IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2013] NZERA Auckland 538
5409668

	BETWEEN	MICHAEL SHEERAN Applicant
	A N D	CITY FITNESS GROUP LIMITED Respondent

Member of Authority:	Rachel Larmer
Representatives:	Colin Bright, Counsel for Applicant Mark Lawlor and Catherine Coup, Counsel for Respondent
Investigation Meeting:	On the papers
Submissions Received:	09 November 2013 from Applicant 18 November 2013 from Respondent
Date of Determination:	25 November 2013

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] An unsuccessful mediation took place between the parties on 11 February 2013 with the assistance of a mediator from the Ministry of Business, Innovation and Employment Mediation Services. Towards the end of the mediation process the parties discussed with the assistance of the mediator a way forward which involved tentatively scheduling an agreed time, date and venue for a pending disciplinary meeting.

[2] Mr Sheeran alleges that in the course of setting the date, time and place for the disciplinary meeting the mediator asked a question of one of City Fitness' employees

who answered within hearing of Mr Sheeran. He claims this exchange was the catalyst for his resignation later that day.

[3] Mr Sheeran filed an affidavit setting out his allegations about what he claims the mediator and City Fitness employee said to each other within his hearing on 11 February. A sworn affidavit has also been provided by the City Fitness Group Limited (City Fitness) employee who denies the mediator asked her the question Mr Sheeran claims he overheard and she denies responding to the mediator as Mr Sheeran alleges she did.

[4] Subsequent to mediation but that same day Mr Sheeran tendered a written resignation via his then representative, Mr Gregory Bennett, and notified his intent to file a Statement of Problem with the Employment Relations Authority. A personal grievance letter from Mr Sheeran's representative was received by City Fitness on 12 February which raised a personal grievance on behalf of Mr Sheeran for constructive dismissal.

[5] Neither the resignation email of 11 February nor the grievance letter of 12 February mentioned the alleged exchange between the mediator and the City Fitness employee. Mr Sheeran raised this alleged exchange for the first time in the Statement of Problem. City Fitness applied to have these comments struck out of the Statement of Problem on the grounds they breached mediation confidentiality and were therefore inadmissible under s.148(1) of the Employment Relations Act 2000 (the Act).

[6] Mr Sheeran does not accept s.148(1) of the Act applies. He seeks an order from the Authority that the alleged comments between the mediator and City Fitness employee he claims to have overheard on 11 February should be admissible to support his constructive dismissal claim.[1]

[7] City Fitness denies the comments attributed to the mediator and its employee were ever made. It says it is inherently unlikely that the comments Mr Sheeran alleges to have overheard were made. It further says that even if comments were made (which is denied) they were clearly made during the course of mediation between the parties so are inadmissible under s.148(1) of the Act.

[1] The substantive grievance is being investigated by Member Robinson.

Relevant law

[8] All statements made during the course of mediation attract statutory confidentiality pursuant to s.148(1) of Act. Under s.148(3) no evidence is admissible in any Court or before any person acting judicially, of any statement, admission, document, or information that s.148(1) requires is to be kept confidential.

[9] In *Just Hotel v. Jesudhass*[2] the Court of Appeal held:

> *Section 148(1) should be construed as applying to **all statements** or submissions **made at mediation**, unless they have come into existence independently of the mediation, or except possibly where public policy dictates otherwise.* (my emphasis)

[10] The Court of Appeal's judgment was a reversal of the Employment Court judgment to allow disclosure where the issue was whether a statement allegedly made in the course of mediation on behalf of the employer (that the plaintiff employee would be dismissed immediately after the end of mediation) could be relied on in evidence at the hearing of a personal grievance alleging unjustified dismissal.

[11] The Employment Court had held that the confidentiality and inadmissibility contemplated by s.148 of the Act was not absolute, and that evidence of conduct at the mediation could be adduced when it did not relate to communications made in an attempt to solve the employment relationship problem[3].

Applicant's submissions

[12] Mr Bright submits that the alleged statements made by the mediator and by the City Fitness employee were not made for the purposes of the mediation because they occurred after mediation had concluded. He says that when the alleged comments were made the parties had already identified that they were not going to resolve the underlying problem so he says mediation must have ended at that point. Mr Bright submits that the discussion about the next steps was not part of mediation so is not caught by the restriction in s.148 of the Act.

