

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE**

[2022] NZERA 307
3148721

BETWEEN FREDRICK NELSON
Applicant

AND DYNACO LIMITED
First Respondent

AND SCOTT STEVENS
Second Respondent

Member of Authority: Nicola Craig

Representatives: Simon Davies-Colley, counsel for the applicant
Jo Baguley and Sharon Greig, counsel for the first
respondent
Richard Mark, counsel for the second respondent

Investigation Meeting: On the papers

Submissions received: 1 July 2022 from the applicant
1 July 2022 from the first respondent
1 July 2022 from the second respondent

Date of determination: 11 July 2022

DETERMINATION OF THE AUTHORITY

- A. Specified material in Fredrick Nelson’s witness statement is barred from being given as evidence by section 148 of the Employment Relations Act 2000.**
- B. Costs are reserved.**

What is the employment relationship problem?

[1] Fredrick Nelson used to work at Tyrepower Kerikeri (Tyrepower), a business operated by Dynaco Limited (Dynaco or the company). Scott Stevens is the manager of Tyrepower.

[2] Mr Nelson and Dynaco representatives attended mediation and reached an agreement. That settlement agreement was signed by the parties and a mediator of the Ministry of Business, Innovation and Employment.

[3] Amongst other things, Mr Nelson claims that Dynaco and Mr Stevens have breached confidentiality and non-disparagement provisions in the agreement.

[4] It is agreed by all that Mr Stevens attended at least some of the mediation.

What has led to this preliminary determination?

[5] An investigation meeting has been set for late July 2022 to consider Mr Nelson's claims but in the process of a case management conference and the provision of witness statements a disagreement has arisen regarding whether information about mediation is properly able to be the subject of evidence in the Authority.

[6] There are confidentiality restrictions on mediation information set out in s 148 of the Employment Relations Act 2000 (the Act).

[7] At the first case management conference an indication was sought of whether the parties consented to evidence regarding mediation being given. Mr Nelson and Mr Stevens were agreeable. Dynaco's representative was given time to seek instructions. She later advised that the company did not consent.

[8] Once witness statements began to be provided, Dynaco objected to material in Mr Nelson's statement as being based on what occurred at mediation. Questions of relevance have also arisen. Initially I did not look at Mr Nelson's witness statement.

[9] A further case management conference was held. In order to simplify the process of dealing with concerns about any mediation material and relevance and to allow the timetable to be completed before the investigation meeting, I asked the parties if they agreed to my seeing the mediation material even though I was the Member

considering the substantive issues. For Mr Nelson and Mr Stevens that was agreed. Dynaco was given some additional time and later advised that it was also agreeable.

[10] I have now looked at material in Mr Nelson's witness statement along with submissions sought from the parties. It is envisaged that this determination will also guide Dynaco and Mr Stevens regarding their forthcoming witness statements.

[11] As permitted by s 174E of the Act this determination has not recorded everything received from the parties but has stated findings of fact and law, expressed conclusions and specified orders made as a result.

What are the issues?

[12] The issues for determination at this preliminary stage are:

- (i) Does Mr Nelson's witness statement contain mediation material which on its face should be barred?
- (ii) Should parts of Mr Nelson's witness statement be excluded as not relevant?
- (iii) Is there material which would otherwise be barred but is able to be given including because:
 - (a) Dynaco and Mr Stevens have impliedly consented to its inclusion; and/or
 - (b) Mr Nelson is entitled to waive confidentiality on the material?

What does s 148 say?

[13] The Act provides:

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 ...
 - (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 or any information that, for

the purposes of the mediation, is disclosed orally in the course of the mediation.

...

- (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.

...

- (6) Nothing in this section-
- (a) prevents the discovery or affects the admissibility of any evidence (being evidence that 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 mediated services; ...

[14] Enabling the parties to have full and frank discussions at mediation is an important part of the Act’s resolution framework. The confidentiality provisions strongly support this aim.

[15] The operation of an Authority investigation by an Authority Member comes within the description of a person acting judicially. Therefore the s 148(3) restriction prevents mediation material from being included in witness statements unless there is an applicable exception.

What is the relevant term of the settlement?

[16] The confidentiality clause, clause one, includes a requirement that “all matters discussed at mediation” shall remain confidential, so far as the law allows.

Is there mediation material in the witness statement?

[17] Mr Nelson’s witness statement contains a fairly detailed description of the events at mediation, set out over almost a dozen paragraphs. Without detailing the evidence, there are clearly portions of his statement which contain statements and information which would be caught by s 148(3) of the Act subject to any exception. Although some dispute exists at the margins of the material, the parties all agree that some material is captured.

[18] The occurrence and date of mediation may well not be confidential, possibly along with the attendees. However, the material here goes substantially further than that.

[19] Evidence concerning statements made at mediation concerning previous events would not usually be admissible but evidence regarding independently existing previous events is admissible.¹ If Mr Nelson wishes to give evidence regarding such events that would be acceptable, just not their mention at mediation.

What is relevant?

