

**IN THE EMPLOYMENT COURT  
AUCKLAND**

**[2011] NZEmpC 11  
ARC 113/10**

IN THE MATTER OF      a challenge to a determination of the  
Employment Relations Authority

BETWEEN                      OVATION NEW ZEALAND LIMITED  
(FORMERLY BERNARD MATTHEWS  
NEW ZEALAND LIMITED)  
Plaintiff

AND                              CHRIS PUHIA  
Defendant

Hearing:              By evidence and memoranda of submissions filed on 20 January and 1  
February 2011

Counsel:              Gary Tayler, advocate for plaintiff  
Mark Webster, counsel for defendant

Judgment:              14 February 2011

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**JUDGMENT OF CHIEF JUDGE G L COLGAN**

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[1]      The parties have agreed that the challenge to the Employment Relations Authority's determination<sup>1</sup> that Chris Puhia's personal grievance was raised within time should be dealt with on the papers. There is one other preliminary matter about which the parties appear to agree. That is Bernard Matthews New Zealand Limited has recently changed its name to Ovation New Zealand Limited. In these circumstances the proceedings may henceforth be entitled "Ovation New Zealand Limited (previously known as Bernard Matthews New Zealand Limited)".

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<sup>1</sup> AA434/10, 7 October 2010.

## **The relevant evidence**

[2] This is taken from the affidavits of the plaintiff's plant manager, Sean Naden, and the defendant, together with exchanges of correspondence between the parties.

[3] On 18 November 2008 Mr Puhia was dismissed summarily in relation to an incident which had occurred at work two days previously. At that time Mr Puhia had worked for the plaintiff for the previous eight years.

[4] Following the relevant collective agreement's advice that his complaint should be raised and discussed with his former manager as soon as possible, Mr Puhia wrote a letter to Mr Naden as follows:

I Christopher Puhia would like to request a written statement setting out the reasons how you came about these [allegations] for my Dismissal

I Christopher Puhia would like to take a personal grievance against Bernard [Matthews] Gisborne New Zealand

[5] Mr Naden's response was on company letterhead and dated 15 January 2009. It read:

The Company acknowledges receipt of your undated letter on Tuesday 6 January 2009.

Further to your request for a written statement we enclose a further copy of the dismissal notice and the reasons as provided to you and your chosen support person on Tuesday 18 November 2008.

Your comment that you would like to take a personal grievance against Bernard Matthews New Zealand Limited is noted.

We suggest that you might obtain advice from your Union before proceeding.

[6] Mr Naden's letter was copied to the company's solicitor. Mr Naden was the representative of the company who had dismissed Mr Puhia.

[7] Mr Puhia heeded Mr Naden's advice and approached Graham Cooke, the Aotearoa Branch Secretary of the New Zealand Meat Workers and Related Trades Union Inc (the Union). Included amongst Mr Puhia's advice to Mr Cooke was:

“PUT PERSONAL GRIEVANCE ASAP PLEASE”. Although unsure of the exact date when he advised Mr Cooke to lodge a grievance on his behalf, Mr Puhia recalls that it was in early January 2009, before Mr Cooke wrote to Mr Naden on 13 January 2009 on union letterhead as follows:

**PERSONAL GRIEVANCE OF MR C PUHIA**

Mr C Puhia was dismissed effective 18<sup>th</sup> November 2008.

We believe that Chris Puhia’s dismissal was unreasonable.

The union hereby [submits] a grievance to Bernard Matthews Ltd (“the employer”) on behalf of the grievant so as to enable the employer to remedy the grievance rapidly and as near as possible to its point of origin in discussions with the New Zealand Meat Workers and Relatives Trades Union Incorporated (“the Union”).

I would be grateful to receive all correspondence and any relevant information with regard to this grievance as per the Privacy Act 1993.

I can be contacted at the above address or on my mobile ...

[8] Mr Cooke’s letter was sent by facsimile transmission and was responded to by an undated letter from Mr Naden on company letterhead as follows:

**PERSONAL GRIEVANCE OF MR. C. PUHIA**

We acknowledge receipt of your letter dated Tuesday 13 January 2009 and respond accordingly.

