IN THE EMPLOYMENT COURT
AUCKLAND

[2013] NZEmpC 56
ARC 15/09

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
AND IN THE MATTER OF	an application for leave to file to waive mediation confidentiality
BETWEEN	LUCY ORA HAMON Plaintiff
AND	COROMANDEL INDEPENDENT LIVING TRUST Defendant

Hearing: 23 July 2012
(Heard at Auckland)
Supplementary submissions filed by the plaintiff on 20 December 2012, by the defendant on 13 August 2012 and by the Chief Mediator (granted leave to appear and be represented) on 30 November 2012

Counsel: Lucy Hamon, plaintiff in person
Robert Coltman and Myriam Mitchell, counsel for defendant

Judgment: 10 April 2013

INTERLOCUTORY JUDGMENT OF JUDGE B S TRAVIS

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[1] The plaintiff has applied for leave to waive mediation confidentiality on the grounds that an alleged blackmail threat is an exception to mediation confidentiality. The defendant's application was opposed and the allegation of blackmail was denied by the defendant. The threat was allegedly made during an employment mediation conference held on 14 April 2008 in Hamilton to deal with the plaintiff's claim that she had been dismissed constructively and unjustifiably.

[2] The application was set down for hearing on 23 July 2012 and was adjourned part-heard to enable the parties to make further submissions on two decisions of this Court. In the meantime, it was agreed between the parties that an order should be made suppressing all references to 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 was made under cl 12 of schedule 3 to the Employment Relations Act 2000 (the Act).

[3] Following receipt of the defendant's supplementary submissions, an informal application was received from the Chief Mediator of the Labour Group, Ministry of Innovation, Business and Employment, seeking to make submissions on the matter of mediation confidentiality. The parties were invited to advise the Court of their attitude to this application. The defendant did not oppose the application for leave to file submissions, but the plaintiff did. On 29 August 2012 I issued an interlocutory judgment stating that if the Chief Mediator wished to pursue the matter a formal application for leave would need to be filed and a timetable was set out. I also extended the time for the parties to make supplementary submissions.

[4] An application for leave to appear or be represented under s 221 and cl 2(2) of Schedule 3 of the Act was duly filed on behalf of the Chief Mediator. The plaintiff responded by advising that to avoid further time delays no objection was made to the Chief Mediator filing and serving submissions on the admissibility issues. In an interlocutory judgment, issued on 2 October 2012,[1] I stated that I was satisfied that the Chief Mediator had a legitimate interest in being heard in relation to the public policy exceptions which were apparently relied upon by the plaintiff in support of her claim that certain statements made during the course of the mediation were admissible. I regarded this as an appropriate case for leave to be granted and made the material on the file available to the Chief Mediator. I set out a new timetable for the filing and serving of submissions.

[5] I recorded the matters that had been argued at the adjourned hearing on 23 July 2012 in an interlocutory judgment,[2] issued the following day, as follows:

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[1] [2012] NZEmpC 169.
[2] [2012] NZEmpC 118.

[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.*[3] 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 in the course of his argument) provides a good illustration of why there should possibly be an exception for criminal conduct. The Judge said:
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> > 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**
> (1) Except with the consent of the parties or the relevant party, a person who—
> …
> (b) is a person to whom mediation services are provided; or
> …

[3] [2007] ERNZ 817 (CA).

(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[s] 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.
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> [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.
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> [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*[4] and *Rose v Order of St John*,[5] both decisions of the Chief Judge.

[6] The defendant's supplementary submissions, filed on 13 August 2012, dealt in detail with these decisions of the Chief Judge. In the *Te Ao* case the plaintiff had been employed by the Department of Labour to provide mediation services. Both parties to a mediation subsequently complained about his conduct during a mediation and, after being dismissed on notice, the plaintiff filed a personal grievance for an unjustified dismissal, seeking reinstatement. The issue was whether the plaintiff could give evidence as to what was said and done at the mediation in support of his personal grievance.

[7] The Chief Judge decided that where there are legal proceedings about the events that took place in the mediation, s 148(2) of the Act appears at first reading to prohibit absolutely the mediator from disclosing evidence to any Court or Tribunal of what was said and done during the mediation. The parties themselves by consent could give that information.

