IN THE EMPLOYMENT COURT
AUCKLAND

AC 31/08
ARC 56/08

IN THE MATTER OF	a referral of a question of law from the Employment Relations Authority
BETWEEN	RICHARD TE AO Plaintiff
AND	CHIEF EXECUTIVE OF THE DEPARTMENT OF LABOUR Defendant

Hearing: 11 August 2008
(Heard at Hamilton)

Appearances: Martyn Chambers and Simon Scott, Counsel for Plaintiff
Andrew Gane, Counsel for Defendant

Judgment: 3 September 2008

JUDGMENT OF CHIEF JUDGE GL COLGAN

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[1] The question of law referred by the Employment Relations Authority in the course of investigating Richard Te Ao's personal grievance (unjustified dismissal), is whether s148(2) of the Employment Relations Act 2000 ("the ER Act") precludes Mr Te Ao from giving evidence to the Authority about the events that led to his dismissal.

[2] Section 148(2) provides:

> *No person who provides mediation services may give evidence in any proceedings, whether under this Act or any other Act, about—*
> *(a) the provision of the services; or*
> *(b) anything, related to the provision of the services, that comes to his or her knowledge in the course of the provision of the services.*

Relevant facts

[3] As found by the Authority, these include the following. Mr Te Ao was employed under s59 of the State Sector Act 1988 to provide employment mediation services under s144 of the ER Act. In April and May 2007 he provided mediation services to parties with an employment relationship problem. The parties were a supervisor and supervisee in an existing employment relationship. Both persons subsequently complained to the defendant about Mr Te Ao's conduct of the mediation. The nature of those complaints included that the mediator was biased towards one party and against the other, that he met with one party privately on a disproportionate number of occasions and that he "hugged" one party during those private meetings. Complaint was also made about Mr Te Ao's comments made to one party about the other, in the absence of that other, on matters of management style and sexuality.

[4] Following his dismissal on notice, Mr Te Ao raised a personal grievance alleging that he had been unjustifiably dismissed. He has sought orders for interim and permanent reinstatement to his former employment.

The questions of law

[5] The questions posed formally by the Authority for determination by the Court are as follows:

> *1. Assuming Mr Te Ao is a 'person who provides mediation services' under s 148(2), are his filing in the Employment Relations Authority of a personal grievance alleging unjustified dismissal, together with the associated application for an order for interim reinstatement, 'proceedings' for the purposes [of] s 148(2)?*
>
> *2. If so, would his giving of evidence addressing the conduct complained of in the letters [of complaint] dated 8 and 1 May 2007 amount to evidence about:*
>
> *(a) the provision of the services; or*
>
> *(b) anything, related to the provision of the services, that comes to his knowledge in the course of the provision of the services?*
>
> *3. If the answer to either or both of (a) and (b) above is 'yes', given that Mr Te Ao's employer dismissed him because of that conduct and Mr Te Ao*

says the dismissal was unjustified, can Mr Te Ao give evidence about the conduct in the course of proceedings addressing the resulting personal grievance and if so under what conditions?

Interpretation of s148(2)

[6] Two statutory provisions govern how the subsection at issue in the case is to be interpreted. The first is s5 of the Interpretation Act 1999 that provides:

> ***5 Ascertaining meaning of legislation***
>
> *(1) The meaning of an enactment must be ascertained from its text and in the light of its purpose.*
>
> *(2) The matters that may be considered in ascertaining the meaning of an enactment include the indications provided in the enactment.*

[7] Next is s6 of the New Zealand Bill of Rights Act 1990 ("NZBORA") that provides:

> ***6 Interpretation consistent with Bill of Rights to be preferred***
>
> *Wherever an enactment can be given a meaning that is consistent with the rights and freedoms contained in this Bill of Rights, that meaning shall be preferred to any other meaning.*

[8] One of the rights and freedoms in the Bill of Rights is the guarantee of natural justice in litigation contained in s27 that provides materially:

> ***27 Right to justice***
>
> *(1) Every person has the right to the observance of the principles of natural justice by any tribunal or other public authority which has the power to make a determination in respect of that person's rights, obligations, or interests protected or recognised by law.*
>
> ...
>
> *(3) Every person has the right to bring civil proceedings against, and to defend civil proceedings brought by, the Crown, and to have those proceedings heard, according to law, in the same way as civil proceedings between individuals.*

[9] It is difficult, if not impossible, to argue against someone's right to give relevant evidence in legal proceedings brought lawfully by that person, not least when the defendant to those proceedings is, in effect, the state. It is perhaps not surprising that such a right is not often, if ever, articulated because it is so fundamental as to be assumed and any breach of or departure from it so rare that courts have not been called upon to identify it.

