

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKĀURAU ROHE**

[2023] NZERA 760
3196520

BETWEEN

WASMI ALFUZAI
Applicant

AND

CITYGUARD NZ LIMITED
Respondent

Member of Authority: Alastair Dumbleton

Representatives: Applicant in person
Ian Crawford, representative for the Respondent

Investigation meeting: 29 September 2023 in Auckland

Determination: 18 December 2023

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Wasmi Alfuzai became a Security Officer employed by Cityguard NZ Ltd (Cityguard) when he and the company signed an individual employment agreement (IEA) on 13 July 2022.

[2] Mr Alfuzai worked his first shift on 21 July. He was guaranteed at least 32 hours work a week and his days and hours were to be set by roster. The IEA provided for the first three months of employment to be a probationary period, which he completed successfully. Within a few weeks of commencement he had been recognised as Employee of the Month.

Explanation meeting

[3] On Monday 17 October 2022, Mr Alfuzai was invited by Cityguard to attend an Explanation Meeting. Cityguard's Employee Handbook describes the purpose of such a meeting as being to investigate whether a company rule has been broken.

[4] The meeting is intended to provide an opportunity for the employee to tell the employer 'what happened and why' and to allow 'fair, unbiased consideration' by the employer of any explanation given. Mr Alfuzai had attended an Explanation Meeting before.

[5] Cityguard proposed having the meeting on Wednesday 19 October at 11.30am. It sent Mr Alfuzai an invitation to the email address he had given Cityguard at the start of employment as his contact address.

[6] The invitation referred in detail to concerns a client of Cityguard had raised about Mr Alfuzai's conduct while guarding that client's business premises. It also referred to concerns Mr Alfuzai had raised with Cityguard about working with that client and another. The invitation invited him to the meeting so that the mutual concerns could be shared and discussed further.

[7] Mr Alfuzai was asked to confirm his attendance by 10am on 19 October, the day fixed for the meeting.

[8] The invitation warned that any failure to attend would result in a disciplinary meeting, described by the Handbook as being one step up from an Explanation Meeting.

[9] Mr Alfuzai claims he did not read the email, because it was sent to him on his day off when he was not checking his cell phone.

[10] On the morning of 19 October, Cityguard's HR Coordinator, Saili Potdar, tried ringing Mr Alfuzai for confirmation that he was coming to the meeting, but contact could not be made.

[11] Cityguard responded to his non-attendance on 19 October by inviting him to a disciplinary meeting. That invitation was again sent to his email address, advising him

that the meeting would be on Friday 21 October at 12.30pm. He was asked to confirm his attendance by 10am that day and warned that any failure to attend would result in a 'verdict' being given in his absence.

[12] Mr Alfuzai did not attend that meeting. Instead, at 8am on the day of it, he sent an email to Cityguard raising a personal grievance. In summary, the complaints he raised were;

- Racial discrimination
- Insult to his dignity
- Failure by Cityguard to comply with legislation including health and safety requirements, and good faith obligations
- Failing to pay for work performed
- Trying to cause him trouble and breaching privacy
- Causing him psychological and financial damage
- Forcing him to resign and sign a casual contract so that he did not have to be given work.

[13] In his email Mr Alfuzai said he hoped Cityguard would agree to settle his grievance, so that he did not have to engage a lawyer and take his claim to the Authority. He proposed a settlement of the grievance by payment to him of \$30,000. He gave a deadline of Friday 28 October for Cityguard to respond to his offer.

[14] Mr Alfuzai also warned Cityguard that if other employees were to hear about the dispute they might take 'steps' such that would not be helpful to the employer, he said.

[15] Of 25 October, Mr Alfuzai sent Cityguard a 'friendly reminder' of his deadline given for a response to his settlement offer. On the same day he signed and lodged an application to the Authority.

[16] On 26 October he was advised by Cityguard it was going to respond to his emails.

[17] The following day, 27 October, Mr Alfuzai advised Cityguard that he was withdrawing his settlement offer and taking his grievance to the Authority. He asked

for all communications by Cityguard to be made through the Authority, not to him directly.

[18] On 29 October he advised Cityguard he would be on stress leave for 15 days, which he wanted to take as paid leave. He communicated with Cityguard directly about his entitlement to pay, and later he returned a payment Cityguard had made to him by mistake.

[19] When Mr Alfuzai suggested his employment had ended, Cityguard advised it was unaware of that fact, as a resignation had not been received and he had been placed on a roster in anticipation of a return to work by him.

[20] On 16 November 2022, Mr Alfuzai replied that he had not resigned but that his employment relationship with the company had ended because of circumstances he had endured. Cityguard in reply advised it considered he remained a permanent member of its team, which he would be able to confirm by viewing the latest roster his name was on.