[8] The Chief Judge held that the answer to the question of the degree of absoluteness in s 148(2) was hinted at in, if not decided by, obiter remarks of the Court of Appeal in the *Just Hotel Ltd* case. In dealing with s 148(1), the Court of Appeal gave a narrow and literal meaning to the purposes of that subsection but left

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[4] [2008] ERNZ 311.
[5] [2010] NZEmpC 163;[2010] ERNZ 490; (2010) 8 NZELR 645.

open the door to advance an argument for an exception to that confidentiality on the public policy ground. After finding that the personal grievances were proceedings for the purpose of s 148(2), the Court approached the issue in two different ways. First the Chief Judge considered a strict legal interpretation of s 148(2) which led quite simply to the conclusion that a mediator may never give evidence in proceedings about what was said and done in the course of providing those mediation services. He observed that such a black letter approach permits no exceptions under any circumstances regardless of the injustice to the mediator. He then considered what a purposive interpretation might mean in the circumstances of the case noting the view of the Court of Appeal in *Just Hotel* in relation to s 148(1) as follows:[6]

> [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.

[9] After noting that a purposive interpretation is mandated by s 5 of the Interpretation Act 1999, and that the principle is sometimes shorthanded to mean from text in light of purpose, an enactment should be given a meaning that is consistent with the rights and freedoms contained in the Bill of Rights Act 1990. The Chief Judge then considered whether the mediator, in the unusual circumstances of the case, should be able to say what was said and done. He considered the situation on a balance of harm basis and found that the result favoured an interpretation allowing for the admission of the mediator's evidence. He found that there would be no harm to the parties to the mediation by allowing this because the information was not being disclosed in any subsequent litigation between the parties who had both complained about the mediator's conduct and there would be harm to the mediator if he was prohibited from giving evidence in support of his personal grievance.

[10] The Chief Judge took into account the Employment Court's jurisdiction to judicially review the actions of the chief executive of the Department of Labour in that Department's provision of mediation services. He queried how that review

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[6] At [34].

could be carried out if there was an absolute embargo on examining how the mediator had performed, in the circumstances of the case. He also noted the mediator's statutory right to access personal grievance procedures under the Act and without these rights persons may be reluctant to become mediators. He concluded:[7]

> The law should not allow such unintended draconian consequences of a strict interpretation. The objective of confidentiality under s 148(2) is to protect parties and the integrity of the mediation process and not to protect or advantage mediators personally.
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> [57] A purposive interpretation of s 148(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.
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> [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.

[11] As an alternative approach the Chief Judge considered the public policy ground for non-compliance with the Act. He noted that neither the Court of Appeal's judgment in *Just Hotel* nor the judgment of the High Court called in aid of the public policy exception in *Just Hotel* identified the legal basis for the practice or described the circumstances in which it could be used. He found, however, that this Court is bound to follow and adhere to the law so stated by the Court of Appeal. He noted that the sole hypothetical example given was the commission of a serious criminal offence during the provision of mediation services though it was unlikely that this would be the only particular circumstances in which public policy might permit the statute to be overridden. He noted:[8]

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[7] At [56].
[8] At [65].

> … 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.

[12] The Court concluded that the particular circumstances of that case constituted grounds, for a public policy waiver of statutory confidentiality, as indicated in *Just Hotel*.

[13] Mr Coltman submitted that the finding in *Te Ao* turned entirely on the right to natural justice of an employee faced with allegations in his employment, to which he must respond. He submitted that to describe this as a "purposive" approach may mislead, for at its essence *Te Ao* was an application of the Bill of Rights Act, which requires that any ambiguity between it and the Employment Relations Act, be construed in favour of the Bill of Rights Act. He also submitted that in relying on the same grounds as the "purposive interpretation" in finding that there was a public policy exception, the Court was simply referring back to the Bill of Rights Act and the rights to natural justice. He submitted the comment on public policy was therefore merely an extension to the Court's application of the Bill of Rights Act to the Employment Relations Act and this allowed evidence of the matter of the complaint against the mediator to be led.