Enclosed please find notes and records relevant to this grievance.

Please note that your sub branch Secretary Mrs. P Koia was invited to all the meetings with Mr. Puhia, who on each occasion rejected Union representation. The Company therefore kept Mrs. Koia informed throughout the reporting, investigating and disciplinary processes.

This serious misconduct event was actually observed and then reported to management.

At the meeting with his supervisor and the Plant Manager on Monday 17<sup>th</sup> November 2008 Mr Puhia admitted the events as reported of Sunday 16<sup>th</sup> November 2008 to be true and correct.

If it would assist you or Mr. Puhia to gain a further understanding of the seriousness of the events of Sunday 16<sup>th</sup> November then representatives of the Company are prepared to meet with you.

[9] The next event was a discussion between the parties on 21 April 2009. Mr Puhia believed this to have been a mediation although that is disputed by the

company and it is common ground that there was no neutral mediator present. The parties discussed Mr Puhia's dismissal and the events leading to it but no other aspect of their employment relationship.

[10] Notes of the 21 April 2009 meeting include the following, the accuracy of which are not challenged by Mr Puhia:

The meeting opened and it was explained by [David Gusscott, an employer representative] and confirmed by [Graham Cooke, Union Branch Secretary] that this gathering was about increasing everyone's understanding for the reasons why [Chris Puhia] was dismissed from Bernard Matthews Gisborne following events at the site on Sunday 16 November 2008. It was not a mediation meeting because it had to be noted that no grievance had been lodged.

[Graham Cooke] said he appreciated the aforesaid and said his concern was more about procedure than the events that led to the dismissal.

...

[Graham Cooke] asked the Company if they would reconsider the dismissal. In good faith the Company representatives agreed to do so. ...

After 10 minutes the Meeting reconvened and the Company advised that the dismissal remained, adding that the actions of [Chris Puhia] were serious misconduct. [Chris Puhia] then said he would take the matter further.

...

After the meeting [Graham Cooke] advised the company that he had to prepare a report and that the Union and [its] advisers would consider his report and advise the Company accordingly.

[11] The applicable collective agreement sets out in Schedule D, as the legislation requires, information about "PERSONAL GRIEVANCES AND DISPUTES". Included among that is the following:

#### Time limit on raising personal grievance

An employee who believes he/she has a personal grievance must make the employer aware of the grievance within 90 days of the grievance arising (or of the employee becoming aware that he/she has a grievance).

#### Raising employment relationship problems

An employment relationship problem should be raised and discussed with the employee's manager as soon as possible.

The employee is entitled to seek advice and assistance from a Union representative in raising and discussing the problem.

The employee, employer and Union will try in good faith to resolve the problem without the need for further intervention.

#### Mediation

If the problem is not resolved by discussion, any party may (without undue delay) seek the assistance of the mediation services provided by the Department of Labour.

All parties must co-operate in good faith with the mediator in a further effort to resolve the problem.

Mediation is confidential and, if it does not resolve the problem, is without prejudice to the parties' position.

Any settlement of the problem signed by the mediator will be final and binding.

[12] It is common ground that Mr Puhia took no other steps, which could be categorised as raising his personal grievance with his former employer, before lodging his claims in the Employment Relations Authority more than 90 days after his dismissal.

### **The Authority's determination**

[13] The Authority concluded that Mr Puhia's written request for the reasons for his dismissal did not itself raise a grievance. It concluded, however, that his statement in the same letter that he "... would like to take a personal grievance against Bernard Matthews ...", taken together with his request for information about the dismissal, "would appear to advise [the employer] that Mr Puhia is raising a personal grievance related to his dismissal." That conclusion was reinforced in the Authority by the company's written response dated 15 January 2009 which acknowledged the grievance and did not seek further details about its nature "as would be expected had there been any uncertainty on [the company's] part as to the grounds of the grievance."

