IN THE EMPLOYMENT COURT
AUCKLAND

[2018] NZEmpC 40
EMPC 381/2017

IN THE MATTER OF	proceedings removed from the Employment Relations Authority
AND IN THE MATTER	of an application seeking direction to mediation
BETWEEN	GRANT JOHNSTON Plaintiff
AND	THE FLETCHER CONSTRUCTION COMPANY LIMITED Defendant

Hearing: On the papers filed on 13 and 16 April and 3 May 2018

Representatives: T Drake, counsel for plaintiff
P Skelton QC and R Upton, counsel for defendant

Judgment: 4 May 2018

INTERLOCUTORY JUDGMENT OF CHIEF JUDGE CHRISTINA INGLIS

Introduction

[1] The defendant, Fletcher Construction Company Ltd (Fletchers), has applied to the Court for a direction to private mediation. That application is opposed by the plaintiff. The plaintiff's position is that the Court's power to direct mediation is limited to mediation provided by the Ministry of Business, Innovation and Employment mediation services (MBIE mediation services) under the Employment Relations Act 2000 (the Act). The parties were content for the application to be dealt with on the papers filed.

[2] The application arises against the following background. Mr Johnston filed proceedings in the Employment Relations Authority, raising numerous claims against

Fletchers (including a claim for unjustified constructive dismissal). He applied for removal to the Court. That application was declined by the Employment Relations Authority.[1] He then sought special leave from the Court. That application was granted, over Fletchers' opposition.[2]

[3] At the initial directions conference I raised with counsel the possibility of alternative dispute resolution. Three potential options were canvassed during the course of discussion: mediation via MBIE mediation services; private mediation and a judicial settlement conference. It was agreed that counsel would take instructions and discuss matters further, before advising the Court as to the position.

[4] It is apparent that discussions have not gone smoothly and no agreement has been reached. The one common point that emerges from the documentation before the Court is that both parties see a value in at least attempting to resolve matters, without judicial involvement. The mechanism by which such discussions might occur is the current sticking point. The defendant wants to engage a private mediator; the plaintiff wants to attend mediation provided by MBIE mediation services.

Analysis

[5] The key issue for present purposes is whether the Court has the power to direct parties to attend private mediation. The defendant says yes; the plaintiff says no.

[6] Under s 188(2) of the Act, the Court has the power to direct parties to mediation and must do so unless it considers that mediation will not contribute constructively to resolving the dispute; will not, in all the circumstances, be in the public interest; or will undermine the urgent or interim nature of the proceedings. Where a direction to mediation has been made the parties must comply with the direction and attempt in good faith to reach an agreed settlement of their differences.

[7] Part 10 of the Act sets out various procedures to support successful employment relationships, and establishes three specialist institutions: mediation

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1 *Johnston v The Fletcher Construction Co Ltd* [2017] NZERA 130.
2 *Johnston v The Fletcher Construction Co Ltd* [2017] NZEmpC 157.

services; the Employment Relations Authority; and the Employment Court. It includes detailed sections relating to the provision of mediation by mediation services, and how such services are to be delivered. I understand the plaintiff's primary point to be that it is implicit in the statutory scheme, and the provision of mediation services under the Act, that any court-directed mediation is to be undertaken via this route. That is certainly the norm, although parties sometimes prefer (by agreement) to arrange a private mediation or request the Court to convene a judicial settlement conference.

[8] I drew counsel's attention to a judgment of the Court in *McCulloch v New Zealand Fire Service Commission* where the then Chief Judge made the following observations:[3]

> [78] Section 188 requires the Court to direct the parties to mediation or further mediation unless there are good reasons why this should not happen. Although the parties have already attempted, unsuccessfully, to settle their dispute by mediation, *I consider that the most productive way of doing so may be by private mediation* if agreement can be reached on the costs of doing so.
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> (emphasis added)

[9] Mediation was directed.[4] Counsel for the defendant submits that the Court's approach in *McCulloch* reflects jurisdiction to order private mediation; otherwise, the direction to mediation that was made in that case could have been ignored. It seems to me that this simply begs the jurisdictional question. As Mr Drake, counsel for the plaintiff, points out it does not appear that the jurisdictional point now before the Court was raised by either party, and no reasoning or authority was referred to for the proposition that private mediation could be directed (if, indeed, that is the correct characterisation of the direction made in that case).

