

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2016] NZERA Auckland 401
5529652

BETWEEN

LESLIE McKINLEY
Applicant

AND

KAREN ANNE & KENNETH
RAE McLANACHAN
PARTNERSHIP
Respondent

Member of Authority: Nicola Craig

Representatives: Sarah McKinley, Advocate for Applicant
Gary Tayler, Advocate for Respondent

Investigation Meeting: On the papers

Determination: 9 December 2016

DETERMINATION OF THE AUTHORITY

- A. The statement of problem and documents filed with it, are to have references to statements and admissions made for the purposes of mediation, and information disclosed orally in the course of mediation, redacted from them.**

Employment relationship problem

[1] The issue before the Authority for preliminary determination is whether certain information, contained in the applicant's statement of problem and attached documents, is confidential and should be removed.

[2] The applicant filed a statement of problem in the Authority on 30 September 2016. His claim concerns minimum entitlements, particularly payment of the minimum wage and various holiday entitlements.

[3] The statement of problem was sent to the respondent, but the requirement to file a statement in reply was put on hold pending further directions from the Authority.

[4] The statement of problem contains references to events which are said to have occurred at mediation between the parties on 22 July 2014. It also has documents attached to it which include references to the same type of material.

[5] The applicant was asked by the Authority to refile the statement of problem with details about what was said at mediation, and why mediation was attended in the first instance, removed. The applicant refused to do so, on the basis that both parties had waived confidentiality.

[6] The respondent opposes material from mediation being included in the statement of problem.

[7] There is no dispute about the terms of settlement being before the Authority for the purposes of this matter.

[8] The applicant argues that confidentiality concerning mediation was waived by both parties. He says that this occurred in relation to a Worksafe prosecution of the McLanachans under the Health and Safety in Employment Act 1992, concerning the applicant's 2012 work accident.

[9] The applicant filed in the Authority a notice of waiver document, which was signed by his daughter who held his enduring power of attorney. This notice states:

I, Leslie James McKinley waiver confidentiality under Section 148(1) ERA in relation to the agreement reached at mediation.”

[10] It is not entirely clear what happened to the notice of waiver after it was signed. Worksafe's lawyer believes that it was either handed to the District Court Judge and returned (which she regards as more likely), or the content was simply conveyed to the Judge.

[11] The McLanachans' defence lawyer in the health and safety prosecution does not recall receiving or seeing the notice of waiver and it does not appear to have been in his file. There is no reference in the sentencing notes to the notice of waiver.

[12] The recall of the defence lawyer is that the settlement agreement was handed up for the Judge to consider. It was then handed back. The Judge stated in the sentencing notes that the settlement figure was not to be published and the next sentence in those notes is redacted.¹

[13] The respondent's position is that the McLanachans did not give a general waiver of confidentiality, rather they simply consented to the disclosing of the details of settlement for the purposes of the sentencing.

[14] Various documents and submissions were received by the Authority from both parties, and have been carefully considered prior to this determination being issued.

[15] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has not recorded all the evidence and submissions received from the parties but has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter, and specified orders made as a result.

Determination

[16] The applicant relied on *Williams (Labour Inspector) v Marx and Roberts as trustees of Vintage Farm Trust*.² That case includes claims of failure to provide and retain written employment agreements, and failure to keep records and to pay minimum wages. That decision does not concern a settlement agreement or waiver.

[17] The respondent referred the Authority to the Employment Court decision in *Maharaj v Wesley Wellington Mission Inc*.³ That case concerns a claim for arrears of wages for sleepovers, following the decision in *Idea Services Ltd v Dickson*.⁴ Prior to the *Idea Services* decision Mr Maharaj had entered into a mediated settlement agreement which purported to be a "full and final settlement of any and all claims between the parties arising out of the relationship between them".

[18] Wesley Wellington Mission successfully applied to strike out the case, including on the basis that the settlement compromised all and any disputes between the parties.

¹ *Worksafe v Kenneth McLanachan and Karen McLanachan* [2015] NZDC 24763 at [21]

² [2016] NZERA Wellington 100

³ [2016] NZEmpC 129

⁴ [2009] ERNZ 116

[19] Although *Maharaj* may be relevant to the substantive part of this case, it does not assist in terms of the waiver issue.

[20] Section 148 (3) of the Act provides that no evidence is admissible in any court or before any person acting judicially of any statement, admission, document or information that is required to be kept confidential by subs (1). That subsection requires various people, including those to whom mediation services are provided, to 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.”

[21] On the face of it this provision covers some material currently in the statement of problem and attached documents. However, s 148(1) starts with the proviso to the general rule; “[e]xcept with the consent of the parties...”. If the parties have consented, or waived, confidentiality, evidence may be admissible.

[22] The question is therefore whether there has been a waiver by both parties sufficient to allow the material in the statement of problem and attached documents to be disclosed in this proceeding.

[23] In this case the applicant’s notice of waiver refers only to waiving confidentiality in relation to *the agreement reached* at mediation” (emphasis added). It does not refer to the contents of what was said at the mediation or more broadly to everything related to the mediation or the like. At least impliedly, the McLanachans waived the same thing, as their lawyer handed the Judge the settlement agreement.

[24] In addition the waiver here is a limited waiver. The notice of waiver is directed specifically to the District Court Judge in the McLanachans’ matter. There is no indication that the settlement agreement was used in open court. The Sentencing Notes state that the settlement figure is not to be published, and there follows some redaction.⁵

[25] I am not satisfied that the parties have waived confidentiality of statements or admissions made at mediation. Therefore s 148 (3) of the Act applies to sections of

⁵ Ibid, footnote 1

the statement of problem and documents attached to it, where they refer to statements and admissions made for the purposes of mediation, and information disclosed orally in the course of the mediation. All such references will be redacted.

Costs

[26] Costs are to lie where they fall.

Nicola Craig

Member of the Employment Relations Authority