

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 413/10
5314363

BETWEEN DINESH LAL
 Applicant

AND ALLOY YACHTS
 INTERNATIONAL LTD
 Respondent

Member of Authority: Alastair Dumbleton

Representatives: Applicant in person
 Mr Graeme Eddy, advocate for Respondent

Investigation Meeting: 13 September 2010

Determination: 14 September 2010

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The Authority has investigated the dismissal of the applicant Mr Dinesh Lal by the respondent Alloy Yachts International Ltd.

[2] In the statement of problem lodged by Mr Lal with the Authority he claimed remedies available under the Employment Relations Act 2000 where a personal grievance has been established. They are reinstatement, compensation and reimbursement of lost wages. From this the Authority has deduced that Mr Lal's employment relationship problem is a personal grievance, either a claim of unjustifiable dismissal or unjustifiable disadvantage, or both.

[3] There is no dispute by Alloy Yachts that Mr Lal was dismissed from his employment with the company as welder. Alloy Yachts claims that the dismissal was justifiable but that in any event it should not have to respond to a personal grievance

because one was not raised, as required, within the 90 day period stipulated by s 114 of the Employment Relations Act.

[4] Mediation was not attempted by the parties, the Authority being satisfied that the case was one falling under s 159(1) (b) of the Act where mediation would not contribute constructively to resolving the matter.

[5] Mr Lal began working for Alloy Yachts as a welder in March 2009. He had come from Fiji to take up this job, for which he had been granted a work permit.

[6] On or about 24 April 2009 the Police arrested Mr Lal and charged him with serious offences under the Crimes Act 1961. They were committed, allegedly, after work hours and off the employer's premises, and did not involve anyone from Alloy Yachts.

[7] After his first appearance in the District Court he was released on bail and was able to continue attending work. In his evidence Mr Lal said that he did not tell his employer about his arrest or his trial by jury eventually scheduled to take place later in 2009.

[8] On about 28 August the Court withdrew Mr Lal's bail and he was taken into custody to await trial on three separate charges, set down for 30 November 2009.

[9] The records of Alloy Yachts show that on Monday 31 August and Tuesday 1 September a message had been received at the company to say that Mr Lal was sick and would be absent. Nothing was heard from him or on his behalf on 2 and 3 September. On Friday 4 September an unknown person rang in, according to the sick leave records, to say that Mr Lal would be absent because he had arc eye from welding. This message was received after 9am, which under the sick leave provisions of the collective employment agreement applying to Mr Lal required notification before that time if the employee was to receive sick pay. In any event Mr Lal was not sick or injured but detained in custody by the Police.

[10] On Wednesday 9 September the Human Resources Manager of Alloy Yachts, Mr Graeme Eddy, wrote a letter to Mr Lal at his home address, advising that as he had been absent from work without notification for three days his employment had been terminated on the grounds of abandonment. This was a ground for termination

expressly provided in the collective employment agreement. Mr Eddy said in his letter “We have not heard from you all this week.”

[11] Mr Lal’s wife had remained in Fiji while finalising plans to move to New Zealand with the couple’s children. Upon hearing her husband had been taken into custody on 28 August and could no longer work, she flew to New Zealand, arriving the same day Mr Eddy wrote the dismissal letter. Unaware of it she contacted Mr Eddy that day. She said in her evidence that her objective had been to keep her husband’s job open for him during the period up to his trial, so that he could return to it afterwards and continue working under the two year work permit that had been granted.

[12] Upon speaking to Mr Eddy she soon learned that Alloy Yachts had decided to dismiss Mr Lal because of his absence and had written to advise him of that. Mrs Lal saw the letter on about 10 September after it arrived at the address where it had been sent. She passed on the advice contained in it to her husband when visiting him in custody on or about the same date.

[13] For the purposes of the 90 day period under s 114 of the Act, I find that Mr Lal knew of his dismissal on or about 10 September 2009 and therefore had up to about 10 December to raise a grievance as required.