[10] So it follows that, pursuant to s6 of NZBORA, s148(2) of the ER Act is to be interpreted in accordance with the rights set out in s27 of the NZBORA.

The cases for the parties

[11] Enigmatically, Mr Te Ao advances the argument that s148(2) precludes him from giving evidence in the Authority, that is either in support of his claim that he was dismissed unjustifiably or in opposition to such evidence as may be called for the chief executive justifying dismissal. If Mr Te Ao is successful in this contention, he may disadvantage significantly or even nullify his prospects of succeeding on his personal grievance. When I put this enigma and its logical consequence to Mr Chambers, he was unable to explain it, at least to my understanding and satisfaction.

[12] Mr Te Ao's stance is consistent with his earlier unsuccessful contention that he could not disclose to his employer, the Chief Executive Officer of the Department of Labour ("the CEO"), what had occurred in the mediation. Dealing with this as another preliminary issue, the Authority found, correctly, that s148(1) did not preclude Mr Te Ao from participating effectively into his employer's inquiry into his alleged misconduct, not least because both parties to the mediation consented to his disclosure of relevant events.

[13] The defendant, on the other hand, takes the position that the legislation does not preclude Mr Te Ao from giving relevant evidence to the Authority about the events in mediation that led to his dismissal.

[14] Despite the consequences of its success to him, Mr Te Ao's case is based on several simple propositions. The first is that the unambiguous words of s148(2) cover Mr Te Ao's circumstances in the Authority and preclude him absolutely from giving evidence about the events of the mediation that led to his dismissal. Second, Mr Te Ao says that even if public policy considerations may override clear statutory language in a particular case, this is not such a case. He says that it is not extraordinary that there may be a complaint of misconduct of a mediation by a mediator and that this may lead to an investigation of that complaint by the defendant. Nor is it remarkable, in the plaintiff's submission, that a mediator may be

dismissed and bring a personal grievance challenging justification for the dismissal. Finally in this regard, the plaintiff says that it will also be sufficiently unremarkable that a mediator in these circumstances may need to give evidence about what happened at the mediation, to permit the Employment Relations Authority to investigate properly the relevant facts.

[15] By absence of refutation, I should not be taken to endorse these assertions. None of these circumstances, Mr Te Ao says, is of such moment as to warrant a finding that public policy requires, despite the legislation's plain words, that evidence should be able to be given by the mediator.

Discussion

[16] With the agreement of the other party or parties to the employment relationship problem, there is nothing to preclude parties to a mediation, or their representatives, discussing what went on including, for the purpose of this case, in an employer's investigation into alleged misconduct by the mediator. Nor is there any prohibition in law upon a mediator speaking about what went on during a mediation, to the mediator's employer's representatives conducting an investigation into alleged misconduct against the mediator. I assume this may have occurred before Mr Te Ao's dismissal because the Authority determined as a preliminary point (not challenged) that this was permissible.

[17] When, however, there may be legal proceedings about those events, s148(2) appears at first reading to prohibit absolutely the person who provided the mediation services (the mediator) from disclosing in evidence to any court or tribunal what was said or done at the mediation. However, no such apparently absolute prohibition exists upon others doing so. So it is likely that the defendant will wish to call one or both of the parties to the mediation to give evidence to the Authority in justification of Mr Te Ao's dismissal.

[18] Mediations usually involve a single mediator and parties, their representatives, and sometimes their supporters. At times during the mediation all three "sides" will be gathered together for discussions. At other times the mediator

will "caucus", that is meet with one party and representative to the exclusion of the other.