[14] Turning to *Rose v The Order of St John*, Mr Coltman submitted that the sole issue in that case was whether evidence of the general subject matter of a mediation was confidential under s 148(1). The plaintiff had become dissatisfied with her treatment by her supervisor, which she had described as bullying and, in response the defendant had proposed and the plaintiff had agreed that her concerns would be discussed in a mediation carried out under s 144 and related sections of the Act. The plaintiff alleged that during mediation her concerns were not discussed and the subject matter of the mediation was instead a review of her job performance. She contended that evidence concerning the subject matter was relevant and admissible as to the issue of whether the defendant had acted fairly and reasonably in accordance with its agreement to discuss the alleged bullying in the mediation.

[15] Mr Coltman observed there was no dispute that what was done or said at the mediation itself in *Rose* was absolutely confidential. The defendant there had

applied for an order that the plaintiff's evidence was inadmissible because s 148 required that it not be disclosed and allowing such evidence would be unfair because the defendant could not respond meaningfully to the plaintiff's allegations. The defendant also submitted that it would be difficult for the Court to determine the truth of the rival accounts given that the details of the mediation would not be admissible and also that the proposed evidence would be of little probative value. The Chief Judge observed that the issues for decision narrowed down to whether the plaintiff was precluded from giving evidence that a mediation arranged by the defendant for a specified purpose did not deal with that matter. The plaintiff did not want to give evidence of what was said and done in the mediation to support her assertion of an agreed subject matter. The Chief Judge held that if the plaintiff was entitled to give evidence that a particular topic was not dealt with at the mediation the defendant must in fairness, be entitled to say that it was. Either party could not, however, give evidence of the particulars of what was said or done at the mediation, without consent. The Court observed that although there may be difficulties in the Court determining the truth of the plaintiff's assertion, that was not a reason to exclude the evidence and there was a record of the outcome which might corroborate her account. The Chief Judge stated that the purpose of s 148 is to permit the parties to a mediation to speak freely in a confidential environment in an attempt to resolve their differences and that an important part of their efforts to achieve a settlement could not be later disclosed. The Chief Judge noted that there is no express reference to the subject matter or topics of mediation in s 148 but that experience and commonsense dictates the subject matter at mediation is frequently known to the Court or the Authority. He observed that the evidence the plaintiff intended to lead referred to the important question under s 103A of the Act of how the employer treated the employee which included the proposal to go to mediation for specified purposes. He found that none of that was made inadmissible by s 148 and concluded:

> [26] Applying a purposive interpretation to s 148 and allowing for public policy exceptions to what might otherwise be a harsh result inconsistent with the spirit of the legislation generally, I consider that s 148 does not exclude as inadmissible evidence about the general subject matter of the mediation. Statutory confidentiality can and will be protected by making inadmissible any evidence about "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."

> [32] Standing back from the particular merits of this case, I do not consider that the interpretation of s 148 arrived at in this decision will affect adversely other parties in other mediations, or the mediators. The confidentiality of what should be kept confidential to preserve the efficacy of mediation is not in doubt. As this and previous cases illustrate, the developing application of s 148 means that it is not an absolute prohibition on the recounting subsequently of any communications in or to do with mediation. Both the purposive interpretation of the section and the allowance for extraordinary public policy exceptions, identified by the Court of Appeal in *Just Hotel Ltd*, will allow justice to be done in cases where there is a demonstrated need and good reasons to have a limited knowledge of the generalities of what went on at mediation.

[16] Mr Coltman sought to distinguish *Te Ao* and *Rose*. He correctly observed that *Te Ao* dealt with s 148(2) therefore was significantly different from the issue presently before the Court where one of the parties to the employment relationship problem was seeking to adduce evidence of what was said and done at the mediation in support of the personal grievance. He submitted that *Rose* could be distinguished as the applicant merely sought to adduce evidence in the subsequent litigation between the parties as to the general subject matter of the mediation, as she wished to claim that her grievance had not been addressed. He submitted that was very different to the current circumstances. He submitted that the present situation has been ruled on by the Court of Appeal in *Just Hotel* and the clear ruling was that anything said or done at the mediation could not be used in any subsequent litigation between the parties. He also submitted that the evidence in this case fell squarely within the recognised and prohibited category in *Te Ao*,[9] where the Court held that if the events related to the resolution of the employment relationship problem between the parties then "the law's expectation is absolute confidentiality and a complete prohibition on the mediator giving evidence".

