Confidentiality of mediation negotiations — How robust can you be?, 01 August 2013

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The mediation of employment disputes is an important feature of employment law practice in New Zealand. The Employment Relations Act 2000 (ERA) creates a regime under which parties to an employment dispute are, almost universally, directed to attend mediation before the Employment Relations Authority or the Court will hear and determine the matters between them. A high proportion of mediations result in an agreed outcome.

Mediation is a forum within which parties can engage in discussions that are statutorily privileged, without prejudice and confidential. Mediation is intended to be an informal process within which the parties can be frank with each other regarding their views on the ongoing viability of the employment relationship, if it still exists, or seek to settle all claims arising out of any allegation of unjustified dismissal. Given these factors, mediation can involve robust exchanges as to where the blame for a particular problem lies and how the matter would play out in the Authority.

In *George* v *Auckland Council* [2013] NZEmpC 76, the Court recently had the opportunity to make findings in relation to a particularly robust mediation in which an employee felt she had been threatened by her former employer's solicitor. The judgment provides guidance on the bounds within which negotiation at mediation may take place and the permissibility of comments that amount to advising the other side of potential further litigation, should the matter not resolve at mediation.

The particular issue dealt with in *George* was what actions in the course of mediation will justify a departure from the confidentiality obligations created by s 148 of the ERA. In other words, the case deals with the situations where the content of a mediation may be admissible in Court.

Background facts

Laura George raised a personal grievance against the then Auckland Regional Council (the defence of which was taken over by Auckland Council). The substance of that personal grievance was yet to come before the Court. The Council applied to strike out particular evidence Ms George had provided in her brief of evidence. The basis for that strike out application was that Ms George had sought to provide evidence on particular statements made by the Council's solicitor during the course of mediation.

The Council also sought to strike out a paragraph from Ms George's amended statement of defence. That paragraph specified that an allegation against her had first been made by the Council's solicitor during a mediation. That particular paragraph was part of Ms George's defence to the Council's counter claim for damages flowing from what it says were breaches of her employment agreement. In short, Ms George's defence to the Council's counter claim was both that it was unmeritorious and also a vexatious abuse of process. It is this latter defence which was dealt with in the judgment.

About six weeks after Ms George filed a personal grievance claim with the Authority, the parties attended mediation. During the course of this mediation, Ms George claims that the Council's solicitor "threatened" her that, unless she agreed to withdraw and abandon her personal grievance claim, the Council would allege that she had acted in breach of her employment agreement and would commence legal proceedings for damages against her. Ms George contended that this threat amounted to blackmail as defined in the Crimes Act 1961.

Shortly before the hearing of Ms George's application for special leave to remove the proceedings to the Employment Court, the Council made good on its threat and filed a statement of problem in the Employment

Court alleging that Ms George had breached her employment agreement and claiming damages, costs and a penalty in respect of the same. Ms George claimed that this statement of problem was brought against her for "tactical reasons" and was "exactly what ARC threatened it would do during the mediation conference on 26 April 2010 if I did not withdraw and abandon my claim …" (quoted at [6]).

Ms George further claimed that, as at the date of the mediation, there had been no previous accusation or suggestion about a lack of competence in her work or a breach of her employment agreement. She claimed that, during the course of the mediation, the Council's solicitor provided her with an unsigned letter dated approximately three years earlier and indicated that the letter contained the basis for the legal action that would be commenced against her unless she withdrew her personal grievance claim. Ms George further claimed that the content of the letter had nothing to do with the matters being mediated that day and importantly, as a member of the New Zealand Institute of Chartered Accountants (NZICA), she was at risk of having her reputation impugned by an allegation that she was negligent or incompetent.

However, the Court noted that there was no suggestion during the mediation of a threat or complaint to the NZICA or to publicise the Council's concern regarding Ms George's work in any other way. Rather, the threat was a limited claim for damages for breach of the employment agreement that Ms George herself was claiming had been breached by the Council in dismissing her unjustifiably.

Legislative context

Section 148 of the ERA provides for confidentiality in mediation on the following basis:

> **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
> (c) is a person employed or engaged by the department; 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 and 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.

The Court's decision

The Court's first observation regarding the alleged "threats" made against Ms George in the course of mediation were that such comments were not an unusual occurrence.

In setting out the purpose of s 148 in ensuring the confidentiality of mediation the Court noted at [17]:

> As has been said before, s 148 imposes apparently watertight obligations of confidentiality about statements made in mediation for the purposes of that mediation. That is to encourage parties to disclose mutually the strengths and weaknesses of their cases and to promote settlements after reflection on those strengths and weaknesses. In order to achieve settlements, it is important that attendees at mediation cannot reiterate these communications later in proceedings.

The Court then turned to consider relevant authorities. The Chief Judge noted that the Court of Appeal in *Just Hotel Ltd* v *Jesudhass* [2007] NZCA 582 had found that the question comes down to whether the communication in mediation can be said to provide a public policy exception to the strict prohibition contained in s 148 of the ERA. In particular, the Court quoted the following passages of that judgment at [20]:

> [41] We now return to the question of public policy considerations. As the Employment Court stated, it may be that such considerations require s 148 be interpreted so as to permit evidence of serious criminal conduct during a mediation to be called, including evidence from the mediator.
>
> [42] An example given by Sinclair J in *Milner* v *Police* (1987) 2 FRNZ 693; (1987) 4 NZFLR 424 (an authority to which Mr Corkill referred in the course of his argument) provides a good illustration of why there should possibly be an exception for criminal conduct. The Judge said:
>
> > For example, if a counsellor has before him [or her] a husband and wife and in the course of the counselling session one party physically attacks another and causes either serious injury or death to the other party then surely it would be necessary to have the counsellor available to give evidence as to what actually occurred. [P 696; P 427]
>
> [43] It is not, however, necessary for us to decide on this appeal whether there should be such an exception.

The Chief Judge then observed that it would be unhelpful to categorise potential exceptions to s 148 as being serious criminal offending alone. Rather, while the occurrence of a serious criminal offence during mediation might provide an exception on public policy grounds to s 148, so too might other sufficiently egregious and reprehensible conduct by a party.

The Court found here, however, that the Council's solicitor's actions could not be appropriately characterised as a threat constituting blackmail. It held at [28]:

> Here, however, the alleged statement of the Council's solicitor has a connection to the proper purpose of the mediation, that is to seek to resolve Ms George's personal grievance. Although it was clearly not intended to resolve the personal grievance in the way that Ms George wished it to be, the statement by the solicitor nevertheless contained a proposal to settle the grievance by the grievant abandoning it in view of the prospect of a counterclaim being brought against her, perhaps for a substantially larger sum of money than she was either claiming or might reasonably have expected to have received to resolve her personal grievance.

Accordingly, it was held that the evidence proposed to be called by Ms George did not meet the threshold required to provide a public policy exception to s 148 of the ERA and the evidence was found to be inadmissible.

It is important that parties attending mediation are aware of the robustness of the confidentiality obligations attached to mediation. Such an awareness encourages free and frank conversation which can more readily lead to the resolution of claims.

However, the extent to which parties may engage with each other and provide clear views on potential litigation risks to the other side represents only one aspect of the mix of strategic factors necessary to fully utilise the mediation process. Each mediation is as unique as the parties involved in it and accordingly a softer or even conciliatory approach may be desirable in some circumstances.