IN THE EMPLOYMENT COURT
AUCKLAND

[2012] NZEmpC 118
ARC 15/09

IN THE MATTER OF	interlocutory applications
BETWEEN	LUCY ORA HAMON Plaintiff
AND	COROMANDEL LIVING TRUST Defendant

Hearing: 23 July 2012
(Heard at Auckland)

Appearances: Plaintiff in person
Robert Coltman and Myriam Mitchell, counsel for defendant

Judgment: 24 July 2012

INTERLOCUTORY JUDGMENT OF JUDGE B S TRAVIS

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[1] The plaintiff has brought two applications before the Court.

[2] The first application, which was filed on 9 March 2012, applies to strike out the defendant's defence or, after a successful application for leave to amend that application, for a Court order to impose a financial penalty, or any other order that the Court thinks just, on the defendant.

[3] One of the two grounds in support of that application pursued by the plaintiff at the hearing was that the defendant had failed to comply with the directions of the Employment Court to file briefs of evidence on prescribed dates. However, as the defendant has pointed out, it obtained leave from the Court to amend the timetable directions and filed the briefs of evidence well within the extended date. This ground, therefore, fails.

[4] The second ground relied on was that the defendant failed to disclose an email dated 14 April 2008 addressed to the Executive Trustee of the defendant, Michael John Noonan, in the defendant's list of documents. This document was affirmed by Mr Noonan on 9 February 2011.

[5] The defendant alleges that the email in question was forwarded to the defendant's then legal representative by an email dated 15 April 2008, for which legal professional privilege was claimed. However, the email enclosure of 14 April 2008, for which no legal professional privilege is claimed, is not separately listed or referred to in the defendant's list of documents.

[6] The defendant now claims that it has been unable to find the 14 April 2008 email. However, Mr Coltman, for the defendant, conceded that it should have been separately listed as a document which had once been in the defendant's possession, custody or control, and which was relevant to any disputed matter in the proceedings, but was no longer in that party's possession, custody or control. In terms of reg 42(3)(c) of the Employment Court Regulations 2000 (the Regulations), the list of documents should have stated in writing to the plaintiff both when that document was parted with and what became of it.

[7] Mr Coltman has agreed to remedy the situation by filing an amended list.

[8] After discussions with the parties, it became clear that the email of 14 April 2008 may well have been solicited by the defendant. Any supplementary list of documents, which it is agreed should be in the form of a sworn or affirmed statement for the purposes of reg 46(3) of the Regulations, ought also to contain reference to any documents in the defendant's possession, custody or control, or former possession, custody or control, which may have brought about the existence of the 14 April 2008 email.

[9] The verified list of documents will be filed and served within 21 days from 23 July 2012.

[10] If that amended list of documents is unsatisfactory to the plaintiff, she has leave to apply to the Court for further and better disclosure. Such an application should be made within 30 days from the receipt by the plaintiff of the amended list of documents.

[11] This effectively deals with the plaintiff's application to strike out the statement of defence which, in itself, is now dismissed, and if the matter is to be pursued, it is to be in the context of the disclosure of documents.

[12] Costs are reserved in relation to that application.

[13] The second application filed by the plaintiff on 27 March 2012 is an application for leave to waive mediation confidentiality. The plaintiff successfully sought leave to amend that application to read: "A determination, or direction, or declaration, or waiver of the Court that this (blackmail threat) is an exception to mediation confidentiality".

[14] The application was made on the grounds that at the mediation for these proceedings in 2008, the plaintiff was subject to a blackmail attempt by a representative of the defendant, that the blackmail does not form part of the "purposes of mediation" for the purposes of s 148 of the Employment Relations Act 2000 (the Act) and, therefore, it falls outside the statutory confidentiality granted by that section. Alternatively, it is contended that the alleged blackmail threat falls within the exception considered, but not determined, by the Court of Appeal in *Just Hotel Ltd v Jesudhass*.[1] In that case, after determining that there was no ambiguity in the words of s 148(1) of the Act and that all communications "for the purposes of the mediation" attract statutory confidentiality except for one possibility, the Court of Appeal then 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.
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> [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

[1] [2007] ERNZ 817 (CA).