[17] Mr Coltman submitted that in this case Ms Hamon wished to adduce evidence one of the defendant's employees alleged "course of [mala] fides" and without the allegation of blackmail, the evidence of what was said or done at the mediation would clearly be excluded. He submitted that the alleged blackmail took the matter no further. He accepted that while it was recognised in *Rose* that the Court is not bound by the Evidence Act 2006, its provisions are taken into account in the exercise by the Court of its relevant jurisdiction under s 189 of the Act, which

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[9] At [58].

gives the Court wide power to accept such evidence, whether strictly legal or not as it thinks fit. Mr Coltman submitted that, considering the circumstances of this case, the probative value of the evidence which Ms Hamon sought to adduce was outweighed by the risk it will unfairly prejudice the proceedings or needlessly prolong them. He referred to s 8 of the Evidence Act and submitted that section was relevant in guiding the Court in the present case.

[18] Mr Coltman submitted that the pleaded case was predicated on two main points, the first on alleged pre-contractual misrepresentations and the second, conduct that led to a constructive dismissal, long before the mediation date. He submitted that if there was any relevant evidence of the defendant's alleged "mala fides" during the employment relationship, that would have already existed long before the mediation. He submitted therefore, that the evidence of what took place at the later mediation had no probative value to Ms Hamon's constructive dismissal and was thus irrelevant.

[19] Further, he submitted the allegation of blackmail did not go to the substantive issues before the Employment Court, but to an alleged criminal offence. He submitted that the Employment Court cannot determine whether what took place at the mediation amounted to a crime, as that was not the function of the proceedings, nor within its jurisdiction. He submitted that if there is an allegation of blackmail that was a matter for the Police and not for the Employment Court. He submitted that this application was simply to support Ms Hamon's ongoing personal grievance and that is precisely what s 148(1) seeks to prohibit. He submitted that, as stated in *Te Ao*, the issue is not the "degree of seriousness" of what was allegedly said at the mediation, but whether the events about which a party intends to give evidence relates to the resolution of the employment relationship problem. If the events relate to the resolution of an employment relationship problem, as it does in the present case, then, in his submission, there was absolute confidentiality and a complete prohibition on that evidence being led at any subsequent litigation between the parties. He submitted that the circumstances of this case fell squarely within the Court of Appeal's decision in *Just Hotel* and that Ms Hamon should be prohibited from adducing evidence as to what was said or done.

[20] The submissions of the Chief Mediator also relied on the interpretation of s 148 by the Court of Appeal in *Just Hotel*. The submissions noted that the Ministry of Business, Innovation and Employment administers the Act and the Chief Mediator has a legitimate interest on being heard on what public policy exceptions should apply, as referred to in *Just Hotel*. It was submitted that the present case raised a serious question of law identified, but not determined, by the Court of Appeal as to whether conduct such as Ms Hamon alleges, falls within the public policy exception to mediation confidentiality.

[21] It was the Chief Mediator's view that allegations of blackmail and extortion were more appropriately dealt with in the criminal jurisdiction. It was noted that Ms Hamon has made a complaint to the Police and that evidence independent of the mediation is in existence. It was the Chief Mediator's view that matters raised in this application do not reach the threshold of the exception of the kind of criminal conduct expressed, obiter, in *Just Hotel* because here the allegations are disputed and they may have been made for the legitimate purposes of mediation.

[22] The Chief Mediator submitted that s 148(1) of the Act is not ambiguous and all communications for the purpose of the mediation attract statutory confidentiality except, possibly, where public policy dictates otherwise. Communications are protected unless created or made independently of mediation so documents, statements and submissions prepared for use in or in connection with mediation fall within the ambit of s 148(1) of the Act. This reflects the desirability of encouraging free and frank discussion between parties in mediation. It was contended that to allow the communications made in mediation in this case to be admitted as evidence would undermine the ability of mediators to resolve employment disputes in the future and set a dangerous precedent.