[14] On 30 November 2009 following his trial a jury unanimously found Mr Lal not guilty on all three charges and he was immediately released from custody.

[15] Mr Lal then spoke to Mr Eddy about resuming his job. The last discussion within the 90 day period was on 2 December.

[16] Mr Lal was not re-employed by Alloy Yachts. Nearly a year after he had last worked for the company he lodged his application with the Authority, raising a problem about the termination of his employment. He pointed out in the application that the job had been his first ever in New Zealand and he had had no idea of the requirements for pursuing a claim until an immigration consultant had given him some advice.

[17] It is understandable that the Lals see a considerable injustice in what happened to Mr Lal. Because of a complaint made to the Police (Mr Lal says falsely) and an investigation leading to his arrest and trial, and because he was held in custody for

about six weeks, Mr Lal was unable to perform his job. He had been in the process of bringing his family to New Zealand where he was allowed to work for at least two years.

[18] The arrest of Mr Lal and the charges laid against him had nothing to do with Alloy Yachts. Mr Eddy was not told anything about this for several months while Mr Lal remained on bail and was able to attend work as usual.

[19] The evidence of Mr Eddy was that in the discussions he had with Mrs Lal on 9 September and Mr Lal on 2 December, the focus was on the resumption of employment as soon as possible rather than on disputing the dismissal or attributing blame to the company for it.

[20] Mr Eddy had advised Mrs Lal when she had contacted him on 9 September that her husband should get back in touch when he was released from custody.

[21] Like many other employers at this time Alloy Yachts had been experiencing problems in its business and had been making adjustments to help it keep trading. Mr Eddy I find explained this to Mr Lal as reason why he could not return to work in December and suggested that he contact him later to see whether further orders had come in during the first months of the New Year. In the meantime Mr Lal looked for other employment.

[22] Mrs Lal's evidence was that in her discussions with Mr Eddy she had not complained about the dismissal and had not sought to blame anyone in the company for it. Her objective had been to try and see that her husband would be able to return to paid work after he was released from custody. Mr Eddy said in his evidence that Mrs Lal had made a plea for retention of her husband's job rather than an accusation of unfairness about the loss of it.

[23] I find that in these various communications a grievance was not raised within 90 days, or at any time before the lodging of the statement of problem in August 2010. This is not surprising as it is difficult to see what grievance Mr Lal could have had against Alloy Yachts in the circumstances, where he had been unable to attend work and perform his job for six weeks while awaiting trial. Trying to make arrangements to resume employment after release from custody is not by itself the raising of a grievance.

Determination

[24] As there has been no application to raise a grievance out of time the determination of the Authority must be that the purported grievance cannot be considered by it.

[25] Although the Authority is not required to determine the grievance on its merits it does seem arguable there was, or would later have been, a basis for justifiable dismissal. Under an express term of the employment agreement termination could occur in the following circumstances;

Abandonment

Employees absent from work for three continuous working days without notification to the Company, shall be deemed to have abandoned employment. Where Employees were unable through no fault of their own to notify the Company employment shall not be deemed to have been abandoned.

[26] Whether that provision was appropriate in the circumstances where the employer knew where Mr Lal was and knew he had not abandoned his job, Mr Lal was incapable of performing it for what proved to be a long period and during a recession.

[27] The misfortune that Mr Lal had to be arrested and then tried for serious offences before being acquitted, was nothing that Alloy Yachts had any responsibility for. The company was not a guarantor that Mr Lal would be able to work for two years, as permitted to by the work visa he had been granted. Arguably grounds existed to substantively justify the termination of employment, if not already by 9 September 2009 then in the days and weeks following when Mr Lal could not attend work. That is not an issue I have to finally decide as I have found that the grievance was not raised within the 90 day period as required by the Employment Relations Act. Therefore this matter may proceed no further.

[28] There is no issue as to costs, as both parties were self represented.

A Dumbleton
Member of the Employment Relations Authority