

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 310/08
5124420

BETWEEN JAN ROBIN THOMAS
 Applicant

AND DRJT LIMITED T/A bike360
 Respondent

Member of Authority: Marija Urlich

Representatives: Applicant, in person
 David Walkinshaw, director of Respondent

Investigation Meeting: Consideration on the papers

Submissions received: 22 and 25 August 2008

Determination: 28 August 2008

**DETERMINATION OF THE AUTHORITY AS TO A
PRELIMINARY MATTER**

Employment Relationship Problem

[1] On 16 May 2008 Mr Thomas filed a statement of problem in the Authority alleging unjustified dismissal and seeking payment of outstanding wages and holiday pay. The respondent, in its statement in reply, denies these allegations.

[2] On 15 July 2008, Mr Thomas wrote to the Authority requesting that his application be granted urgency and setting out the grounds upon which urgency was sought.

[3] Mr Walkinshaw raised an objection to this letter, and in particular the grounds upon which urgency is sought. He says the letter includes statements which were made at mediation, attended by the parties on 14 July 2008. He says those statements

were made in confidence and that that confidence will be breached if they are put before the Authority.

[4] To preserve the objection the letter was sealed. The Authority wrote to Mr Thomas' representative, Brian Spong, on 17 July 2008, advising the letter was sealed and inviting comment.

[5] On 22 July 2008 Mr Spong wrote to the Authority objecting to the sealing of the letter and requesting its lifting because:

- (i) the first ground on which urgency was sought was a matter of record;
- (ii) the second ground concerned comments made at the conclusion of the mediation and therefore, in Mr Spong's submission, were not made in the course of mediation¹ and in any event are discoverable².

[6] On 22 July 2008 the issue of whether Mr Thomas' letter of 15 July 2008 should be sealed was referred to me to consider. I will not determine the substantive claim between the parties.

[7] Due to the parties' availability a conference call could not be convened until 15 August 2008.

[8] During the course of that conference call the issues arising from the 15 July 2008 letter were discussed, in broad terms, and a timetable for filing of submissions was set. I have received and considered those submissions.

Discussion

[9] Mediation is a confidential process conducted on a without prejudice basis. Section 148 of the Employment Relations Act 2000 establishes the confidentiality of the mediation process and the limits of that confidentiality.

¹ Section 148(1)(d) Employment Relations Act 2000

² Section 148(6) Employment Relations Act 2000

[10] In *Just Hotel Ltd v Jesudhass*³ the Court of Appeal considered section 148 and held:

- (i) Statements made during mediation and documents created for the purpose of mediation are confidential;
- (ii) Documents created independently of mediation are not confidential.

[11] The parties agree the comments Mr Thomas seeks to rely on were made at the conclusion of the mediation in the mediation room. The mediation was a foot. The comments arose during the mediation and they are confidential to that process. They cannot be put before the Authority.

[12] Mr Thomas seeks to put before the Authority information relating to the presentation of a cheque for the payment of wages. Such information is not confidential. The circumstances in which the cheque was received are confidential for the reasons stated above.

Determination

[13] The letter dated 15 July 2008 is to remain sealed on the Authority file. The submissions made in relation to this determination are also to be sealed and placed on the Authority file.

[14] Mr Thomas may put information before the Authority which is created independently of the mediation process.

Costs

[15] Costs are reserved pending final determination of the substantive claim.

Marija Urlich

Member of the Employment Relations Authority

³ 14/12/07, CA 249/06