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]
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> [43] It is not, however, necessary for us to decide on this appeal whether there should be such an exception.

[15] The plaintiff has relied on s 237 of the Crimes Act 1961 which describes the offence of blackmail for which s 238 of that Act renders any person convicted of that crime liable for imprisonment for a term not exceeding 14 years. Ms Hamon submitted that the evidence she and her husband have brought before the Court describes a blackmail attempt which falls within the Crimes Act section and in respect of which she lodged a complaint with the Police the following day.

[16] The defendant's submissions in opposition rely on the express wording of s 148, the relevant parts of which provide:

> **148 Confidentiality**
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> (1) Except with the consent of the parties or the relevant party, a person who—
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> …
>
> (b) is a person to whom mediation services are provided; or
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> …
>
> (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.
>
> …
>
> (6) Nothing in this section—
>
> (a) prevents the discovery or affects the admissibility of any evidence (being evidence which is otherwise discoverable or admissible and which existed independently of the mediation process) merely because the evidence was presented in the course of the provision of mediation services; or
>
> (b) prevents the gathering of information by the department for research or educational purposes so long as the parties and

> the specific matters in issue between them are not identifiable; or
>
> (c) prevents the disclosure by any person employed or engaged by the department to any other person employed or engaged by the department of matters that need to be disclosed for the purposes of giving effect to this Act; or
>
> (d) applies in relation to the functions performed, or powers exercised, by any person under section 149(2) or section 150(2).

[17] In reliance on the Court of Appeal decision, the defendant's counsel submit that nothing said or done by the parties at the mediation in 2008 can be adduced in evidence before the Court as it is confidential. As to the only possible exception, being where questions of public policy dictate otherwise, they submit that what is being alleged is not serious criminal conduct within the terms of the example quoted by the Court of Appeal being an assault by one party on another causing "serious injury or death".

[18] The defendant's counsel also submit that the Employment Court has no power or authority to impose such an exception on the statute and has no inherent jurisdiction to do so.

[19] Mr Coltman observed that, given the defendant's view that what occurred at the mediation was confidential, it had not sought to adduce evidence to contest the plaintiff's allegations, which were not admitted. It had, however, prepared an affidavit from the plaintiff's representative but did not propose to submit that affidavit to the Court as that would be contrary to its position that nothing said or done by the parties at the mediation could be adduced in evidence.

[20] The plaintiff's evidence has put precisely before the Court what her allegations are and, in any event, it would not have been possible to have resolved any conflict between the parties as to what was actually said in an interlocutory application based solely on untested affidavit evidence. On the face of it, the information put before the Court, which I do not propose to reveal at this stage and (depending upon the outcome of the plaintiff's application), may not reveal at any stage, raises an arguable issue as to whether it amounted to blackmail. This then raises the issue of whether blackmail falls within the public policy exception contemplated, but not ruled upon, by the Court of Appeal.

[21] In this regard, I noted to the parties two decisions of this Court, subsequent to the Court of Appeal decision, and invited them to consider those cases and provide additional submissions. The cases are *Te Ao v Chief Executive of the Department of Labour*[2] and *Rose v Order of St John*,[3] both decisions of the Chief Judge.

[22] It was agreed that the defendant's counsel would have 21 days within which to file further submissions in response to these matters and that the plaintiff is to have 30 days within which to reply following receipt of those submissions.

[23] In the meantime, it was agreed between the parties that an order should be made suppressing all references in any affidavits or submissions as to what was actually alleged to have been said at the mediation until further order of the Court. That order is made under cl 12 of Schedule 3 to the Act.

[24] The plaintiff's second application is adjourned part-heard.

BS Travis
Judge

Judgment signed at 1.30pm on 24 July 2012

[2] [2008] ERNZ 311.
[3] [2010] NZEmpC 163, [2010] ERNZ 490.