[14] The Authority's preliminary conclusion was also reinforced by letter from the Union to the company dated 13 January 2009 which included references to Mr Puhia's personal grievance, to his dismissal, to the union's view that this was "unreasonable", and to the Union's wish for the employer to "remedy the grievance rapidly". So, too, did the company's undated letter in reply to the Union reinforce that a grievance had been raised. This referred to the company having kept the Union informed throughout "the reporting, investigating and disciplinary processes" as well as the letter's reference to the incident on 16 November 2008 and its offer to meet with Mr Puhia and the Union Secretary, Graham Cooke. It was significant, in

the Authority's assessment, that the employer's letter to the Union did not express any uncertainty about its concerns on behalf of Mr Puhia nor request any additional information about the nature of the grievance as might have been expected if there was any uncertainty on its part. The Authority concluded:

It would be reasonable to expect that an employer who received a letter with a headline stating a personal grievance, consistently with a duty of good faith and the requirement to be 'responsive and communicative' pursuant to s4(1A)(b) of the Act, to have requested specific details if unsure of the nature of the grievance. However the letter from Mr Naden appears to indicate that he was aware that the personal grievance related to the dismissal of Mr Puhia on 16 November 2008 for serious misconduct.

[15] Although the Authority concluded that Mr Puhia's handwritten letter alone might not have been sufficient to raise a grievance, the totality of the relevant communications exchanged meant that a grievance had been raised: *Board of Trustees of Te Kura Kaupapa Motuhake O Tawhiuau v Edmonds*.<sup>2</sup>

[16] The Authority found that a grievance had been raised without reference to the interchanges between the parties at the meeting on 21 April 2009. In these circumstances it concluded that Mr Puhia had raised his personal grievance within time and although it scheduled a conference of the representatives to progress its investigation, this challenge by the employer has delayed that process.

## **Decision**

[17] I conclude that the Authority determined correctly that Mr Puhia raised his grievance within the statutory period of 90 days from the date of his summary dismissal. Considered objectively and across a series of exchanges between the parties and their representatives, it is clear that Mr Puhia challenged the justification for his dismissal and sought to have that resolved in discussions which occurred but were not fruitful. I do not accept the plaintiff's claims that it was uncertain at the time whether a grievance had been raised and, especially, that its relevant managerial representatives believed that a grievance had not been raised. That is for the following reasons.

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<sup>2</sup> [2008] ERNZ 139.

[18] I do not accept Mr Naden's assertion that, after receiving Mr Puhia's and the Union's letters, he expected more about the basis of the grievance because it was not clear to him "whether the challenge was as to process, or the grounds for the dismissal, ...". That is not consistent with the company's responses which included acknowledging the grievance brought to its attention by Mr Puhia and reiterated by the Union and failing to make any response that would have been consistent with a lack of understanding or an expectation of further information. Nor do I accept Mr Naden's assertion that after the Union had written to the company, the plaintiff was still unaware "what the grievance was about" and that it regarded the letters to that point "as a precursor to a full and detailed grievance letter if it was considered by the union after meeting to discuss the dismissal that there were grounds." Again, the evidence at the time is not consistent with that assertion and, indeed, the company met with Mr Puhia and his representative to discuss his grievance, being the justification for his dismissal as is illustrated by the company's record of that meeting. I reject Mr Naden's assertion that the reason that the company used the word "grievance" in its correspondence to Mr Puhia and the Union was that it had not initiated any of the correspondence so, I infer, the categorisation of Mr Puhia's concerns as a "grievance" was solely the defendant's.

[19] Nor do I accept that the notes of the meeting of 21 April 2009 confirm that the Union considered that a personal grievance had not been raised at that time. Reference in the notes is to the following shorthand summary:

It was not a mediation meeting because it had to be noted that no grievance had been lodged.

[Graham Cooke] said he appreciated the aforesaid and said his concern was more about procedure than the events that led to the dismissal.

