



CONFIDENTIALITY IN MEDIATION: A REVIEW OF NEW ZEALAND CASE LAW

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Abstract

The Employment Relations Act 2000 has as a core value the settling of employment relationship problems at the lowest level practicable. Mediation plays a prominent part in this process. A key issue in the mediation process is the application of confidentiality. Through review of significant cases determined by the Employment Relations Authority, Employment Court and the Court of Appeal, this paper examines the development and application of confidentiality within the mediation process in New Zealand. The Paper finds that while the law is well developed ethical and public interest issues remain. Further judicial and parliamentary consideration is called for.

Introduction

The object of the Employment Relations Act 2000 (ERA) is:

(a) to build productive employment relationships ... (v) by promoting mediation as the primary problem-solving mechanism; and (vi) by reducing the need for judicial intervention; (s3 ERA, 2000, p.6).

To achieve these ends s148 ERA provides the mediation process with a cloak of confidentiality. But a number of exceptions are noted (s148(6)). And as with any statute, legal interpretation and guidance has been necessary over the extent and application of s148 ERA.

Mediation has existed in some form since the Industrial, Conciliation and Arbitration Act 1894. A significant uptake of mediation for individual grievances occurred in the early 1990's (Barker, 2004), with statutory mediation provided under the Employment Contracts Act 1991. But mediation has not been without controversy. When preparing the UNCITRAL Conciliation Rules in 1979, Professor Sanders questioned whether confidentiality could be absolute (van Ginkele, 2005). Commenting on the Employment Tribunal's separation of mediation from adjudication Skiffington (1993) noted that "*Arguably the current system has attempted to accommodate the legal and practical, leaving equity issues yet to be adequately addressed*" (p.52). And in respect of ethics, Gardiner (1993) stated that "*mediations are conducted in the shadows of the law*" (p.343), inferring that parties use mediation not for the purpose of settlement but to assess the strength of their opponents case. Other ethical issues identified by Spiller (2001) include the conflict between the parties right of self-determination with the mediators

obligation to assist the parties to settle, what a mediator should do if a settlement contains an illegality, what if one of the parties thwarts legislative intent by not acting in good faith, and the conflict between a mediators impartiality and the public interest need to protect vulnerable parties.

New Zealand Case Law

Crummer v Benchmark Building Supplies Ltd [2000]

A convenient starting place to examine the legal interpretation and development of mediation confidentiality, and its exceptions, as held by the specialist employment institutions, is Crummer. A full bench of the Employment Court heard the case.

Crummer alleged he was unjustifiably dismissed. Employment Tribunal mediation occurred (the case was heard under the Employment Contracts Act 1991) at which the parties expressly agreed that it was on a confidential and without prejudice basis. The mediation was unsuccessful. For the adjudication Crummer's lawyer sought disclosure and admissibility of a document prepared for and produced at the mediation hearing. The respondent refused. The case was removed to the Employment Court.

The Court held that there were four questions to be answered:

"(i) whether statements made in mediation, if reduced to writing, were discoverable in subsequent adjudication proceedings, (ii) whether

such statement were admissible in evidence, (iii) if the answer was 'no', whether any exceptions exist, and (iv) if they do, in what circumstances would exceptions be made?" (pp.5-6).

The respondent's statement when they dismissed the applicant inferred the sole reason was a threat of violence against another employee. But in the document presented at mediation the respondent noted that they considered other factors. The applicant argued that the mediation statement was not privileged because 1) it was not prepared for the purpose of settling a dispute, but rather for justification of the respondents position; 2) because the document contained material that gave rise to further action; 3) if it were privileged, sufficient public policy considerations existed to have the privilege removed; 4) equity and good conscience required its admissibility; and 5) even if it was not admissible, it was still discoverable.

Crummer argued that the respondent misled him and that he would not have agreed to confidentiality had he known the real basis for his dismissal. Crummer's lawyer agreed that in general, documents prepared for mediation are not admissible in evidence. But he relied on common law to argue that without prejudice privilege was subject to removal on grounds of public policy and in the interest of justice. Also, at common law facts discoverable independently of mediation, even if given at mediation, are not privileged.

The respondent's lawyer argued that mediation confidentiality is "almost absolute and would only be lifted where there had been an abuse of the mediation process" (p.14). She argued that the document had been prepared solely for mediation, and thus for the purpose of settlement. She argued that removing the absoluteness of mediation would reduce its effectiveness and acceptability and thereby undermine public policy consideration that parties settle without recourse to litigation.

Mr Dumbleton, Chief Mediator of the Employment Tribunal, explained that mediation was conducted on a confidential and without prejudice basis, that this was carefully explained to the parties, and that without this the effectiveness of mediation would be considerably reduced. In his view, "Confidentiality ... underpins and enhances the effectiveness of the mediation process." (p.10).