[23] Counsel for the defendant responded to the submissions of the Chief Mediator and largely agreed with them. However, issue was taken with the Chief Mediator's submissions that communication had to be made for the "legitimate" purpose of the mediation. Counsel for the defendant pointed out that the word "legitimate" is not contained in s 148 of the Act. The Act only provides for the communication to be made for the purposes of the mediation. Mr Coltman observed

that in *Just Hotel* the Court of Appeal rejected the introduction of words such as "genuinely", "legitimate" or "proper" as qualifying the purposes of the mediation.[10] Mr Coltman submitted that as the alleged statement was said to have been made orally during the mediation process there was no need to enquire as to whether it was made "for the purposes of the mediation".

[24] The plaintiff duly responded to all of the submissions filed in opposition to the admission of the evidence she sought to lead. She submitted that the question before the Court was whether evidence of an oral blackmail threat, allegedly issued by an agent of the defendant, during the course of the mediation conference, was protected by the statutory confidentiality of s 148. She submitted that s 148 was not a cloak for criminal behaviour and was restricted by its own words which states in part that "oral statements made in mediation must be 'for the purposes of mediation'". She attempted to distinguish the *Just Hotel* case on the grounds that it involved a document and not criminality.

[25] However, it does appear that the statement she relied on was made solely for the purposes of mediation as the alleged threat was that if her personal grievance was not settled, the threat would be carried out. Settlement of her grievance was the purpose of the mediation. It did not appear to be made for any other purpose and was caught by s 148(1) of the Act. I therefore do not accept Ms Hamon's submission that as blackmail is a crime under the Crimes Act 1961 such a threat at a mediation conference cannot be for the purposes of mediation.

[26] Ms Hamon relied on the *Te Ao* case. She submitted that pursuant to s 6 of the Bill of Rights Act the Employment Relations Act is to be interpreted in accordance with the rights set out in s 27 of the Bill of Rights Act which deals with the right to justice. Although the Bill of Rights Act deals with the relationship between individuals and the state rather than between private individuals, as in the present case, Ms Hamon contended that she has an inalienable right with respect to the crime of blackmail to:

a) report the crime to the state authorities;

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[10] [38].

b) for the state to bring a criminal prosecution in evidence;

c) to bring a private criminal prosecution;

d) personally bring civil proceedings and lead evidence;

e) bring evidence before the Employment Court.

[27] However s 27 of the Bill of Rights Act, upon which she relies, sets out the right of every person to the observance of natural justice by any tribunal or other public authority, and the right to bring civil proceedings against and to defend civil proceedings brought by the Crown. The proceedings in the Employment Court do not fall into that category. That distinguishes the present situation from the *Te Ao* case where the plaintiff was exercising statutory rights against Chief Executive of the Department of Labour.

[28] The Court which has jurisdiction to deal with criminal matters and the plaintiff's complaint, may have to determine whether s 148 of the Act operates as a bar to the release of the information that Ms Hamon seeks to bring before that Court. However, that does not assist Ms Hamon in bringing the evidence of what was said at the mediation brought before the Employment Court.

[29] Her strongest ground is that of the public policy exception in *Just Hotels*. As the Chief Judge concluded in *Rose* the Employment Court is bound by that statement and must determine whether, in the particular case, public policy will allow for the waiver of confidentiality.

[30] Ms Hamon submitted that as a serious assault could be an exception to s 148 as according to *Just Hotel*, any serious criminal offending is an exception to s 148 of the Act. She pointed out that blackmail carries a maximum term of imprisonment of 14 years so it is serious criminal offending and therefore meets the criteria referred to by the Court of Appeal in *Just Hotel*. She submitted, on public policy considerations, that blackmail is an exception to s 148 and that evidence of the blackmail threat is therefore admissible. In support she submitted that the s 148 statutory obligation of

confidentiality is to encourage unfettered settlement negotiations, what the Court of Appeal in *Just Hotels Ltd* described as:[11]

> …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.