[19] The difficulty in this case is that the misconduct alleged against the mediator is said to have occurred while he caucused with one party to the mediation who was there on her own. She has given an account of what Mr Te Ao is alleged to have said and done during that caucusing session. I assume Mr Te Ao disagrees with that account or otherwise wishes to be able to put his side of these crucial events in support of his case that he was dismissed unjustifiably after his employer accepted the account of the person with whom he was in caucus.

[20] The answer to the question of the degree of absoluteness in s148(2) is hinted at in, if not decided by, obiter remarks of the Court of Appeal in *Just Hotel Ltd v Jesudhass* [2007] ERNZ 817; [2008] 2 NZLR 210. That was a case addressing the issue of confidentiality under s148(1) of the ER Act. The Court of Appeal gave different mediation confidentiality restrictions to those here, a narrow and literal meaning although, for the purposes of that subsection, left open the door to advance an argument for an exception to that confidentiality on *"public policy"* grounds. At paragraph [31] of its judgment the Court of Appeal concluded:

> *... All communications "for the purposes of the mediation" attract the statutory confidentiality, except possibly (as we discuss later in this Judgment at [41] to [43]) where public policy dictates otherwise.*

[21] At paragraphs [41] to [43] the Court stated:

> *[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.*

[22] Paragraph [42] of the Court of Appeal's judgment referred to a pertinent example from a judgment of the High Court (Sinclair J) in *Milner v Police* (1987) 4 NZFLR 424.

[23] The particular circumstances in which the mediator seeks to give evidence about what happened at the mediation are, hopefully, extremely unusual. The subject matter of the intended evidence will not be the parties' positions in the

employment relations dispute between them but, rather, the mediator's own conduct. By agreement that seems clear to have been given in this case, the participants in the mediation will be free to give evidence to the Authority in support of the employer's case justifying dismissal. However, a prohibition upon Mr Te Ao from doing so will preclude him from presenting his case against a decision that has brought about the end of his employment as an employment mediator.

[24] The behaviour that led to Mr Te Ao's dismissal occurred during the provision of mediation services falling squarely within the language of s148(2)(a) of the ER Act. Section 148(2)(b) is not relevant. The issue is not about something related to the provision of mediation services that came to Mr Te Ao's attention during the provision of those services. Rather, the issue is about his conduct of mediation services.

Are there *"proceedings"*?

[25] The reference from the Authority does not ask the Court to determine whether Mr Te Ao was a person who provided mediation services under the ER Act. It is predicated on the assumption that he was. The first question focuses, rather, on whether Mr Te Ao's personal grievance, including the claimed remedies of interim and permanent reinstatement, are *"proceedings"* under s148(2).

[26] "Proceeding" is not defined in the ER Act which addresses litigation between persons in the Authority, in the Employment Court, in the Court of Appeal, and now in the Supreme Court. Personal grievances are a statutory procedure under Part 9 of the ER Act.

[27] In relation to the Authority, the word *"proceedings"* first appears in s161(1)(l) including within its exclusive jurisdiction to make determinations about employment relationship problems generally, *"... any proceedings related to a strike or lockout (other than those founded on tort or seeking an injunction) ..."*, other cases that the Authority is empowered to determine are described as *"matters"* in s161(1)(f)-(k). Under s161(1)(e) personal grievances such as that brought by Mr Te Ao have been described simply as *"personal grievances"*. Other descriptions of

matters brought to the Authority include as *"actions"*, the recovery of penalty under s161(1)(m), (q) and (r).

[28] It is difficult to identify deliberate and significant distinctions between *"matters"*, *"actions"* and *"proceedings"* under s161.

[29] The same pattern is followed in s187 for the Employment Court. Types of cases are variously described as *"elections"* (s187(1)(a)), *"actions"* (s187(1)(b)), *"matters"* (187(1)(e)), and *"proceedings"* (s187(1)(h)). The heading to s191 uses the phrase *"proceedings of Court"* but then the body of the section refers to *"matters"* within the Court's jurisdiction. Section 193 also refers to *"proceedings"* adding them as part of a list that includes *"decisions"* and *"orders"*. *"Proceedings"* are also referred to in s194(1) in relation to judicial review and, in particular, in a case where orders of, or in the nature of, mandamus, prohibition, certiorari, declaration or injunction are sought in addition to, or as an alternative, to an application for judicial review under Part 1 of the Judicature Amendment Act 1972.