The Court held that without prejudice statements, expressly or impliedly agreed, are not admissible in subsequent hearings, except for enforcement purpose. It also stated (obiter) that the privilege applied to documents prepared for the purpose of reaching a settlement, and that would include all documents prepared and presented at mediation. But statements made after mediation had failed are admissible. Facts that can be obtained independently of the mediation are discoverable and admissible, "notwithstanding that its existence may have been revealed only during the negotiations" (ERNZ, 2005, p.15). And that privilege cannot be used to conceal the fact that one party made a threat against another or to pervert the course of justice. The Court noted that public policy encouraged mediation and quoted the Court of Appeal in *Vaughan Holdings Ltd v Lindsay* (1997) 10

PRNZ 557, 559 (CA) "The whole point of mediation is to remove the process from litigation or arbitration and to ensure that anything said or done in a mediation does not later rebound to the detriment of any party, should the mediation fail" (p.20).

The Court also noted that mediation confidentiality was "an implied parliamentary intention that the adjudicator should not be or become aware of any admission made during attempts at settlement" (p.20). The Court also noted "we find there is a much stronger case for protection of statements made during mediation than there is for protecting agreements between parties that their discussions should be without prejudice" (p.21). It based this on public policy reason that it was undesirable for a mediator to be called to give evidence in any subsequent hearing.

The Court therefore held that the general rule to follow was that statements or admissions made in mediation for the purpose of settling disputes are not admissible in further hearings, unless good public policy grounds existed such as the adjudicator would be deceived, legislative intent would be thwarted, or the statement give rise to further action.

The Court noted that the issue of disclosure was separate from that of admissibility. It held that the document was discoverable. But was it admissible? The Court held that it was admissible but only if the respondent held to their amended brief prepared for adjudication and thus result in the Employment Tribunal being misled. It was also admissible because based on the facts of the case it would not defeat legislative intent, namely that employment problems be settled at mediation.

The Court also made reference to the Employment Relations Bill then before Parliament and its provision to strengthen mediation confidentiality. In its report back the Employment and Accident Insurance Legislation Committee (2000) noted that s160 (s148 ERA) of the Bill is intended to "prevail over the finding in the "Crummer" case, ensuring that mediation is always held on a without prejudice basis. However, we agree that the confidentiality should only attach to things said and created for the purpose of the mediation and not to pre-existing evidence" (p.163).

Moa v Steve Mora [2003]

The issue for the Authority was whether a discussion, and a letter containing information about the discussion, between the respondent and a mediation support officer of the Department of Labour, was covered by s148 ERA. The discussion and letter arose as a result of the officer making arrangements for the parties to agree and enter into mediation. The question for the Authority was whether this discussion was "in the course of the mediation" (s148(1)ERA).

The Authority held that mediation services include the provision of information about mediation services available. Thus a mediation officer providing information and attempting to organise a mediation hearing was doing so for the purpose of mediation, and therefore covered by s148 ERA. Neither the discussion nor the letter was

admissible. This finding is in line with the stated intent of the legislation (Employment and Accident Insurance Legislation Committee, 2000).

Shepherd v Glenview Electrical Services Ltd [2004]

Shepherd claimed unjustified dismissal. At his mediation, he claimed the employer's representative told him that the reason for his redundancy was that the Principal of the site where they were contracted to work had asked that he be removed. Based on this statement he had settled at mediation, the settlement being duly signed by a Department of Labour mediator. It subsequently emerged that the Principal had made no such request. Shepherd lodged an application with the Authority. The defendant asserted that s149(3) ERA prevented the Authority from hearing the case. The Authority agreed; where s149 (1) and (2) ERA are properly followed s149(3) ERA is an absolute bar on the Authority from hearing the case. The defendant lodged an application with the Court.

The Court noted the similarity between Shepherd and Crummer. Colgan J stated that "While I respectfully agree with The Court's approach in Crummer which both allowed for the maintenance of the integrity of mediation and ... to also set right injustices, Parliament has rejected that balanced approach and has opted for an absolute maintenance of mediation integrity at the expense of achieving justice" [40].

The Court rejected the Authority's decision that s149(3)(b) ERA bars it from hearing the case. One, Shepherd was not asking for the terms of the settlement to be examined but rather the way the settlement was obtained. And secondly, such an examination did not constitute "action, appeal, application for review, or otherwise" (s149(3)(b) ERA). The Court went on to say (obiter) that s149(3)(a) ERA was a stronger argument, that is, when properly signed by a mediator the terms of the settlement are final and binding. However, that of itself is not determinative. The Court stated that:

"the combined effects of s148(1) and (3) are clear, absolute and draconian. They would even appear to make inadmissible evidence of the commission of criminal offences by persons in mediation such as attempts to pervert the course of justice, unlawful threats, and other offences that may be committed by one person making a statement to another for the purpose of mediation it is not right that such absolute and unassailable confidentiality is required in the interests of justice in all cases." [46].

