

**IN THE EMPLOYMENT COURT OF NEW ZEALAND  
AUCKLAND**

**I TE KŌTI TAKE MAHI O AOTEAROA  
TĀMAKI MAKĀURAU**

**[2020] NZEmpC 238  
EMPC 191/2020**

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
AND IN THE MATTER OF	an application to strike out part of the pleadings
BETWEEN	ANGELA NEIL First Plaintiff
AND	TINA WEST Second Plaintiff
AND	NEW ZEALAND NURSES ORGANISATION Defendant

Hearing: On the papers

Appearances: A Halse and Dr J Bishop, advocates for plaintiffs  
S Hornsby-Geluk and C Luscombe, counsel for defendant

Judgment: 23 December 2020

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**INTERLOCUTORY JUDGMENT OF JUDGE KATHRYN BECK  
(Application to strike out part of the pleadings)**

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[1] This is an application to strike out paras 136, 136(a), 137(a), 137(b) and 136(c) (the paragraphs) of the second amended statement of claim filed on 15 September 2020, pursuant to r 15.1 of the High Court Rules 2016, on the basis that they disclose no reasonably arguable cause of action, defence or case appropriate to the nature of the pleading, or are otherwise an abuse of the process of the Court.

[2] The paragraphs deal with two alleged communications:

- (a) an alleged request for a bullying complaint to be put in writing (claimed in paras 136, 137(a), 137(b) and 136(c)); and
- (b) a claim that particular individuals said that the New Zealand Nurses Organisation (NZNO) office at Tauranga was dysfunctional and that the office would be closed if the situation could not be resolved (para 136(a)).

[3] It is accepted that all of the comments set out in the above paragraphs are alleged to have been made in the course of mediation between the parties on 4–5 December 2018.

[4] Section 148 of the Employment Relations Act 2000 (the Act) provides:

**148 Confidentiality**

- (1) Except with the consent of the parties or the relevant party, a person who—
  - (a) provides mediation services; or
  - (b) is a person to whom mediation services are provided; or
  - (c) is a person employed or engaged by the department; or
  - (d) is a person who assists either a person who provides mediation services or a person to whom mediation services are provided—must keep confidential any statement, admission, or document created or made for the purposes of the mediation and any information that, for the purposes of the mediation, is disclosed orally in the course of the mediation.
- ...
- (3) No evidence is admissible in any court, or before any person acting judicially, of any statement, admission, document, or information that, by subsection (1), is required to be kept confidential.
- ...

[5] The defendant does not consent to the disclosure of the alleged comments made.

[6] It submits that it is only in very rare cases of extraordinary circumstances that a party can rely on or disclose such information,<sup>1</sup> and these circumstances do not exist in this case.

[7] It further submits that such references should be struck out of the statement of claim on the grounds that it cannot plead to them without itself breaching s 148. Likewise, the plaintiffs are unable to substantiate such claims without breaching s 148. The paragraphs do not disclose any reasonably arguable cause of action as neither party can bring evidence in respect of them. Therefore the claims are so clearly untenable that they cannot succeed.

[8] Further, the defendant argues that to allow the plaintiffs to breach s 148 would amount to an abuse of process.

[9] The plaintiffs say that the references in the paragraphs led to the existence of evidence that exists independent of the mediation and that such independent information is not protected by s 148:

- (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

[10] It also submits that the paragraphs should be admissible under ss 189(2) and 57(3)(d) of the Evidence Act 2006, as a matter of equity and good conscience and in the interests of justice. Further, the plaintiffs say that such disclosure is necessary for a subsequent prosecution for perjury.<sup>2</sup>

[11] In general terms, the plaintiffs say they also rely on:

- (a) Section 148(6)(a) of the Act;
- (b) Section 85 of the Health and Safety at Work Act 2015;

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<sup>1</sup> *George v Auckland Council* [2013] NZEmpC 76, [2013] ERNZ 492 at [51].

<sup>2</sup> Evidence Act 2006, s 57(2B)(a).

- (c) Section 110A(1)(c) of the Act;
- (d) Section 57(2B)(b) of the Evidence Act; and
- (e) Section 57(3)(d) of the Evidence Act;
- (f) the Human Rights Act 1993; and
- (g) the New Zealand Bill of Rights Act 1990.

[12] The Court has jurisdiction to strike out all or part of a pleading. The criteria to be applied are well known.<sup>3</sup>

[13] Essentially, as set out above, the defendant relies on the argument that the pleading is untenable on the basis that it cannot be proved because the evidence to prove it is inadmissible.