[31] Ms Hamon submitted that this statement from the Court of Appeal begs the question of whether the mediation had been conducted in a safe manner and in a safe place. She submitted that freedom to speak freely and frankly referred to by the Court of Appeal, must, by inference, include freedom from assault, threats, intimidation and blackmail. If assaults, threats, intimidation and blackmail are acceptable at mediation then one party to the mediation must feel unsafe and unable to speak freely and frankly. She submitted that such a state of affairs prevents the very purpose of a mediation and is not protected by s 148.

[32] Ms Hamon relied on the statement in *Rose* where the Employment Court said:

> [23] In a sense, mediation is the modern day formalised equivalent of without prejudice settlement negotiations between parties through their lawyers, the concessionary detail of which cannot be used in evidence subsequently if there has been no settlement.

[33] Ms Hamon referred to the wealth of decisions in the common law on without prejudice communications and submitted that they should apply when deciding the parameters of s 148 of the Act. She observed that these cases exclude statements and documents which had used without prejudice as a façade to conceal facts or evidence from the Court.

[34] She relied on *Unilever PLC v Procter & Gamble Co*[12] a decision of the English Court of Appeal. The Court, observed that the without prejudice rule governing the admissibility of evidence is founded on the public policy of encouraging litigants to settle their differences rather than litigate them to the finish. It stated that one of the most important instances where one party will be allowed to

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[11] At [34].
[12] [2001] 1 WLR 2436; [2001] 1 All ER 783.

give evidence of what the other party said or wrote in without prejudice negotiations, was when the exclusion of the evidence would act as a cloak for perjury, blackmail or other "unambiguous impropriety". The Court of Appeal, warned that the exception should be applied only in the clearest cases of abuse of a privileged occasion.

[35] That exception has been endorsed by the New Zealand Court of Appeal in *Sheppard Industries Ltd and Avanti Bicycle Company Ltd v Specialized Bicycle Components Inc*[13] citing the United Kingdom Supreme Court decision in *Oceanbulk Shipping and Trading Sa v TMT Asia Ltd.*[14]

[36] Ms Hamon submitted that the legitimacy of the oral statements made at the mediation was an issue that must be addressed. She submitted there is an overarching requirement for legitimacy that is implied into the Act to support the obligations of good faith found in s 4 and elsewhere in the Act.

[37] The difficulty with that submission is, as Mr Coltman submitted, that a similar argument was rejected by the Court of Appeal in *Just Hotels* as follows:

> [38] As we noted at paras 17 and 18, the Employment Court held that s 148(1) only protected communications that were "genuinely" for the purposes of settling an employment dispute (at para 56), or for the "legitimate" purposes of the mediation (at para 59). In defending that position, Mr Corkill submitted that the section should be read as referring to the "proper" purposes of the mediation and argued that this imposed a high threshold for scrutiny. We disagree. Such concepts could be applied only after a detailed examination of what occurred at a mediation. Such a retrospective examination, based on a mere allegation of illegitimate or improper purpose or of non-genuine use, would effectively defeat the protection that s 148(1) seeks to provide.
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> [39] The resolution of disputed accounts of what occurred at a mediation would be particularly difficult because s 148(2) would prevent the only independent witness, the mediator, from being called to give evidence.

[38] There is also the difficulty of distinguishing between statements which may carry implied threats and those which fall within the Crimes Act definition of blackmail. In the *Unilever* case for example, the English Court of Appeal referred to

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[13] [2011] 3 NZLR 620 (CA).
[14] [2010] UKSC 44, [2011] 1 AC 662.

situations where there may be without prejudice, wide ranging, unscripted discussions during a meeting which may last several hours, which:

> …may contain a mixture of admissions and half-admissions against a party's interest, more or less confident assertions of a party's case, offers, counter-offers, and statements (which might be characterised as threats or as thinking aloud) about future plans and possibilities.[15]