[30] Section 213 that deals with judicial review of the Employment Court refers to *"any proceedings before the Court"*.

[31] These various terms are used apparently interchangeably. The differences may result from previous uses transferred to the current statute and more modern descriptors in new sections. I do not consider that any special meaning attaches to the word *"proceedings"* in s148(2). It is intended to encompass a case before the Employment Relations Authority (or the Employment Court or the Court of Appeal or the Supreme Court on appeal from the Employment Court) howsoever that case may have been commenced and irrespective of the different descriptions given to cases such as *"matters"*, *"actions"*, or otherwise.

[32] Put another way, one might ask, rhetorically, what would qualify as a *"proceeding"* in which an employment mediator might be called to give evidence if not a personal grievance where mediation services have been provided but had not resolved the complaint constituting the grievance? There is no valid distinction, for example, between a case in the Employment Relations Authority, on the one hand

and in the Employment Court on the other, for the purposes of s148(2). Indeed, the scheme of the ER Act is that most cases must be commenced in the Employment Relations Authority before progressing to the Court and certainly those classes of case in which there may have been mediation.

[33] Very recently, indeed noted by me only after the hearing in this matter, the Court of Appeal has addressed the meaning of the word *"proceedings"*, albeit in a different context. In *Ye & Ors v Minister of Immigration* [2008] NZCA 291, a judgment issued on 7 August 2008, the Court of Appeal considered comprehensively legislation affecting immigrants and the care of children. At paragraph [35] Glazebrook J noted:

> *The word "proceedings" habitually denotes pure court matters and does not include administrative decisions – see for example r 3 of the High Court Rules which defines proceeding as "any application to the Court for the exercise of the civil jurisdiction of the Court other than an interlocutory application". In my view, there is nothing to suggest that the word "proceedings" in the [Care of Children Act] should be accorded other than its ordinary and natural meaning.*

[34] It cannot be argued that a personal grievance investigation by the Authority is an *"administrative"* decision. Although not one, it is more akin to what Glazebrook J described as a *"pure court [matter] ..."*.

[35] I conclude that a personal grievance challenging justification for dismissal is a proceeding under the ER Act for the purposes of s148(2) irrespective of whether interim reinstatement and/or permanent reinstatement are claimed as remedies.

Question 2 – Evidence about the provision of mediation services

[36] The facts of the case, as stated by the Authority and agreed by the parties, mean that this part of the judgment turns on s148(2)(a). What Mr Te Ao may have said and done to participants in the mediation would not seem to fall under subs(2)(b), that is they are not *"anything, related to the provision of the services, that comes to his or her knowledge in the course of the provision of the services"*.

[37] So, at the heart of the case is whether evidence about what he did and said as the provider of mediation services and about which Mr Te Ao may wish to give evidence, will be *"about ...the provision of the services"*.

[38] There seems little doubt that what Mr Te Ao is alleged to have said and done occurred in the context of a mediation. Mediators are given a broad discretion under the statute as to how, when, and where mediations can be conducted. Irrespective of the wisdom of some mediation practices, the law does not prohibit, for example, mediators meeting with, and expressing views to a party or parties in the absence of the other or others. Nor are there any requirements that a mediation must be concluded in a single session or that it can only be conducted with the parties present at the same place as the mediator. Although there are no doubt fundamental standards applicable to all mediations, employment mediation is also a flexible "horses for courses" exercise.

[39] That said, the purpose of any mediation must be kept in mind. It is a dispute resolution mechanism provided for the benefit of the parties and not of the mediator. There must be an expectation that it is the parties' employment relationship problem that will be focused upon in the mediation and hopefully resolved. Communications between, and interactions with, the parties and the mediator will be conducted for these purposes and with these goals in mind. So long as what goes on at a mediation remains within these broad parameters, there is a statutory expectation of strict confidentiality including by the mediator. One important element of that expectation is that a mediator cannot be required to disclose what went on at the mediation and indeed must not do so in subsequent proceedings of any sort, even by consent of all concerned, and voluntarily or even willingly by the mediator.

[40] Any evidence that Mr Te Ao may wish to give to the Authority in its investigation of his personal grievance will be about the provision of the mediation services to the parties to the mediation on the relevant dates concerned.