### **Are the paragraphs admissible?**

[14] Accordingly, it is necessary in the first instance to determine whether the paragraphs, as pleaded, are admissible.

[15] The plaintiffs have accepted that these paragraphs refer to discussions that took place in mediation.

[16] Statements and submissions made orally at mediation come within the ambit of s 148(1) of the Act and the parties are therefore required to keep them confidential.<sup>4</sup>

[17] As stated by the Court of Appeal in *Just Hotel Ltd v Jesudhass*, this:

... reflects the desirability of encouraging the parties to a mediation to speak freely and frankly, safe in the knowledge that their words cannot be used

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<sup>3</sup> *Attorney-General v Prince* [1998] 1 NZLR 262 (CA) at 267-268; *Couch v Attorney-General* [2008] NZSC 45, [2008] 3 NZLR 725 at [33]; *Performance Cleaners All Property Services Wellington Ltd v Chinan* [2017] NZEmpC 152, [2017] ERNZ 858 at [20].

<sup>4</sup> *Just Hotel Limited v Jesudhass* [2007] NZCA 582, [2007] ERNZ 817 at [34].

against them in subsequent litigation if the dispute does not prove capable of resolution at mediation.

[18] The protection of confidentiality of discussions at mediation is important in the context of employment relationships. The Act emphasises the importance of parties endeavouring to resolve employment relationship problems directly themselves and with the support (in this case) of Mediation Services.<sup>5</sup> Mediation is a longstanding and important process for attempting to resolve employment relationship problems, and it is in the public interest that parties should conduct themselves safe in the knowledge that what they say is protected from admission in any proceeding before this Court.

[19] The plaintiffs have relied on s 148(6)(a) as supporting the admissibility of the paragraphs. However, that provision relates to evidence that existed independently of the mediation but was presented or referred to in the course of the mediation. That is not the case here. The paragraphs refer to discussions that took place during mediation, not ones that took place outside of mediation and were repeated, or that existed independently of the mediation process. Accordingly, the exception to inadmissibility in s 148(6) does not apply.

[20] Mr Halse, advocate for the plaintiffs, has submitted that the Court should admit the otherwise inadmissible paragraphs, exercising its equity and good conscience discretion under s 189 of the Act. However, there is no compelling countervailing equity and good conscience reason for the paragraphs to be before the Court.

[21] Mr Halse's submission that the paragraphs possibly establish a basis for perjury proceedings at a later date is not sustainable. No compelling evidence – or indeed any evidence – in support of a claim for perjury has been put before the Court. The exception in relation to perjury in the Evidence Act also applies only in connection with plea discussions in criminal proceedings.<sup>6</sup> And as discussed, considerations of justice and equity, as required under s 57(3)(d), operate to strengthen the argument against admissibility, having regard to the purpose and objectives of the Act.<sup>7</sup>

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<sup>5</sup> Employment Relations Act 2000, ss 143(b)–(c) and 101(a–ab).

<sup>6</sup> Evidence Act 2006, s 57(2A).

<sup>7</sup> Sections 101 and 3(a)(v)–(vi).

[22] There are no extraordinary circumstances which point to this being one of the rare cases where disclosure of what was said at mediation would be admissible.<sup>8</sup> I also see no relevance in the references to the Human Rights Act 1993, the Bill of Rights Act 1990, or s 85 of the Health and Safety at Work Act 2015.

### **Conclusion**

[23] Accordingly, the references to the discussions at mediation in paras 136, 136(a), 137(a), 137(b) and 136(c) are inadmissible under s 148 of the Act. There is no compelling evidence as to why the Court should admit them under s 189(2). If they are not admissible, it follows that they cannot be referred to in the pleadings. As noted by the defendant, it cannot plead to them without itself being in breach. The claims are therefore clearly untenable and an abuse of process.

[24] Paragraphs 136, 136(a), 137(a), 137(b) and 136(c) are accordingly struck out.

[25] An amended statement of claim, omitting these paragraphs, is to be filed by the plaintiffs by 4 pm on 18 January 2021. The defendant must file and serve a statement of defence by 4 pm on 2 February 2021.

[26] Costs are reserved.

Kathryn Beck  
Judge

Judgment signed at 4.45 pm on 23 December 2020

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<sup>8</sup> *George v Auckland Council*, above n 1.