[20] Had the evidence been about a meeting outside the mediation context, much of the material might well be allowed to remain in evidence although not seemingly particular necessary to the claim or the reply. However, in the context of the rules regarding mediation a tighter approach should be adopted.

[21] As part of my assessment of relevance, I have matched up the material from mediation Mr Nelson argues has been disclosed as set out in paragraph 15 of his application to the Authority, along with what Mr Fredrick and a witness from his current workplace say, in their witness statements. I have concluded regarding :

- (a) 15(a) – the portions of Mr Nelson’s witness statement about mediation do not contain evidence regarding this allegation;
- (b) 15(b)(i) – ditto;
- (c) 15(b)(ii) – ditto;
- (d) 15(b)(iii) – the witness statements do concern evidence regarding this allegation;
- (e) 15(b)(iv) - the portions of Mr Nelson’s witness statement about mediation do not contain evidence regarding this allegation; and
- (f) 15(b)(v) – ditto.

[22] This assessment will be fed into the finding excluding evidence below.

¹ The Act, s 148(6)(a).

Has there been consent?

[23] Mediation evidence is restricted by s 148(3) of the Act where subsection (1) requires it to be kept confidential. Under s 148(1) of the Act, confidentiality is required except “with the consent of the parties”.

[24] Here Mr Nelson wishes to give evidence about what occurred at mediation. There was initially a willingness on Mr Stevens’ behalf to contemplate mediation evidence but having received Mr Nelson’s evidence, the submissions for Mr Stevens seek to have mediation material excluded due to relevance and confidentiality. Dynaco does not consent to mediation material going into evidence.

[25] Dynaco’s statement in reply indicates that Mr Stevens only attended the parties’ opening statements and left before negotiations occurred. Through its reply, Dynaco has impliedly consented to evidence about Mr Stevens’ attendance and whether negotiations occurred during that attendance being given to the Authority.

[26] The position regarding Mr Stevens and consent is a little complicated. He was not a party to mediation in the sense of being a party to the employment relationship or a signatory of the settlement agreement. It is agreed that he was an attendee at least at a part of mediation. Whether his consent is required may be arguable but I will treat it as being necessary on the basis that a claim is being made against him based on what he heard at mediation.

[27] I accept the point made on behalf of Mr Stevens that denial of liability to Mr Nelson’s claim should not (of itself) be taken as consent. However, Mr Stevens’ statement in reply refers to his attendance only being at the start of mediation and not being present for negotiations. This goes further than a simple denial of liability and brings into question which parts of mediation he attended and what was discussed in those parts.

[28] I conclude that both Dynaco and Mr Stevens consented to some evidence about mediation being provided to the Authority.

What happens with Mr Nelson’s evidence?

[29] In conclusion, taking into account relevance and what was impliedly consented to, from Mr Nelson’s witness statement:

- (a) The second sentence of paragraph 13 until the end of that paragraph, are deleted;
- (b) Paragraphs 14 to 17 are deleted;
- (c) Paragraphs 18 to 21 remain; and
- (d) Paragraph 22 is deleted.

Is waiver permissible?

[30] Having decided that Dynaco impliedly consented to some evidence regarding mediation being given, I turn to considering whether the remaining parts should be permitted on the basis of Mr Nelson waiving confidentiality. It is argued for Mr Nelson that he is effectively able to waive confidentiality privilege on his own statements made in mediation.

[31] Some of the portions of evidence excluded above concerns statements by Mr Nelson's lawyer at mediation on which Mr Nelson seeks to waive confidentiality.

[32] Under s 148(1), the exception to the general mediation confidentiality rule, refers to situations where there is "*the consent of the parties or the relevant party*".

[33] This suggests in some circumstances, perhaps with some pieces or types of information, only the consent of one party is needed to disclosure and in others, some or all the parties' consent will be needed.

[34] Chief Judge Inglis in *Downer New Zealand Limited v Livingstone* noted there appears to be no authority about the meaning of the phrase "or the relevant party" or which party is considered relevant.² With documents, Her Honour found room for argument that only the consent of the party creating the document was needed.

[35] Here only oral statements are involved. With the to and fro of conversation, there is more complication in suggesting that anything a person says at mediation, can be freely used by that person if they wish. Take for example, a hypothetical statement by an employee at mediation that "*I refute your comment that I was such a hopeless employee, that you had been desperate to find a way to get rid of me for ages*". It seems unfair for her or him to be able to waive confidentiality on their statement when

² *Downer New Zealand Limited v Livingstone* [2019] NZEmpC 109 at [28].

effectively that would allow them to repeat by reporting what the employer had said, when the employer thought they were able to speak frankly at mediation in a protected manner. It would substantially undermine the statutory purpose of creating a free environment for discussion at mediation.

[36] I am not satisfied that Mr Nelson is able, by himself without agreement of at least Dynaco, to waive confidentiality on statements he made during mediation.

Costs

[37] Costs are reserved and will be dealt with along with costs regarding the substantive investigation, if necessary.

Nicola Craig

Member of the Employment Relations Authority