

### **Costs**

24. Costs are reserved.

**G J Wood**  
**Member of Employment Relations Authority**