

*Under the Employment Relations Act 2000*

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND OFFICE**

**BETWEEN** (Tony) Anthony James Bakewell (Applicant)

**AND** Burns & Ferrall Limited (Respondent)

**REPRESENTATIVES** Tony Bakewell in person  
Jim Marsh for respondent

**MEMBER OF AUTHORITY** Alastair Dumbleton

**INVESTIGATION MEETING** 29 March 2006

**DATE OF DETERMINATION** 29 March 2006

**DETERMINATION OF THE AUTHORITY**

Employment relationship problem

[1] The applicant Mr Tony Bakewell has brought a claim against his former employer the respondent Burns and Ferrall Ltd (B&F), to recover;

- (a) 8 days salary wrongly deducted from the entitlement to untaken leave he had as at the date of termination of his employment,
- (b) commission payments due to him on sales completed before termination,
- (c) interest on the outstanding amounts, and
- (d) \$70 in reimbursement of the Authority filing fee paid by him to commence his claim.

[2] The claims have been the subject of mediation but remain unresolved.

8 days salary

[3] There is no dispute that on 18 July 2005 Mr Bakewell gave four weeks written notice of resignation because he had decided to leave B&F and go and work for a competitor. There is also no dispute that at the beginning of the notice period Mr Jim Marsh, the CEO of B&F, during a discussion with Mr Bakewell had said, "we don't do garden leave" or something very similar. Presumably this was a response to a question or suggestion from Mr Bakewell about being paid if he was not attending work.

[4] Mr Bakewell attended at B&F and performed work for nearly 3 weeks of the 4 week notice

period. When eight days remained of that period, according to Mr Bakewell his supervisor Mr Kevin Gallagher said, “if you want to you can go now we no longer need you,” or something like that. Mr Bakewell spent that last eight day period away from the office, occupied on private pursuits, while continuing to use his B&F car as had been permitted by the company.

[5] B&F regarded Mr Bakewell as having taken annual leave for the eight days and deducted those days from his accrued entitlement before paying him out the balance. Mr Bakewell contends that it was at B&F’s requirement that he not present at the office for work and that he could not be forced to take the time as annual leave. He seeks \$3,034.16 as payment in lieu of 8 days annual leave which he contends was untaken at termination.

[6] I find that Mr Bakewell was not ordered or directed not to come to work for the eight days in question. If he had wanted to he could have attended the office until the last day of the notice period. He did not enquire, as he could easily have done, whether he would be regarded as being on annual leave if he did not attend.

[7] I find in the circumstances it was implicit that if Mr Bakewell chose not to attend work then his absence was for the purpose of taking a period of annual leave. Mr Marsh had earlier squashed any suggestion that he could stay away from work and receive normal pay for that time, as in a garden leave situation, and Mr Bakewell had not tried to stipulate that he would only be absent under such an arrangement.

[8] I therefore reject the claim for eight days salary.

#### Commissions

[9] The information given to the Authority seems incomplete and (to me at least) unclear. The situation seems to be that either B&F still owes Mr Bakewell about \$200 in commissions or he owes B&F about \$80 overpaid to him but which the company does not seek to recover.

[10] B&F has invited Mr Bakewell to talk to the company Chief Financial Officer, Mr Ron Finlay, about this claim. I note that B&F has not been obstructive or simply dismissive of this claim but has made earlier efforts to bring clarity to it in so far as the details are concerned.

[11] As discussed, final resolution of the commission claim will be suspended to allow further sharing of information between the parties. If there is still no resolution and Mr Bakewell wants to pursue the claim it will be reactivated upon request by him made to the Authority.

#### Interest and filing fee

[12] Given the result to this stage there is no basis for ordering either of these payments in favour of Mr Bakewell. If later on the Authority resolves the commission claim in his favour the question of interest and costs can be revisited then. Mr Marsh has advised that B&F does not seek any costs against Mr Bakewell.