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Burton v Talley's Group Ltd CA150/10 (Christchurch) [2010] NZERA 633 (26 July 2010)

Last Updated: 5 November 2010

IN THE EMPLOYMENT RELATIONS AUTHORITY CHRISTCHURCH

5312529 CA 150/10

5312529

BETWEEN

DAMIEN BURTTON Applicant

A N D

TALLEY'S GROUP LIMITED Respondent

Member of Authority: Representatives:

Investigation Meeting: Determination:

James Crichton

Anjela Sharma, Counsel for Applicant Graeme Malone, Counsel for Respondent

23 July 2010 at Nelson

26 July 2010

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant (Mr Burton) alleges that he was unjustifiably dismissed from his employment and suffered disadvantage as a consequence of unjustifiable actions of his employer. He seeks redress both in terms of substantive remedies and by way of interim reinstatement to his former position pending the disposal of the substantive matter.

[2] The respondent employer (Talley's), denies wrongdoing and for the purposes of the present determination, resists the application for interim reinstatement.

[3] Mr Burton has worked as a deckhand on Talley's fishing vessel in the MVF *Enterprise* since 2004 and for present purposes is subject to an employment agreement dated 2 October 2009.

[4] On 12 May 2010, the crew of MV *Enterprise* were preparing to sail the following day. A drug search was conducted by Talley's on 12 May and the specialist drug dog took an interest in Mr Burton's luggage. Further inquiries were conducted. In an initial meeting with a Talley's senior manager, Mr Burton denied knowledge of drugs on the vessel and denied personal involvement in drug use. During a second interview with Talley's, further inquiries were made and, amongst other things, Talley's asked Mr Burton whether he had been in contact by telephone with another crew member, Karl Browne. Mr Burton admitted that he had spoken with Mr Browne. When Talley's searched Mr Burton's phone, it found Mr Browne's name and cellphone number stored in the phone's memory. Talley's did not accept Mr Burton's explanation that this information was for the purposes of maintaining contact with shipmates while at sea. Talley's considered that Mr Burton had had a

longstanding friendship with Mr Browne and that Mr Burtton had lied in his responses about his relationship with Mr Browne.

[5] There was a lengthy suspension during which Talley's investigated matters. When a disciplinary meeting was finally convened, Mr Burtton was facing allegations that witnesses had seen him using P while at sea and that he had supplied that narcotic to young female crew members. Further, Mr Burtton was alleged to have been dishonest in his responses to Talley's about his relationship with Mr Browne.

[6] After due consideration of Mr Burtton's responses to those allegations, Talley's dismissed Mr Burtton on 25 June 2010. Mr Burtton's application for relief, including urgent relief by way of interim reinstatement, was filed on 16 July 2010 and it is the application for that urgent relief together with Talley's response to it that is the subject of this determination.

Issues

[7] [Section 127](#) of the [Employment Relations Act 2000](#) confers power on the Authority to order interim reinstatement pending the hearing of the substantive grievance. The Authority has power to grant interim reinstatement orders on such bases as it thinks fit and in forming its judgment on the matter, the Authority is required to apply the law relating to interim injunctions *having regard to the object of this Act*.

[8] That last phrase has been helpfully commented on by the Chief Judge in *Cliff v. Air New Zealand* [2005] ERNZ p.1 where His Honour makes clear that because [s.125](#) of the Act introduced a requirement that the Authority must provide for reinstatement wherever that was practicable and where that remedy was claimed, and the personal grievance proved, it followed that *the primacy now accorded by*

Parliament to the remedy of reinstatement is a relevant factor in considering interim reinstatement.

[9] The law relating to interim injunctions is well settled and is usually summarised in three propositions:

- (a) Does the applicant have an arguable case?
- (b) If so, where does the balance of convenience lie?
- (c) What does the overall justice of the case require?

[10] A related issue, sometimes expressed as a separate proposition on its own, is the question of whether remedies short of interim reinstatement would meet the case. In particular, the question will be whether damages are an appropriate remedy. In relation to this point, I agree with the submission of counsel for the respondent that matters to do with alternative remedies properly speaking affect the balance of convenience and accordingly it is my intention to deal with that issue under the balance of convenience head.

Does Mr Burtton have an arguable case?

[11] I am satisfied Mr Burtton does have an arguable case. It is often observed that the threshold is a low one and as counsel for Talley's himself observed, by virtue of the inevitable factual matrix in applications of this nature, a conclusion that there is an arguable case is frequently a foregone conclusion.

[12] Talley's argues that while there may be an arguable case, it is not a strong one and I agree. It may be, as Mr Burtton alleges, that there are procedural infelicities in the way in which Talley's dealt with this matter, but the substance of its decision, recognising that the evidence before the Authority is limited to sworn affidavit form, appears to be robust enough to justify the conclusion that it was available to a fair and reasonable employer, on the balance of probabilities, to reach the conclusion that it did. There was evidence of Mr Burtton using P on the vessel and supplying P to female staff. Mr Burtton denied that evidence. Talley's chose to believe it.

[13] Further, the evidence was incontrovertible that Mr Burtton had lied about the extent of his relationship with Mr Browne. Given that Mr Burtton had been caught in a lie by Talley's in relation to his friendship with Mr Browne, it seems to the

Authority inevitable that, in those circumstances, Talley's would prefer the evidence of other crew and the drug dog that Mr Burtton was involved with illicit drugs.

Where does the balance of convenience lie?

[14] I am satisfied that the balance of convenience lies with Talley's. If, as a consequence of the disposal of Mr Burtton's substantive claim, it becomes evident that his employment was unjustifiably terminated, then I am satisfied that damages are an adequate remedy to put him back in the position that he would otherwise have been rather than impose interim reinstatement on the unwilling employer at this juncture. While it is no doubt clear from the affidavit evidence that Mr Burtton is suffering financial stress as a consequence of the dismissal and the preceding suspension without pay, I am not satisfied that granting interim reinstatement, a discretionary remedy, is a proper use of the Authority's discretion.

[15] As I noted in the earlier section, in my judgment, Mr Burtton only just has an arguable case and then only on the alleged

procedural irregularities. On the basis of the affidavit evidence before the Authority, I think the substantive decision was sound in that it was available to Talley's to reach the conclusion that it did.

[16] As counsel for Talley's quite properly emphasised, dishonesty in the face of the employer effectively constitutes a *fundamental breach* of the employment relationship. If a party to an employment relationship cannot be relied upon to be trusted in its contact with the other party, then it is difficult to see how there can be any continuation of the relationship, even on an interim basis.

Where is the overall justice of the case?

[17] I am satisfied that the overall justice of the case favours Talley's. As I noted earlier, there may be some procedural difficulties in the employer process which would justify my finding of an arguable case, but after hearing the witnesses give their evidence orally, I may well conclude that even that aspect is not troubling. Certainly, as I have emphasised, it seems to me the decision of the employer was robust, based on the affidavit evidence before the Authority, and the evident dishonesty of Mr Burton makes it impossible for the Authority to extend to him the benefit of its discretion.

Determination

[18] The application is refused. **Costs**

[19] Costs are reserved. James Crichton

Member of the Employment Relations Authority

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