

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Clayton Burney (Applicant)
AND North Sails New Zealand Limited (Respondent)
REPRESENTATIVES Marcus Paiwai, Advocate for Applicant
Glenn Finnigan, Counsel for Respondent
MEMBER OF AUTHORITY Dzintra King
INVESTIGATION MEETING 28 September 2005
DATE OF DETERMINATION 13 December 2005

DETERMINATION OF THE AUTHORITY

The issue for determination is whether the applicant, Mr Clayton Burney, submitted his grievance within the 90 day time period. This determination has taken longer to issue than would normally be the case. This is because Mr Burney has a disability and was represented by a lay advocate. Mr Burney was difficult to understand. During the investigation comments were made about Mr Burney's consulting solicitors and discussing his dismissal with them. The ascertaining of the names of the lawyers consulted took some time.

Employment History

Mr Burney was employed as a sail maker by the respondent on 20 February 2002. On 19 July 2002 after a staff social function Mr Burney and some fellow employees went on to a bar where Mr Burney had an altercation with the bouncers. It appears that Mr Burney was persuaded to leave the bar and go the residence of a fellow employee, Mr Smeaton. While there, he became uncontrollable and threatened to jump off the balcony and the police were called. Mr Burney was removed.

On 21 July Mr Burney phoned Mr Richard Brickell, the General Manager, wanting to speak to him. The following day Mr Burney was present at work when Mr Brickell arrived. Mr Burney had not clocked in. He told Mr Brickell that he was upset the police had been called. Mr Brickell said from he knew he did not see what else could have been done. He asked Mr Burney and Mr Smeaton to meet with him. Mr Burney told Mr Smeaton that he was unhappy that the police had been called, Mr Smeaton gave his reasons. Mr Burney then said he could no longer work for the respondent and left the building. He did not return to work. Mr Brickell said he assumed that Mr Burney had resigned or abandoned his employment. Mr Burney's final pay was paid on 7 August 2002.

Some time after leaving, Mr Burney phoned North Sails and asked his supervisor if there was any work available for him. At that time, there was not. It appears Mr Burney made other requests relating to the availability of work. Mr Brickell said that on the occasions Mr Burney spoke to him

he did not say that he thought he had been unjustifiably dismissed or that he thought he had a grievance. Mr Brickell referred Mr Burney to Mr Oliver.

Submission of Grievance

The first indication that Mr Burney believed he had a grievance came with a letter dated 4 November 2003 which the company received on 17 November. The Statement of Problem states that Mr Burney had spoken to Mr Brickell asking whether he could return to work and asking why he had been dismissed. When Mr Burney was questioned, he indicated that he had not said anything about being dismissed but had asked if there was any work.

I asked Mr Paiwai whether he was claiming there were exceptional circumstances and he stated that that was not ; the claim was that the grievance had been notified within the 90 day period.

On 25 November 2004 Mr Paiwai wrote to Mr Finnigan saying:

I refer to paragraph two in relation to the 90 day clause; Mr Burney believes he is indeed with in (sic) both section 114 and 115 of the Employment ACT 2000.

Mr Finnigan had written to Mr Paiwai asking

You say that Sections 114 and 115 of the Employment Relations Act 2000 apply. Before our client can sensibly consider its position in relation to your suggestion that both of these sections apply, it is incumbent on you to say why. If a grievance was raised within the 90 day period or there are exceptional circumstances, please provide the basis for your contention.

Mr Paiwai replied saying:

Disclosure regarding Section 114 & 115 is currently with the Employment Mediation Department, I believe they (Mediation) will disclose certain points to your client in due course (sic).

Mr Finnigan replied asking that any grounds be disclosed to him. None were.

I note that in a letter dated 23 February 2004 Mr Paiwai stated:

I refer to your correspondence dated 23rd February 2004.

It now appears Mr. Burney was wrong to assume he had been dismissed, but cannot understand why he is no longer working. Either way, your client owes Mr Burney an explanation.

Furthermore, you do not need to meet the requirements of section 114 or 115 of the Employment Relations Act, as referred to in your letter dated 23rd February 004 and other correspondence, not if there is no dismissal issue.

An earlier letter from Mr Paiwai – 4 January 2004 – states:

Nevertheless my client argues that he had exchanged dialogue on several occasions with his former employer which was in relation to reemployment.

One of my reasons for seeking information regarding contact with solicitors was to ascertain whether Mr Burney believed he had a personal grievance at an early stage, whether he had instructed anyone to pursue the matter for him and whether, given his disability and the fact that although Mr Paiwai did not plead exceptional circumstances there might nonetheless have been such, given the nature of Mr Burney's disability. The first solicitor consulted said that he had been approached by Mr Burney in late July 2002 regarding a grievance but that due to prior commitments and the fact that the solicitor no longer practised in the employment law area he referred him to another law firm. Upon making contact with the other law firm, the Authority was told that there was no record of Mr Burney as a client.

It appears, therefore, that Mr Burney thought he had a grievance in July 2002 but did not pursue it beyond the initial legal contact. I accept Mr Finnigan's submissions that the mere asking about whether there was work available does not constitute the raising of a personal grievance despite Mr Paiwai's insistence that it does. A request for reasons for dismissal does not constitute a submission of a personal grievance: NZ Automobile Association Inc v McKay [1996] 2 ERNZ 622. That being the case, it is difficult to see how a request for work can constitute the submission of a personal grievance. Mr Burney did not alert his employer to the fact that he believed he had been dismissed and that he believed that action was wrong.

Mr Burney did not submit his grievance within the 90 day period.

If the parties are unable to resolve the issue of costs the respondent may file a memorandum within 35 days of the date of this determination. The applicant should then file a memorandum in reply within 14 days of receipt of the respondent's memorandum.

Dzintra King
Member of Employment Relations Authority