The Court noted that the effect of s148(3) ERA could be to defeat the public policy interest of encouraging mediation, given that a parties behaviour, no matter how reprehensible, was beyond review. Colgan J further noted that legislative intent that parties act in good faith could be thwarted. In dismissing the application, Colgan J noted that he did "so reluctantly but in consequence of the legislation." [48].

Rutledge v Telecom NZ Ltd [2004]

The issue of good faith during mediation arose in Rutledge. The applicant argued that s148 ERA did not prevent him presenting evidence of a breach of good faith, despite it occurring during mediation. He sought to submit in evidence conversations between the parties and the mediator. The Authority held that confidentiality did not only apply to written documents, but extended to statements. Further, that confidentiality extended to all aspects associated with initiation and conclusion, and not limited to the mediation discussions. The mediator need not be present for mediation to be occurring.

Snaith v S&A Ltd [2004]

The fear expressed by Colgan J in Shepherd arose in Snaith. The plaintiffs sought exemplary damages for threats, humiliation and abuse they alleged the defendants engaged in during a mediation hearing. Noting that Crummer was no longer good law, the Authority applied Shepherd. Even where an injustice may occur, the Legislature has made absolute the confidentiality of mediation, regardless of what other considerations may exist. Cressey (2000) was prophetic when he wrote of s148 ERA:

"This will mean that parties will be able to mislead and deceive ... by improperly sheltering behind the confidentiality of the mediation process perjury will go unpunished. It will mean that parties will be able to sterilize evidence that is unhelpful to their cases by tabling it at mediation ... It will also mean that a party will be able to conceal the fact that at mediation, he or she made a threat against the other party ... these are unintended consequences" (p.1).

Such ethical issues need addressing.

Just Hotel Ltd V Jusudhass[2008]

That opportunity arose but not taken up in Jusudhass. He alleged that during the mediation the employer told him that he would be dismissed after the mediation, and he was. He lodged a personal grievance for unjustified dismissal. As part of his case he sought to introduce the alleged employer statement made during the mediation. A full Bench of the Employment Court gave permission.

The Court held that the cloak of confidentiality is limited to actions and communications relevant to resolution of the employment issue for which the mediation is convened. The alleged statement regarding Jusudhass continued employment, being an issue not related to the employment issue for which the mediation was convened, was therefore not subject to the confidentiality of mediation. The employer appealed.

The Court of Appeal upheld the appeal. The Court took counsel for the appellant view that s148(6)(a) allowed use of evidence that existed independently of the mediation process "thereby making clear that all evidence provided

as part of that process is inadmissible” [24]. The important point here is that the prohibition applies to evidence.

The Court also noted the submission of the Department of Labour to the Select Committee hearing the Employment Relations Bill that s148 “... is intended to prevail over the finding in the *Crummer* case, ensuring that mediation is always held on a without prejudice basis. However, officials agree that the confidentiality should only attach to things said and created for the purposes of the mediation and not to pre-existing evidence” [25].

The Court held that there was no “ambiguity in the words of s148” [31]. Actions and communications made for and during mediation are confidential. Writing in the Employment Law Bulletin (March, 2008) Robson agreed that the meaning of s148 is “clear. It lacks ambiguity” (pg.27). While acknowledging the logic, the reasoning is suspect. It is unknown what was in the minds of the legislators when they passed s148 as part of the Employment Relations Act 2000. And given the various cases regarding this issue, there is clearly room for differing interpretation. And as stated by the appellant’s lawyer, the confidentiality applies to ‘all evidence provided as part of that process’ (ditto). The Employment Court interpretation is the more sensible, namely that issues unrelated to the brief for which the mediation is held ought not to be covered by the blanket coverage of confidentiality. Arguing that the issue is one of degree, not principle, the Employment Court position is most likely to prevent abuse of the mediation process while still achieving the legislative intent.

In what may be an optimistic interpretation the Court of Appeal did not entirely reject the Employment Court reasoning. They noted the potential of the existence of a public policy interest that could limit or remove the provision of confidentiality. Noting s148(2) that a mediator cannot give evidence in any proceedings regarding the mediation, the Court noted the authority presented by the respondent’s lawyer that “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” (*Milner v Police*, 1987, (HC) at 427). The evidence would not involve the mediation itself but an act outside the mediation brief, a situation similar to the *Jesudhass* case. The Court was not asked and did not give an opinion. It is not the purpose here to speculate, it is sufficient to note that the door is ajar.