How the case will be decided

[41] The decision in this case can and will be approached in two ways. First is the conventional exercise of interpretation of the legislation. This ascertains Parliament's meaning for all cases, not simply the case at hand however unusual its circumstances may be. The second approach follows the first and depends upon an interpretation that precludes mediators giving evidence under any circumstances.

[42] This second way of determining the case applies what the Court of Appeal described in the *Just Hotel* judgment as the application of *"public policy"*. As I understand the notion, it is to determine whether, despite the statute being interpreted in one way, public policy may nevertheless demand that it be applied in another way in particular and exceptional circumstances. So, to use the example provided by the Court of Appeal in *Just Hotel*, even if s148(2) may have been intended to prohibit a mediator from giving evidence about what occurred at a mediation, that prohibition may nevertheless be waived by a court where a serious criminal offence has been committed in the course of the mediation and the mediator's evidence is crucial to a prosecution for that. That is, of course, not precisely the case here.

[43] Assuming the availability of a public policy exception to the application of s148(2), I must consider whether the circumstances of this case would warrant a departure from the ER Act and, if so, the extent of that departure. To ignore deliberately and contravene a clear legislative prohibition must be a rare and extraordinary curial practice and the grounds for doing so must be both compelling and the departure from the requirement no more than is necessary to right manifest injustice that might otherwise occur.

A literal or "purposive" approach to interpretation?

[44] A strictly literal interpretation of s148(2) leads quite simply to the conclusion that a mediator may never give evidence in proceedings about what was said or done in the course of providing those mediation services. Such a black letter approach permits no exceptions under any circumstances. If adopted, it would mean that,

irrespective of the injustice created, Mr Te Ao could not contradict or otherwise address, in his own evidence, serious allegations against him that led to his dismissal.

[45] On the other hand, what would a purposive interpretation mean in the circumstances of this case?

[46] The purpose of these statutory provisions is the same as, and an extension of, those contained in s148(1) described in the judgment of the Court of Appeal in *Just Hotel Ltd v Jesudhass* [2007] ERNZ 817; [2008] 2 NZLR 210 as follows:

> *... [they] [reflect] the desirability of encouraging the parties to a mediation to speak freely and frankly, safe in the knowledge that their words cannot be used against them in subsequent litigation if the dispute does not prove capable of resolution at mediation.*

[47] A purposive interpretation is, of course, mandated by s5 of the Interpretation Act set out at paragraph [6] of this judgment: the principle is sometimes shorthanded to meaning from text in light of purpose.

[48] A purposive as opposed to a literal interpretation also permits consideration of the requirement that wherever an enactment can be given a reason that is consistent with the rights and freedoms contained in the Bill of Rights, that meaning shall be preferred to any other: see paragraphs [7] and [8] of this judgment. So if s148 can be interpreted to permit a mediator in the circumstances faced by Mr Te Ao to give evidence in his own proceeding lawfully issued to challenge the justification of his dismissal brought about by what he was alleged to have said and done as a mediator providing mediation services, then such an interpretation shall be preferred by the Court to a literal one that would be inconsistent with the identified right to the observance of the principles of natural justice.

[49] If one considers the interpretation of the section on a balance of harm basis, the result favours an interpretation allowing for the admission of the mediator's evidence. What is the harm to the parties to the mediation of allowing disclosure by the mediator of what was said and done by him or her? Both parties complained formally about the mediator's conduct and his dismissal was the direct consequence

of these complaints. There can be little, if any, harm to both parties to the mediation in interpreting the legislative provision so as to permit disclosure by the mediator in evidence of what he said and did that resulted in their complaints made about him.

[50] On the other hand, what would be the harm to a mediator of prohibiting him or her from giving evidence about these matters? Mr Te Ao has participated in the defendant's inquiry including, I assume because he was permitted expressly to do so, giving his account of events. Mr Te Ao's personal grievance that he is entitled to bring and has brought, may be emasculated if he is unable at all to give evidence in litigation in support of his claim that he was dismissed unjustifiably, or to oppose the defendant's case in justification for dismissal.

