IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON

WA 158/08
5115705

	BETWEEN	David O'Malley Applicant
	AND	Te Oranganui Iwi Health Authority Respondent

Member of Authority:	Denis Asher
Representatives:	At the completion of the investigation Mr O'Malley was representing himself Leile Sims for the Authority
Investigation Meeting	Wanganui, 22 July & 17 November 2008
Submissions Received	Oral and written received at the 17 November investigation
Determination:	27 November 2008

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Mr O'Malley claims the Health Authority breached a mediated and confidential settlement they had entered into.

Background

[2] The Health Authority provides a range of health care services including disability support services and supported independent living.

[3] Mr O'Malley was employed by the Health Authority as a care giver during 2006 until his dismissal on 30 August of that year.

[4] By letter dated 2 September Mr O'Malley raised a grievance with the Health Authority claiming he had been unjustifiably dismissed.

[5] The parties underwent mediation and an agreement was reached. It was set out in a record of settlement dated 2 October. The key term to this confidential, full and final settlement was that:

> *The parties agree that there shall be no statement on this matter other than* "we went to mediation and the matter was settled".

[6] Mr O'Malley says the filing of a complaint by the Health Authority with the Health and Disability Commissioner about his behaviour with the client was in breach of the parties' agreement to make *"no statement on this matter … "*.

[7] In undertaking its investigation, and in a letter dated 21 December 2006, the Health and Disability Commissioner's office advised the parties of its view that:

- The Health Authority had an ethical duty as a health care provider to report any conduct that raised public safety concerns.

- The process involving the Commissioner was separate and concerned different issues (from employment problems between the parties).

- The outcome of mediation involving Mr O'Malley and the Health Authority was not a finding in favour of the former that his dismissal was unjustified.

- The confidentiality clause in the mediated settlement did not cover issues outside the employment relationship; and

- The wording of that settlement related only to issues discussed and agreed on the day of the mediation; it did not prevent the parties disclosing information that existed prior to 2 October 2006.

[8] The Health and Disability Commissioner confirmed that the Health Authority had not provided information to it about matters discussed at mediation on 2 October.

[9] The Health and Disability Commissioner also reminded the parties that any person who refused to provide information required by the Commissioner committed an offence under the Health and Disability Commissioner Act 1994 and was liable on summary conviction (s. 73 of that Act).

[10] Mr O'Malley's conduct and the investigation by the Health and Disability Commissioner attracted media attention, as has the subsequent involvement of the Human Rights Review Tribunal.

[11] Mr O'Malley made his identity publicly known by way of correspondence to the media dated 21 February 2008.

Health Authority's Position Summarised

[12] The Health Authority says that, because of a complaint from one of its clients, at the dismissal meeting on 30 August 2007 it told Mr O'Malley that the Health and Disability Commissioner would be informed of his conduct.

[13] Confirmation of its intention was set out in its letter to Mr O'Malley of 6 September.

[14] The Commissioner was advised via a letter dated 25 September and received by his office on 29 September.

[15] Mediation took place on 2 October by which time the Health and Disability Commissioner had been advised of the Authority's concerns about Mr O'Malley's conduct.

[16] Nothing discussed at mediation has been provided to the Commissioner.

[17] The Health Authority was bound, legally and ethically, to assist the Health and Disability Commissioner's investigation.

[18] By letters to the media Mr O'Malley has elected to identify himself publicly in respect of the settlement and of the complaint against him.

[19] What was settled at mediation was the personal grievance allegation brought by the applicant of unjustified dismissal.

Findings

[20] In *Just Hotel Ltd* v *Jesudhass* [2007] ENZ 817, the Court of Appeal,

> … did not see any ambiguity in the words of s 148(1) ERA. All communications *"for the purposes of the mediation"* attract the statutory confidentiality, except possibly where public policy dictates otherwise. In accordance with the ordinary meaning of the word *"purpose"*, that of the intended object of an activity, a communication (written or oral) is protected unless it is created or made independently of the mediation. Documents which are prepared for use in or in connection with a mediation therefore come within the ambit of s 148(1) ERA. So do statements and submissions made orally at the mediation, or a record thereof. Only documents which come into existence independently of the mediation are excluded. (paras 31-33)
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> Section 148(6) (a) ERA provides that nothing in s 148 ERA prevents the discovery or affects the admissibility of evidence which exists *"independently of the mediation process"*. That wording strongly supported the interpretation of s 148(1) ERA which the Court adopted. The obvious implication of s 148(6) (a) ERA was that communications at a mediation which do not exist independently of it will not be discoverable or admissible. There is no reason why such evidence should not be discoverable or admissible unless it attracts the confidentiality conferred by subs (1). All evidence which does not exist independently of the mediation process is therefore evidence created or made *"for the purposes of the mediation"*. (para 37)
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> …
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> As the Employment Court stated, it may be that public policy considerations require s 148 ERA be interpreted so as to permit evidence of serious criminal conduct during a mediation to be called, including evidence from the mediator. It was not, however, necessary for the Court to decide on the present appeal whether there should be such an exception.

[21] In *Balfour* v *Chief Executive Department of Corrections* [2007] ERNZ 808 the Employment Court considered a similar fact situation to this employment problem in which the parties had reached a settlement agreement and where the respondent subsequently entered into communications with the Accident

Compensation Corporation when the latter enquired into its settlement with Mr Balfour. Clause 6 of the settlement agreement included the words, *"Except as required by law, these terms of settlement are to remain strictly confidential …"*.

[22] In *Balfour*, the Employment Court held that:

- The words of the settlement agreement were plain on their face.
- Clause 6 gave protection to a party to the settlement agreement where they were required to respond to requests such as those made under s. 309 Injury Prevention, Rehabilitation, and Compensation Act 2001.
- That exception was a bar to any action against the defendant for breaching the confidentiality of the settlement agreement by providing information to the ACC.
- The terms of the settlement could not override the statutory powers granted to the ACC under s. 309.
- Disclosures made in the District Court and under summons were protected by the witness immunity rule.

[23] In this instance the parties' settlement bound them to make no statement on the matter other than to say they went to mediation and the matter was settled: *"The parties agree that there shall be no statement on this matter other than* "we went to mediation and the matter was settled"*"*.

[24] The settlement did not include the phrase 'Except as required by law … '.

[25] What was *"the matter"* that was settled? The words are ambiguous and do not have a plain meaning on their face. No definition or outline of the parties' thinking or intentions is set out in their settlement.

[26] I am satisfied *"the matter"* could not have been to keep silent on the events leading to Mr O'Malley's dismissal. I reach that conclusion because the Health Authority had already advised the applicant well before the time of their mediation that it had reported its concerns about his conduct to the Health and Disability Commissioner. That matter was already in the public domain and Mr

O'Malley had been informed of that fact. It would be neither logical nor effective for the parties to pretend that *"the matter"* encompassed a complaint by a client about Mr O'Malley's professional conduct.

[27] There is no evidence of the Health Authority breaching the confidentiality of its mediated settlement with Mr O'Malley.

[28] Applying *Just Hotels* (above), the Health Authority's prior communications to the Commissioner were plainly not for the purposes of mediation. I do not find any public policy consideration such as to attract statutory confidentiality.

[29] Applying *Balfour* (above), the terms of the settlement could not override the statutory powers granted to the Health and Disability Commissioner under the Health and Disability Commissioner Act 1994. The Health Authority was bound to co-operate with the any proper request from the Commissioner for relevant information.

Determination

[30] Mr O'Malley's claim of breach of a confidential mediated settlement fails.

[31] As agreed by the parties, costs are reserved.

Denis Asher
Member of the Employment Relations Authority