[21] Mr Alfuzai asked again not be contacted directly except to discuss a settlement of his grievance. He said he had health and safety concerns, because;

I am constantly being watched and observed by various and different staff members from Cityguard it has come to a point that I am not only fearing for my safety but also for my reputation among others.

Grievance claims

[22] In Mr Alfuzai's application of 25 October 2022 to the Authority, he listed 11 matters he raised as comprising his grievance. To remedy these he sought compensation of \$60,000 from Cityguard. The matters raised were;

1. Bullying
2. Favouritism
3. Mistreated
4. Unpaid wages

5. Overworked with no break times according to the New Zealand Employment [law]
6. Working under Unsafe conditions
7. Being threatened by HR employee to be [un]reasonably dismissed without any notice
8. Persistence to distribute [*disturb?*] my personal day off times
9. I was removed from the roster system without prior notice
10. Persuading me to convert my full-time contract to a casual contract with no guaranteed hours. So, with a condition of ending the contract anytime without a prior notice
11. False allegations from the client.

[23] In a statement in reply lodged by Cityguard on 15 November 2022, the company said it was confused by Mr Alfuzai's claims, but later it did provide a comprehensive reply addressing each of the complaints set out in Mr Alfuzai's email raising his grievance. The company said it regarded him as still employed, a view it maintained at the Authority's investigation meeting.

[24] Objectively the employment must now be regarded as having ended, through the passage of time since October 2022 and in the absence of any attempt by either party to perform it further.

[25] Mr Alfuzai considers he did not resign but was dismissed.

[26] Cityguard denies that it dismissed or suspended him or forced his resignation.

Mediation - investigation meeting

[27] The parties attended mediation before the Authority held an investigation meeting, in which Mr Alfuzai took full part. He did not need an interpreter and showed a good command of written and spoken English.

[28] For Cityguard the director and owner of the company, Ian Crawford, attended with HR Coordinator, Saili Potgar. They answered questions and arranged for further information or evidence to be obtained by telephone call to Norm Newton, a Cityguard supervisor.

[29] This determination is given in accordance with s 174E of the ER Act and does not therefore fully record all the evidence or information considered by the Authority, or submissions received by it.

A missed opportunity

[30] A valuable opportunity to resolve problems in this employment relationship was lost when the Explanation Meeting wanted by Cityguard, did not take place.

[31] He had been to Explanation Meetings before when requested and the concerns of his employer then had been addressed by that means on those occasions.

[32] What could have been a low-key, productive and constructive discussion, instead was abruptly escalated by the ultimatum Mr Alfuzai gave, that he was to be paid \$30,000, or else the Authority would be asked to investigate and determine his claims.

[33] Mr Alfuzai said he did not check his email on his day off and had therefore been unable to confirm his attendance at the meeting.

[34] The Authority considers that to be unlikely. It is contrary to the normal behaviour of those who extensively use email or cell phone communications, which is likely to be most of New Zealand's population.

[35] The evidence for Cityguard was that it had used the contact email address Mr Alfuzai had given and that, on earlier occasions, he had read company emails on his day off. He worked on a roster and his hours could vary from 32 to 60 a week, so it seems probable he kept an eye on his Inbox as most people would do, even on their day-off, in case of a short notice request to work another shift.

[36] Even if he did not see the message until 19 October, there was no reason he could not have confirmed his attendance early on that day, as the meeting was not going to be held until 11.30 am.

[37] The Authority considers that Mr Alfuzai acted unreasonably in spurning the opportunity he had to resolve matters at a relatively low level, where the best chance usually lies for restoring or maintaining an impaired employment relationship. His IEA had required him to observe the Explanation Meeting procedure if his employer invoked it.

[38] His failure to attend the Explanation Meeting gave Cityguard reasonable grounds for elevating matters to a disciplinary level, thereby reducing the chances of a quick and amicable resolution of problems.

[39] Mr Alfuzai said he could not attend the disciplinary meeting to be held on 21 October because he had gone on sick leave. Cityguard then rescheduled it to 25 October, but Mr Alfuzai still did not attend. He was not entitled to paid sick leave at this time, as he had not been employed for 6 months or more.

The grievance claims

[40] To resolve the employment relationship problem the Authority has considered the substance of each of the claims Mr Alfuzai raised in his grievance.

1. Bullying

[41] On occasions it seems Mr Alfuzai may not have been spoken to as nicely or softly as he would have liked by co-workers or the staff of clients. He said someone had called him 'stupid.' It is not bullying but simply an unpleasant fact, that human communication is not always by polite and thoughtful conversation.