[51] There is a greater harm to the mediator than to the parties to the mediation or indeed to the integrity of the mediation system, if a strictly literal approach to s148(2) is adopted.

[52] There is another statutory indication that s148(2) should not be read literally as an absolute prohibition upon mediators giving any evidence in any proceedings in any circumstances about the provision of mediation services. Section 194 of the ER Act carves out of the jurisdiction of the High Court, a limited jurisdiction in judicial review for the Employment Court. This judicial review jurisdiction is limited in a number of ways including by reference to the persons whose actions may be judicially reviewed. These include the *"chief executive"* (by s5, identified as the chief executive of the Department of Labour) in respect of acts or omissions pursuant to the ER Act. It is a statutory obligation of the chief executive to provide mediation services under the ER Act and, in law, it is the chief executive who provides those services although in practice these are performed by mediators appointed for that purpose such as Mr Te Ao.

[53] So the legislation contemplates that judicial review of the chief executive's provision of mediation services may be sought in proceedings in the Employment Court. How the statutory right to bring such a proceeding could be reconciled with an absolute prohibition upon the giving of evidence by the provider of that service that is impugned in the judicial review proceedings, is at best problematic and at

worst nonsensical. Such an outcome might be to preclude the chief executive effectively from defending proceedings for judicial review. That cannot have been Parliament's intention in enacting ss148(2) and 194.

[54] To use a variation of the example provided by this case, if the complaint to the CEO about Mr Te Ao's conduct had not been upheld by the defendant, it would have been open to either or both of the participants in the mediation to have sought judicial review of the CEO's provision of those services. One of the complaints was of bias. That is a classic ground of judicial review. With the consent of the other party to the mediation (as would probably have been forthcoming in the circumstances) evidence could have been given by either or both of the parties about what transpired at the mediation. However, a literal interpretation of s148(2) would have precluded the CEO from having defended review proceedings by calling Mr Te Ao, as mediator, to give evidence on the CEO's behalf. A purposive interpretation might allow the CEO to call evidence from the mediator and therefore to defend such proceedings.

[55] That is another indication of the necessity for a purposive as opposed to a literal interpretation of s148(2).

[56] Another relevant consideration is what might be the consequences of prohibiting mediators in all circumstances, including those such as are faced by Mr Te Ao, from giving evidence. Persons may be reluctant to become mediators if it is known that accusations of misconduct against them cannot be answered if those accusations have led to disadvantage in, or dismissal from, employment. Mediators are employees of the defendant. Their terms and conditions of employment include, by statute, access to the personal grievance procedures provided for under the ER Act. Those valuable rights would be reduced significantly, if not rendered meaningless, if s148(2) were to be interpreted strictly and so as to prohibit mediators from giving evidence in circumstances such as those of Mr Te Ao. The law should not allow such unintended draconian consequences of a strict interpretation. The objective of confidentiality under s148(2) is to protect parties and the integrity of the mediation process and not to protect or advantage mediators personally.

[57] A purposive interpretation of s148(2) will produce a different result than a purely literal interpretation of what might be said to be unambiguous words and phrases. Applied literally, these would preclude a mediator from ever giving evidence in any proceedings about anything that may have happened in the course of a mediation. One only has to consider an extreme example to appreciate why a purposive, as opposed to a literal, interpretation is appropriate and indeed necessary.

[58] How to apply such a purposive interpretation in practice? The applicable principle is not the degree of seriousness of what is said or done in the mediation but, rather, whether the events, about which it is intended to have the mediator give evidence, relate to the purpose of the mediation, that is the resolution of the employment relationship problem between the parties. If those events so relate, then the law's expectation is absolute confidentiality and a complete prohibition upon the mediator giving evidence. If an analysis of the events results in a conclusion falling on the other side of this line, that is that 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.

[59] Where the issue may become difficult is in borderline cases. That may possibly be so in respect of some of Mr Te Ao's alleged misconduct as a mediator. One of the allegations that contributed to his dismissal was that the mediator made adverse remarks to one of the parties about the managerial abilities or competencies of the other. That on its own may be protected by the statutory requirement of confidentiality. Competence and ability is the stuff of employment relationship problems and not always affecting only an employee or, in this case, a supervisee. So it may be in order for a mediator to make comments to one party about the perceived performance inadequacies of the other. There can be even less complaint about such a practice if this is done by the mediator in the presence of both. Providing specific justification for a recommendation by a mediator to settle is common, even expected in employment mediation. On its own such a remark may be both protected absolutely by s148(2) and acceptable conduct of his duties by the mediator.

