

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2015] NZERA Auckland 60  
5526107

BETWEEN	TGP Applicant
A N D	TFE First Respondent
A N D	SDI Second Respondent
A N D	TDI Third Respondent

Member of Authority: T G Tetitaha

Representatives: A Twaddle, Counsel for the Applicant  
K Radich, Counsel for the Respondents

Submissions received: None

Date of Determination: 24 February 2015

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**INTERIM DETERMINATION OF THE AUTHORITY**

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- A. **I decline to dispense with mediation. There is a direction for the parties to attend mediation pursuant to s159 of the Employment Relations Act 2000.**
- B. **The determination shall be released to the parties only. There is an interim non-publication order for the period of 28 days from the date of this determination is made to allow the applicant to file a proper application for non-publication order together with supporting evidence. If no application is filed, the interim non-publication order shall lapse and the determination shall be released for publication in the usual way.**

[1] This Determination deals with an application to defer or dispense with mediation under s159(1). The respondent sought to delay mediation due to the intervention of a professional regulatory body. Mediation has not been attempted as a result. The

respondent has also filed an application to strike out the Statement of Problem on the basis there is no jurisdiction.

[2] Section 159 of the Employment Relations Act 2000 imposes a duty upon the Authority to consider mediation before investigating a matter:

**159 Duty of Authority to consider mediation**

*(1) Where any matter comes before the Authority for determination, the Authority—*

*(a) must, whether through a member or through an officer, first consider whether an attempt has been made to resolve the matter by the use of mediation; and*

*(b) must direct that mediation or further mediation, as the case may require, be used before the Authority investigates the matter, unless the Authority considers that the use of mediation or further mediation—*

*(i) will not contribute constructively to resolving the matter; or*

*(ii) will not, in all the circumstances, be in the public interest; or*

*(iii) will undermine the urgent or interim nature of the proceedings [; or]*

*[(iv) will be otherwise impractical or inappropriate in the circumstances; and]*

*(c) must, in the course of investigating any matter, consider from time to time, as the Authority thinks fit, whether to direct the parties to use mediation.*

[3] Unless the matters in s159(1)(b) apply, the Authority must direct mediation.

[4] The file was referred to me on 27 January 2015. I issued a Minute by way of email directing:

(a) This will be treated as an application to dispense with mediation under s.159(1)(b) of the Act;

(b) The parties are to lodge and serve written submissions and evidence by 3pm on 5 February 2015; and

(c) The matter will then be determined on the papers.

[5] On 24 February 2015, the respondents filed a copy of the statement of claim filed in the High Court at Tauranga in January 2015. The statement of claim pleads a cause of action of defamation. The respondents now allege this is a duplication of the claim before the Employment Relations Authority.

[6] No submissions about deferring or dispensing with mediation were received on 5 February 2015. I have inferred from the parties material before me that the basis for deferring or dispensing with mediation are:

- a) The applicants case lacks merit;
- b) The intervention of other bodies such as the applicants professional body and the High Court are seized of the same matters; and
- c) Mediation will be inappropriate in the circumstances.

### **Merit**

[7] The parties concluded a Record of Settlement dated 27 June 2014. It requests a mediator sign the terms. The mediator did not sign the terms. I do not have any information why that did not occur.

[8] Section 149 of the Act pertains to settlements signed by persons who meet the criteria under s.149(1) of the Act. This does not prevent a settlement agreement which was not concluded before a person authorised under s.149(1) of the Act from being valid and enforceable. There is no express term in the Record of Settlement that it would only be effective once signed by a mediator. The Employment Court has held where there was no such term, it remained effective upon the date of signing by the parties<sup>1</sup>. More particularly, it appears that the parties have affirmed the agreement by accepting the employee's resignation on or about 27 June 2014 and making the payments set out therein.

[9] It may mean the applicant would not have recourse to the provisions of s.149(3) of the Act. However there are other remedies. Section 134 of the Act provides for penalties in the event of a breach of an employment agreement. The issue may be whether the record of settlement is a variation to the employment agreement. This is a matter for legal submission.

[10] In respect of the second and third respondents, the allegation is one of aiding and abetting the breaches. A penalty is available for aiding or abetting any breach of an employment agreement under s.134(2) of the Act.

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<sup>1</sup> *Penny v. Fonterra Cooperative Group Ltd* [2011] NZEmpC 151 at [44]

[11] From the information before me, there appears to be an arguable case about jurisdiction to determine the alleged breaches by these respondents. I make no conclusion about this. That is a matter left until determination of the strike out application is required. However it is not so hopeless that a direction to mediation is impractical or inappropriate pursuant to s159 of the Act. Such a direction will assist in the parties exchanging information and deriving assistance from an experienced mediator to consider the merits and whether a hearing should proceed and in what form.

### **Intervention of other bodies**

[12] The intervention of bodies such as a professional regulatory body is not a basis to defer or dispense with mediation. The professional body does not deal with breaches of employment agreements. Its purpose is to ensure registered professionals maintain their competency to practice. The hearing may be assisted by evidence from the professional body. However this is not a basis for delay or dispensation of mediation.

[13] High Court proceedings for defamation are not the same cause of action before the Authority. Defamation does not rely upon there being a breach of an employment contract and vice versa. The remedies are also different. Defamation remedies lie in damages. Breaches of employment agreements are remedied by the award of penalties in the Authority. Parties are entitled to seek remedies in other jurisdictions for losses arising on a different legal basis against the same parties. I would have thought the fact of proceedings in multiple jurisdictions supports a reference to mediation in this jurisdiction prior to hearing before the Authority.

[14] In the circumstances, I decline to dispense with mediation. There is a direction for the parties to attend mediation pursuant to s159 of the Employment Relations Act 2000.

### **Non-publication order**

[15] I also make the comment about the non-publication order. A proper application together with supporting material should be made immediately if this is being sought. It is inadequate to give notice of a future application. Delays and possible inadvertent publication may result in any future application being declined.

[16] To prevent the applicant being prejudiced, the determination shall be released to the parties only. There is an interim non-publication order for the period of 28 days

from the date this determination is made to allow the applicant to file a proper application for non-publication order together with supporting evidence. If no application is filed, the interim non-publication order shall lapse and the determination shall be released for publication in the usual way.

**T G Tetitaha**  
**Member of the Employment Relations Authority**