[13] I do not accept that submission. The legislation makes no distinction about restricting the admissibility of comments during mediation only up until the point the parties have identified they are not going to settle the underlying problem.

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2 [2007] NZCA 582.

3 *Jesudhass v. Just Hotel* [2006] 1 ERNZ 173.

[14] It is clear that in this case the parties were still in mediation. They were still actually at mediation and the alleged comments occurred in the same room in which mediation had occurred. The mediator was also still present and was still assisting the parties with their discussions regarding the way forward. Both parties and their representatives were also still present. I find that the mediation process had not ended.

[15] I reject Mr Bright's submission that the alleged comments do not fall within s.148 of the Act because they were not made in an attempt to resolve the employment relationship problem. The Court of Appeal in *Just Hotel v. Jesudhass* [4] rejected that argument and in the course of doing so made the following comments:

> *In accordance with the ordinary meaning of the word 'purpose'* [used in s.148(1)] *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).* ***So do statements and submissions made orally at the mediation****, or a record thereof. Only documents which come into existence independently of a mediation are excluded.*

[16] The Court of Appeal also recognised that s.148(6)(a) and the Department of Labour Report to the Select Committee also confirmed that the restriction on admissibility was intended to apply to all but pre-existing evidence. What this means is that all evidence which does not exist independently of the mediation process is therefore evidence created or made *"for the purposes of mediation"* in accordance with s.148(1) of the Act.

[17] I find that the alleged comments Mr Sheeran wants to admit in evidence (if they were made and I have serious doubts about that) were made for the purposes of mediation so are inadmissible under s.148(1) of the Act.

[18] Mr Bright submits that the alleged comments made by the mediator and a City Fitness employee should fall within the public policy exception to the cloak of confidentiality imposed by s.148(1) of the Act. He submits that the alleged statements are:

> *[…] crucial to the consideration of the merits of this application and the issue of damages. The exclusion of the statement not only denies the applicant a key element of the reasons for the assertions made in*

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4 Ibid 2.

> *the statement of problem, of constructive dismissal, humiliation and a lack of good faith on the part of the respondent, but it also enables the applicant to put forward and to pursue submissions that the statement made would show were untrue.*

[19] Mr Bright submits that it is unconscionable and contrary to public policy for s.148 to be used to allow City Fitness to advance an on the record position that it did not want Mr Sheeran to leave his employment when Mr Sheeran claims that is untrue.

[20] I do not accept Mr Bright's submissions. The alleged comments he wants admitted as evidence are strongly denied by City Fitness and the employee concerned. I consider it inherently unlikely that the comments Mr Sheeran claims he overheard would have occurred. The mediator involved is very experienced and I cannot imagine him asking the question that has been attributed to him in front of Mr Sheeran. It is also unlikely that the City Fitness employee would have given the answer which Mr Sheeran attributes to her in front of him even if it had been asked.

[21] Even if the alleged comments were to be admissible I consider it very unlikely that the Authority would accept Mr Sheeran's version of what was allegedly said when his own documentation (the email that day and his personal grievance letter the next day which were both prepared by his representative) did not make any reference to these comments which he now claims caused or contributed to his resignation.

[22] I find that there is no evidence of wrongdoing on the part of City Fitness which would qualify as a public policy exception to s.148. As can be seen from the Employment Court decisions in *Hamon v. Coromandel Living Trust*[5] and *Auckland Council v. George*[6] the bar for a public policy exception is set very high. There is no way that the evidence proposed to be called by Mr Sheeran meets the high threshold required to provide a public policy exception to the constraints of inadmissibility imposed by s.148 of the Act.

Outcome

[23] Even if the alleged comments did occur (which I do not accept), they occurred during the course of mediation and *"for the purposes of mediation"* so they are not admissible in accordance with s.148(1) of the Act. The fact that the alleged

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5 [2013] NZEmpC 56
6 [2013] NZEmpC 76

comments do not exist independently of the mediation means that they cannot be referred to as part of the evidence in support of Mr Sheeran's constructive dismissal claim. They must also be struck out of the Statement of Problem.

Costs

[24] City Fitness as the successful party is entitled to a contribution towards its costs in respect of this application. The parties are encouraged to resolve costs by agreement. If that is not possible then costs are reserved to be dealt with at the conclusion of the substantive matter.

Rachel Larmer
Member of the Employment Relations Authority