

CONFIDENTIALITY OF MEDIATION

CLARIFICATION FROM COURT OF APPEAL *JUST HOTEL LTD v JESUDHASS*

Employment Team Contacts:

Richard McIlraith, Partner

email: richard.mcilraith@russellmcveagh.com

DDI: + 64 9 367 8248

Gillian Service, Associate (England & Wales)

email: gillian.service@russellmcveagh.com

DDI: + 64 9 367 8183

Andrew Schirnack, Senior Solicitor

email: andrew.schirnack@russellmcveagh.com

DDI: + 64 9 367 8453

Kylie Dunn, Senior Solicitor

email: kylie.dunn@russellmcveagh.com

DDI: + 64 9 367 8136

Mediation is, in effect, compulsory in any employment dispute. It is one of the most important tools for employers. The Employment Court had cast some doubt on the true confidentiality of the mediation process. The Court of Appeal has now clarified the situation. It has confirmed that what is said at mediation is indeed confidential.

Following the Employment Court's decision in *Jesudhass v Just Hotel Ltd* in March 2006, there had been some doubt over the confidentiality of mediation. An employee had claimed that he had been constructively dismissed during a mediation. In that context, the Employment Court held that evidence of the employer's conduct at mediation could be produced in a proceeding regarding that alleged dismissal. The Employment Court's decision had caused some concern. It meant that evidence of conduct at mediation could be produced in court at a later date and this had the potential to undermine the mediation process.

The Court of Appeal has recently overturned this decision. It has held that all communications in mediation are confidential and must remain so. The only exception to this will be where there are strong public policy reasons. The Court of Appeal in its judgment gave the extreme example of where a serious assault or murder occurred during a mediation and a criminal proceeding ensued. In such a case the cloak of confidentiality of the mediation could be lifted. In reaching its view, the Court of Appeal highlighted the importance of encouraging parties to speak freely and frankly at mediation without concerns that these discussions could be used against them in subsequent litigation. Parties can now feel more comfortable that what is said in mediation will remain in the mediation.

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