[39] Practical examples of this have arisen. In the recent case *Tinkler v Fugro PMS Pty & Pavement Management Services Ltd*,[16] the plaintiff contended that an agreement signed by the parties and a mediator was void because it was entered into under duress. The context was allegations that the plaintiff's former employee had allegedly obtained in excess of $95,000 in unjustifiable advances through false and invalid expense claims for personal gain. The improper pressure largely consisted of an allegation that during a car drive he was told that it was a very serious matter of fraud and that if he did not sign the settlement agreement the employer would hand the matter over to the Police and, if convicted, the plaintiff would go to prison. One of the elements that had to be established for duress, as set out by the New Zealand Court of Appeal in *Pharmacy Care Systems v Attorney-General*,[17] was that there must be an improper threat or pressure. Hammond J had observed that the threat to institute a criminal prosecution has generally been regarded as an improper means of inducing a party to make an agreement. It seemed to be conceded by the parties that if a threat of the sort alleged had been made by the employer, this would have amounted to an improper threat or pressure. The Court found that no such threat had been made and that the plaintiff had not been threatened with a referral to the Police. His challenge of duress fell at the first qualifying hurdle identified by the Court of Appeal in the *Pharmacy Care* case.

[40] There can be a very fine line between robust settlement discussions at mediation, in which views are expressed as to the consequences of the matter not settling, and blackmail.[18] It was said in the *Unilever* case the exception to without prejudice privilege should be applied only in the clearest cases of abuse. In this

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[15] At 2444.
[16] [2012] NZEmpC 102.
[17] (2004) 2 NZCCLR 187 (CA) at [98].
[18] Cameron Loughlin and Greg King, "Fine Line between settlement negotiations and blackmail" *Lawtalk*, (New Zealand, 8 February 2012).

context I place considerable weight on the opinion of the Chief Mediator that allegations of blackmail and extortion are more appropriately dealt with in the criminal jurisdiction and to allow the communications allegedly made in mediation in this case to be admitted as evidence would undermine the ability of a mediator to resolve employment disputes in the future and set a dangerous precedent. It would operate as a major disincentive to the encouragement of free and frank discussions between the parties in mediation.

[41] I also accept Mr Coltman's submissions. I consider that the public policy exception in *Just Hotels* should only be used for the clearest of cases and where it has the most important consequences for the parties to the litigation in the Authority or the Employment Court if the evidence was to be excluded. This is not such a case. The plaintiff is free to pursue the complaint that she made to the Police or to lay a private prosecution. It will be for the Judge dealing with the criminal prosecution to deal with the consequences of s 148 of the Act.

[42] Further, I find that what was allegedly said in the mediation had no direct bearing on the plaintiff's personal grievance. There is a very real question as to its relevance. The exception recognised for without prejudice communications that it not be a cloak for perjury, blackmail or other ambiguous impropriety, does not appear to assist in the disposition of the plaintiff's personal grievance. She is not alleging that her constructive dismissal was as a result of the conduct that was carried out at the mediation. The plaintiff's pleading in her amended statement of claim was that she found her employment relationship to be an impossible situation as the defendant's trustee manager was intent on forcing her to resign by any means possible. She lists what she describes as the oppressive and predatory behaviour which repeatedly breached the employment agreement. None of those allegations relate in any way to the subject matter of the threat allegedly made during the mediation and predate it.

[43] I have also taken into account the good faith report of the Authority dated 22 July 2009, which held that the matters contained in the alleged blackmail threat should not have been raised at all and should not in any event have been pursued as they were irrelevant as to whether or not she was constructively dismissed. They

were also held to be unnecessary to any investigation of the Authority concerning the remedies available to her in the event that she was found to have been constructively dismissed unjustifiably.

[44] Whilst it would be ultimately for the trial Judge to consider the relevance of the evidence to be led, I consider the absence of clear relevance to be a factor in determining whether the *Just Hotel* public policy exception should apply. For all of these reasons I consider that the evidence of what was allegedly said at the mediation does not fall within the *Just Hotel* public policy exception and therefore I dismiss the application to waive mediation confidentiality.

[45] In view of my conclusion that mediation confidentiality will remain in place, until further order of a Court the order I made on 24 July 2012 suppressing all references in any affidavits or submissions as to what was actually alleged to have been said at the mediation will continue in force until further order of the Court.

[46] Costs have been sought by the defendant. If they cannot be agreed the defendant's memorandum should be filed and served by 26 April 2013 and the plaintiff's memo should be filed and served by 10 May 2013.

B S Travis
Judge

Judgment signed at 3pm on 10 April 2013