[10] There is scope for argument that the Act confers a broad power of direction on the Court to require parties (reluctant or otherwise) to attend mediation provided by a private mediator nominated by the Court. In this regard "mediation" is defined as including (but not limited to) mediation provided under s 144 of the Act by the chief executive of MBIE, and "any other mediation services that are provided (whether by the chief executive, or *any other person*) to help resolve employment relationship

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3 *McCulloch v New Zealand Fire Service Commission* [2010] NZEmpC 160.
4 At [81].

problems."[5] These provisions, the broader objectives of the Act (including the legislative endorsement of flexibility of approach to problem solving by the Authority and the Court), may be seen to lend weight to the defendant's argument as to the Court's power to make the direction sought.

[11] While such an interpretation is possible on a literal reading of the Act, I am not drawn to it. Rather, it seems more likely that Parliament intended that court-directed mediation would be undertaken, at no cost, by specialist MBIE mediators appointed by the chief executive under s 144(1), and in accordance with the detailed processes and procedures set out in ss 144A-149A. It is probable too that if s 188 was intended to confer on the Court a broad discretion to direct mediation both within and outside of the mediation services provided for under the Act it would have included an express ability to impose conditions on any such direction, including as to what might otherwise be the substantial costs associated with private (as opposed to cost free MBIE-provided) mediation.

[12] More generally, adopting the defendant's broad interpretation of the Court's power to direct mediation, to include private mediation, would likely give rise to numerous complexities, including as to the detail of cost-sharing arrangements, mediator-identity, and the basis on which such mediation might occur (absent the detailed provisions in the Act); the extent to which the parties' statutory good faith obligations in relation to mediation might be engaged; and difficult questions as to what might constitute a breach of any direction made. It is doubtful that such difficulties were intended by Parliament.

[13] Further, and as Mr Drake points out, while the definition of "mediation" refers to mediation services provided by the chief executive or "any other person", the definition of mediation services itself is confined to mediation services provided under s 144 (namely by the chief executive and not anyone else).

[14] It seems to me that the broad definition of mediation contained within s 5 may simply reflect the scope of s 154, making it clear that: "Nothing in [Part 10 of the Act]

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5 Employment Relations Act 2000, s 5, definition of "mediation".

prevents any person seeking and using mediation services other than those provided by the chief executive under s 144."

[15] For completeness, I have considered (and invited further submissions on) the issue of whether the Court has the power to direct the source of mediation (MBIE, private or otherwise). Counsel for the defendant submits that the Court must have the power, otherwise previous judgments containing a direction to mediation via MBIE would not be binding. Again, this tends to beg the question. I have concluded, having particular regard to the detailed statutory scheme relating to the appointment of specialist mediators and the processes and procedures for the provision of mediation services, that the Court's power to direct mediation is to be read as the power to direct mediation provided by mediation services.

[16] Parties are free to agree to engage in alternative dispute resolution processes. The Court retains the ability to direct mediation.[6] It is usual for agreed arrangements to be raised with the Court and for such arrangements to be taken into account when the Court is discharging its obligation under the Act to consider whether a direction to mediation ought to be made.

[17] For the foregoing reasons, I do not accept that the Court has the power to direct parties to private mediation. Even if I had the power to direct the parties to attend private mediation I would not have done so in this case, and in light of the plaintiff's views. In the circumstances I would have concluded that attendance at mediation provided by a specialist mediator appointed by the chief executive, with the associated suite of applicable statutory processes and procedures, would be more appropriate.

Conclusion

[18] The defendant's application for a direction to private mediation is declined. The parties are directed to attend mediation provided by MBIE mediation services under the Act. They are reminded of their obligation under s 188(3) to attempt in good faith to reach an agreed settlement of their differences.

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[6] Note that the Act specifies the circumstances in which the Court must **not** give a direction (s 188A).

[19] The plaintiff is entitled to costs on the defendant's unsuccessful application.

Christina Inglis
Chief Judge

Judgment signed at 4 pm on 4 May 2018