[60] But when such a remark or remarks is or coupled with others disparaging the supervisor's sexual orientation, the protection of confidentiality would seem to fall away. That is on the basis that a person's sexual orientation, that is otherwise irrelevant to the employment relationship problem, would not be properly the subject of adverse comment by a mediator to the other party. 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.

[61] Just whether or how the Employment Relations Authority might distinguish remarks made in the same sentence about the managerial competence and the sexual orientation of the other party, may prove difficult. In such circumstances the answer is that the Authority should hear evidence about the whole of the impugned conversation, if only to put in context the allegedly offending elements of that. If the purpose of the statements complained about was not for the resolution of the parties' employment relationship problem but for an ulterior motive such as the mediator's personal gratification, the shield of absolute confidentiality will be lost.

A *"public policy"* exemption from confidentiality in this case?

[62] I have just concluded that a purposive interpretation of s148(2) will not preclude Mr Te Ao from giving evidence in his personal grievance proceedings about what he said and did in the mediation that led to his dismissal. However, if I am wrong and a strict literal interpretation of the section must be given, then it is necessary to decide whether the circumstances of this case constitute a *"public policy"* ground for non-compliance with the statute. What is that and how and when might it be available?

[63] Neither the Court of Appeal's judgment in *Just Hotel* nor the judgment of the High Court called in aid of the *"public policy"* principle in *Just Hotel*, identifies the legal basis for this practice or describes the circumstances in which it can be used. My researches have failed to disclose, in legal texts, reference to a principle of law that enables courts on occasions to override a clear statutory provision

prohibiting the giving of certain evidence in proceedings properly before the Court. Such a bold approach to the rule of law is inherently counter-intuitive.

[64] On the other hand, the Court of Appeal has pronounced upon it, in relation to the mediation confidentiality provisions in the ER Act and this Court is bound to follow and adhere to the law as so stated.

[65] The sole hypothetical example given is on the commission of a serious criminal offence during the provision of mediation services. That is unlikely to be the only particular circumstances in which *"public policy"* may permit the statute to be overridden. Indeed, there is no logical reason why an exception to absolute confidentiality should be restricted to criminal offending. On the other hand, given the counter-intuitive propriety of a court effectively ignoring a statutory provision, the occasions on which this might occur must be rare and the circumstances for doing so compelling.

[66] Also to be borne in mind is that a statutory provision such as s148(2) is not set in stone. If a plain but literal interpretation of a statutory provision results in injustice, even clear and unconscionable injustice, in some cases, a court's judgment may bring this unintended consequence to the notice of Parliament so that statutory amendment may follow. That would both avoid such cases for the future and make application of the law more certain and without the necessity to have a court determine which side of a line the circumstances fall on a case by case basis.

[67] I conclude that the relevant circumstances of the case constitute grounds for a *"public policy"* waiver of statutory confidentiality as indicated in *Just Hotel.* Most of the grounds for so concluding have also been grounds used by me to support a purposive interpretation of the legislation as opposed to a strict literal interpretation, as are set out above.

[68] Employee mediators have the usual statutory protections afforded to employees in New Zealand including, if they are dismissed from or disadvantaged in employment, to bring personal grievance proceedings to challenge the justification for such outcomes. Irrespective of whether one categorises mediation as a

profession, it is indisputable that employment mediators, including those employed by the CEO, are skilled and experienced practitioners in an important discipline and their individual and collective reputations stand or fall by the performance of their work. Loss of employment as a statutory mediator for reasons of misconduct in that role will be likely to make alternative work in that field unavailable, at least easily and in the short term. Dismissal in circumstances and for grounds such as in Mr Te Ao's case will, irrespective of the justification for that action that is yet to be determined, be a very serious blow to him.

