

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 432/09
5280361

BETWEEN MELANIE PINKER
 Applicant

AND SERIOUSLY OUTDOORS
 LIMITED
 Respondent

Member of Authority: Marija Urlich

Representatives: Applicant, In person
 Martin Round, for Respondent

Investigation Meeting: On the papers

Information and
Submissions Received: 16 and 24 November 2009

Determination: 3 December 2009

PRELIMINARY DETERMINATION OF THE AUTHORITY

[1] This determination concerns a preliminary issue – whether Ms Pinker communicated to Seriously Outdoors that she no longer intended to pursue her personal grievance.

[2] Seriously Outdoors says this is the case and the personal grievance cannot be revived. Ms Pinker says her personal grievance is afoot.

[3] I have received affidavit evidence and submissions from the parties in support of their respective positions. By consent this employment relationship problem is determined on the papers.

Did Ms Pinker withdraw her personal grievance?

[4] There is no dispute Ms Pinker raised a personal grievance within the 90-day statutory timeframe.

[5] Seriously Outdoors says Ms Pinker cannot pursue that personal grievance because she advised her intention not to. It relies on the following email received from a mediation services coordinator on 20 October 2008:

Subject: 5135932 Melanie Pinker and Gill McCann trading as Gill's Gym

Good afternoon

I have been advised that Ms Pinker wishes to withdraw the above matter. The mediation currently scheduled for Thursday, 13 November will not proceed and the file will be closed.

Please don't hesitate to contact me if you have any further queries.

[6] Ms Pinker, in her sworn affidavit to the Authority, avers that she told mediation services to cancel the mediation because she had had a conversation with Gillian Ms McCann, a director of Seriously Outdoors, earlier in the day where they discussed Ms Pinker returning to work and the cancellation of the mediation.

[7] In her affidavit evidence filed in the Authority Gillian McCann, a director of Seriously Outdoors, said she relied on this email because:

I believed that the email from [the mediation service employee concerned] on 20 October 2008 meant that Melanie Pinker had decided to withdraw her personal grievance and that she was no longer going to take legal action against me and thus it was the end of the matter.

[8] Did Ms McCann have a reasonable basis to believe Ms Pinker was *no longer going to take legal action against me*? No. Ms Pinker's request for mediation assistance¹ and her personal grievance are not synonymous. What had been withdrawal was Ms Pinker's request for mediation assistance (made to mediation services on 4 September 2004). This is clear from the email which references a file number assigned to that request.

[9] I record that Seriously Outdoors have not advanced an argument of accord and satisfaction – that the application for mediation assistance was withdrawn because the

¹ Section 146 Employment Relations Act 2000

parties had resolved Ms Pinker's personal grievance: *Rosenburg v Air New Zealand* 5/12/06, R A Monaghan (member), AA367/06.

[10] For the above reasons I find Ms Pinker' personal grievance remains afoot between the parties. The parties are referred to mediation the outcome of which should be advised to the Authority.

Costs

[11] Costs are reserved.

Marija Urlich

Member of the Employment Relations Authority