[20] Ignoring the fallacy that a mediation cannot occur unless a grievance has been "lodged", I find that reference to be more consistent with the position that Mr Puhia had not filed proceedings in the Employment Relations Authority than with an interpretation that he had not raised a grievance with his employer. It follows from that, that the Union's agreement with the stated position was agreement that the meeting was not a mediation and that proceedings had not been brought in the Authority. That was not a concession on the part of the Union that a grievance had not been raised with the employer and, indeed, the meeting was conducted to try to

settle the grievance that had been raised with the employer. I reject Mr Naden's assertion that the Union confirmed that no personal grievance existed and then, in July 2009, that it was taking the matter no further. That may have been the Union's position in relation to proceedings in the Authority but it is clear that a grievance had been raised by Mr Puhia, and confirmed by the Union, and that this was the matter dealt with in April 2009. I reject utterly Mr Naden's assertion that the notes disclose that it had been agreed by the parties on 21 April 2009 that "no grievance had been properly raised at that time." That is to mis-state the plain words of the company's own meeting notes and what I am satisfied was the meaning of the actual words used by the parties on that occasion.

[21] It is not to the point, as Mr Tayler for the plaintiff argues, that the particular grounds of challenge to the justification for dismissal may have changed or, in particular, that the Union appeared more concerned about process than substance. Section 103A of the Employment Relations Act 2000 (the Act) makes it clear that justification for dismissal affects both the merits of its reasons and the fairness of the way in which it was gone about. Even if there had been an apparent change of emphasis or concentration by the Union on one aspect more than another, this does not mean that a grievance previously raised had somehow lapsed and become ineffectual if that is the thrust of the plaintiff's case. Nor is it significant that in its letter to the employer the Union may have described the dismissal as "unreasonable" whereas the statutory test is one of justification. It is clear from other relevant surrounding events that Mr Puhia challenged the justification for his dismissal and that the employer was aware that this was the nature of his personal grievance.

[22] Although there is no evidence of this before the Court, Mr Tayler has included with his submissions the fact that on 29 July 2010 the Union advised the employer in writing that it was not taking Mr Puhia's personal grievance any further. The advocate submits that the employer understood this to mean that after the meeting in April 2009, the Union had been satisfied that there was no grievance. Even if, however, there had been evidence supporting those assertions, as I would have expected, this does not affect the threshold jurisdictional question whether a grievance was raised with the employer within time. It is, in any event, open to the interpretation that although the Union was not prepared to advance a grievance on

Mr Puhia's behalf, he remained entitled to do so himself as he has done and his proceedings were filed with the Authority within the statutory period for doing so.

[23] The plaintiff relies on the judgment of this Court in *Creedy v Commissioner of Police*<sup>3</sup> and, in particular, the following conclusion:

... it is insufficient, and therefore not a raising of the grievance, for an employee to advise an employer that the employee simply considers that he or she has a personal grievance ... As the Court determined in cases under the previous legislation, for an employer to be able to address a grievance as the legislation contemplates, the employer must know what to address. ...

[24] In this case I am satisfied, as was the Authority, that Mr Puhia made it known sufficiently in the course of correspondence sent by him or on his behalf that he challenged the justification for his summary dismissal and that he wished to address that in discussions, in which he was assisted by the Union, with the employer which took place and dealt with that issue. The facts in this case make it distinguishable from *Creedy* and other judgments relied on by Mr Tayler including *Melville v Air New Zealand Ltd*<sup>4</sup> and *Commissioner of Police v Hawkins*.<sup>5</sup>

[25] In the foregoing circumstances, I find that, within the period of 90 days after his summary dismissal, Mr Puhia raised his personal grievance with his employer by challenging the justification for it and sought to have the grievance resolved in discussions with the employer which took place as intended by the collective agreement. That these discussions did not resolve the grievance does not mean that it had not therefore been raised with the employer.

[26] The plaintiff's challenge is dismissed. Mr Puhia's grievance must now be investigated by the Employment Relations Authority which I am confident will afford it a degree of priority given the regrettable delays occasioned by this challenge.

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<sup>3</sup> [2006] 1 ERNZ 517.

<sup>4</sup> [2010] NZEmpC 87.

<sup>5</sup> [2009] NZCA 209, [2009] 3 NZLR 381.

## **Costs**

[27] The defendant is entitled to costs which are reserved and, if they cannot be settled between the parties directly, may be the subject of application by memorandum filed and served within two months of the date of this judgment and responded to by the plaintiff within the following period of one month.

GL Colgan  
Chief Judge

Judgment signed at 9 am on Monday 14 February 2011