[69] In these circumstances it is really unthinkable for the law to both allow Mr Te Ao access in theory to the personal grievance procedure, but also to preclude him in practice from using that procedure by prohibiting him from giving, in evidence in his own proceedings, his account of what happened that led to his dismissal. That is all the more repugnant because there is no such prohibition on the complainants giving evidence in support of the CEO's case in circumstances where, as here, they have agreed to waive confidentiality. Put shortly, unless public policy exempts Mr Te Ao from the requirement of absolute confidentiality under s148(2) he may not be able to succeed in, or even have any prospect of success in, his own personal grievance and its determination on its merits. That cannot be a fair or just consequence of a blind and literal application of s148(2).

[70] In these circumstances, and if I have interpreted wrongly the less than absolute prohibition in s148(2), I conclude that the Authority should permit Mr Te Ao to give evidence to it about the events that were the subject of the complaint against him that led to his dismissal.

Conditions on evidence being given?

[71] The final matter raised by the Employment Relations Authority for decision by the Court is whether, if evidence from the mediator is admissible, the Court and the Authority should nevertheless attach conditions to the giving of that evidence. The Authority has not indicated either the sorts of conditions that it may have contemplated or the circumstances in which these might be imposed and enforced. Except that this may mean making orders prohibiting publication of evidence, the

parties have not been able to suggest what the Authority meant by this part of the question removed.

[72] Whether the Authority makes an order for non-publication of identity or evidence is a matter for the exercise of its discretion and it is not appropriate in this proceeding for me to express a view about that. The parties have agreed, in both the Authority and this Court, to orders that the identities of the complainants not be published and I imagine there will be no change to that. Until now, at least, no order has been made about Mr Te Ao's identity or about any of the other relevant circumstances of the case and there are now, or will be, determinations and a judgment in the public arena. So long as any evidence that Mr Te Ao may give to the Authority is about the events that form the basis of the complaints against him and subsequently his dismissal, there is no reason obvious to me at this stage why such evidence should be prohibited from publication.

[73] Apart, therefore, from the scope of the evidence that Mr Te Ao is entitled to give, I do not consider that any condition should attach to that and none has been proposed by Mr Te Ao, the CEO or the Authority.

Answers to the Authority's questions

[74] Question:

> *1. Assuming Mr Teo is a 'person who provided mediation services' under s 148(2), are his filing in the Employment Relations Authority of a personal grievance alleging unjustified dismissal, together with the associated application for an order for interim reinstatement, 'proceedings' for the purposes [of] s 148(2)?*

[75] Answer:

> Mr Te Ao's personal grievance and associated claims that are before the Authority are a proceeding or proceedings referred to in s148(2).

[76] Question:

> *2. If so, would his giving of evidence addressing the conduct complained of in the letters [of complaint] dated 8 and 1 May 2007 amount to evidence about:*
>
> *(a) the provision of the services; or*
>
> *(b) anything, related to the provision of the services, that comes to his knowledge in the course of the provision of the services?*

[77] Answer:

If Mr Te Ao were to give evidence before the Employment Relations Authority addressing the complaints of the two parties to the mediation, this would be to give evidence about the provision of the mediation services.

[78] Question:

> *3. If the answer to either or both of (a) and (b) above is 'yes', given that Mr Te Ao's employer dismissed him because of that conduct and Mr Te Ao says the dismissal was unjustified, can Mr Te Ao give evidence about the conduct in the course of proceedings addressing the resulting personal grievance and if so under what conditions?*

[79] Answer:

Section 148(2) does not prohibit in law Mr Te Ao from giving evidence about the allegations made against him by the parties to the mediation that resulted, after the defendant's inquiry, in his dismissal. Alternatively, the particular circumstances of Mr Te Ao's personal grievance constitute public policy grounds to permit him to give such evidence to the Authority. Although *"conditions"* should not necessarily be placed on the giving of evidence by Mr Te Ao or its content, such evidence as he or others may give about the mediation must be relevant to his dismissal and the events that gave rise to it.

[80] Costs are reserved.

Non-publication

[81] By consent there is an order pursuant to clause 12 of Schedule 3 to the ER Act that no person shall publish the names or other particulars that may identify the persons who were the parties (referred to herein as the supervisor and supervisee) to the mediation the subject of this case.

G L Colgan
Chief Judge

Judgment signed at 4.30 pm on Wednesday 3 September 2008