Te Ao v Chief Executive of the Department of Labour [2008]

The situation described in *Milner* (1987) is at the extreme of when the public interest might override mediation confidentiality. Another is the right to present your best defence. Mr Te Ao was employed by the Department of Labour as a mediator. Arising out of a mediation he was accused of inappropriate behaviour. After an investigation he was dismissed. He took a personal grievance. The

Authority asked the Employment Court for a determination on whether s148(2)(a) prevented Te Ao from giving evidence.

As noted in the *Jesudhass* case confidentiality applies to the process of mediation. In *Te Ao Colgan* CJ made a distinction between the provision of services and the conduct of one of the parties while those services are being provided. The Court held that on a literal interpretation of s148(a) the prohibition on a mediator giving evidence about a mediation is absolute. However, applying a purposive interpretation a mediator can give evidence not on the provision of services but on the conduct of a party to the provision of such services.

Of note is the comment that “*If an analysis of the events ... about which it is intended that the mediator give evidence, are not about the employment relationship problem and its resolution, then there is no prohibition upon the mediator’s compellability as a witness*” [49].

Noting that it is a matter of judgement and discretion whether a comment by a mediator was appropriate, the Chief Judge states that where “What the mediator is alleged to have said would not have been for the purpose of the mediation, to resolve the parties’ employment relations problems, and therefore not subject to the s148(2) prohibition” [60]. The compatibility of this decision with the Court of Appeal in *Jesudhass* is a matter for discussion at another time. Of more certainty is the Chief Judge’s decision that in a proceeding it is in the public interest that the mediator be allowed to defend/explain their actions. This complies with the intent of the right of employees to the personal grievance procedures and the right to present a best defence. The door may be more ajar?

Rose v The Order of St John [2010]

In *Rose* the issue was whether the subject matter of mediation could be presented to the Authority. The plaintiff argued that the purpose for which the mediation was called was not addressed. The defendant argued that all communications in mediation are confidential. The Employment Court decision is unsurprising. The issue is whether what was discussed, or not discussed, at the mediation could be stated before the Authority or Court. The content of those discussions is confidential. No question. But the topic of discussion is not.

Grey v Murrays Veterinary Clinic Limited [2012]

Lawyers for the applicant and appellant communicated with each other. The applicant wanted to use one of the correspondence in their personal grievance case. The appellant argued that the correspondence was created for the purpose of mediation and so confidential (s148(3)).

The issue is one of fact. The Authority Member found parts of the correspondence was the employer’s response to the raising of the personal grievance, and so not being a document created solely for the purpose of mediation, subject to some restrictions, was admissible. What makes the case of note is the need for those involved in personal

grievance cases to clearly distinguish between material raised as a result of the lodging of a personal grievance from material specifically raised for use in mediation. Such ambiguity is easily avoided if consideration of the matter is given at the time of the document creation.

Hamon v Coromandel Living Trust [2012]

In *Hamon* the plaintiff sought the Employment Court's permission to introduce evidence from mediation. The plaintiff asserts that a blackmail attempt during the mediation satisfies the public interest test referred to by the Court of Appeal in *Jesudhass (Milner v Police, 1987)*. The defendant challenged this assertion.

Applying the reasoning of the Chief Judge in *Te Ao*, it could reasonably be assumed that such a waiver to confidentiality would be granted on two grounds, namely, that blackmail is not part of the purpose for which the mediation was called, and it is in the public interest. The Chief Mediator has now sought to be a party to the hearing. The defendant opposes this. The matter has yet to be determined. The argument and likely appeal regardless of the decision will be followed with interest.

Conclusion

Berman (2004), in defending the totality of mediation confidentiality notes the distinction between the mediation process and the use of information for research and educational purposes. This aligns with the Employment and Accident Insurance Legislation Committee (2000) recommendation, and Parliament's acceptance (s148(6)(b) & (c)) that exceptions from confidentiality "need to be limited to those necessary for proper administration of the bill and for research" (p.163). Unfortunately no reasons for these exceptions are given. This is an issue requiring continued consideration because of a possible 'Hawthorne' effect.

The degree and coverage of mediation confidentiality is an issue in many jurisdictions. There are significant public policy issues that support limitations on its absoluteness, but in those that we most closely associate ourselves with there is unanimity that the absoluteness of confidentiality in mediation is worth preserving, albeit occasionally at the expense of perceived justice. At present the law is well developed but settled? Regardless of the outcome of *Hamon* the issue of confidentiality will no doubt continue to engage both judicial and parliamentary minds. Watch this space.

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