[42] Mr Alfuzai might have questioned whether he was suited to the work of a security guard if he was upset by verbal contact, he says was directed at him, and if he lacked sufficient awareness of the nature and conditions of work likely to bring him into conflict with others. In his job he was from time to time likely to encounter uncouth behaviour from others in adverse situations. Verbal as well as physical confrontation could be expected in this type of work. More resilience to insensitivity in the manner of others, could be expected from a person suited to being a security guard.

[43] This matter could and should have been discussed at an Explanation Meeting.

2. Favouritism

[44] Although there was no overt conduct or language, Mr Alfuzai had a sense that others of different ethnicity or national origins employed by Cityguard clients, viewed him as their inferior.

[45] The Authority finds in the circumstances that does not give a foundation for a personal grievance claim. An unspoken attitude perceived or intuited as existing in others, is unlikely to be sufficient to sustain a claim of discrimination.

[46] Mr Alfuzai was not unjustifiably disadvantaged by favouritism shown towards any other employee.

3. Mistreated

[47] Mr Alfuzai explained to the Authority that he was not complaining of racial discrimination, but that he had been shouted at by a person of different ethnicity. The Authority has discussed this problem above under the heading Bullying.

4. Unpaid wages

[48] As a security guard Mr Alfuzai was required by Cityguard to report after every shift he worked. He claims that he was not given an opportunity to do this before each shift ended. He said he had to compile and send the report immediately afterwards, in his own time and when he was no longer being paid.

[49] The Cityguard Employee Handbook provides (page 12) that the report is to be submitted '15 minutes prior to leaving site'. The clear inference is that it is to be compiled during paid work time, which stops once the site has been left.

[50] An email to Mr Alfuzai from Cityguard Control, sent on 16 September 2022, should have made the employer's instructions clear to him;

Make sure you take some time before the end of your shift to do your shift report. We need them asap after shift.

[51] The Employee Handbook provides that the report can be created and submitted by cell phone or by using a PC at the office, but it also provides (page 7) that personal cell phones are not to be used while on duty.

[52] Cityguard should review its rules to make sure they are clear as to how and when a report is to be compiled and sent, in the event of a security officer being at a site away from Cityguard's office yet working under instruction not to use their cell phone while on duty.

[53] Any misunderstanding about this could have and should have been raised and discussed at the Explanation Meeting that Mr Alfuzai decided not to go to.

5. No break times

[54] The IEA provided he was entitled to 'meal and rest breaks in accordance with the Employment Relations Act'. The timing of them was to be agreed between him and Cityguard, having regard to work requirements or as notified by the employer.

[55] Mr Alfuzai received an induction when he began guarding at the Westhaven Marina site. He signed a form confirming the induction had been given on 28 July 2022, a few days after he began his job. The form showed with a tick that 'Break Facilities' had been explained, which suggests that the taking of rest breaks was not forbidden or prevented.

[56] Also, a company induction had been given when Mr Alfuzai first started his employment. Rest breaks had been covered off then with new staff.

[57] Norm Hewitt who conducted the induction, confirmed to the Authority that the taking of rest breaks had been discussed with Mr Alfuzai. He denied telling Mr Alfuzai he would be fired if he took rest breaks, although he had warned against taking breaks longer than allowed.

[58] The Authority finds that breaks could be taken and the toilet facilities used at the Westhaven office building. Clients located elsewhere such as in Queen Street and Newmarket, were expected by Cityguard to allow security officers assigned to their premises to use their facilities for rest breaks. Mr Alfuzai raised an issue whether a

client was allowing security officers on duty to use the client's kitchen and bathroom facilities.

[59] The Cityguard Employee Handbook at page 6, set out the employers 'expectations' in relation to timekeeping. *Rest* breaks are not expressly mentioned but the employer's expectations included the following

- Breaks – Use your initiative and go in quiet periods.
Make sure you are timely.
 - As per employment legislation – 1x30 - minute unpaid break.

[60] The IEA clearly inferred that Mr Alfuzai was entitled to rest breaks, as well as a 30-minute meal break in each shift, both of which are requirements of s 69ZD of the ER Act.

[61] In the way it is written the Handbook is expressly addressing the 30-minute *meal* break, unpaid under the IEA. That could be made clearer by referring to *unpaid meal break*. Having mentioned the 30 minute break for meals, for greater clarity the Handbook could also have referred to the 10 minute breaks required to be provided for rest.

[62] At most there was a simple misunderstanding about the type of break being referred to.

[63] The Authority finds that Mr Alfuzai was not disallowed rest breaks. Nor was he discouraged from taking them.

[64] To the extent any issue had arisen about this matter, it should have been raised and discussed at the Explanation Meeting that Mr Alfuzai did not attend.

6. Working under unsafe conditions

[65] Mr Alfuzai began to suffer in cold conditions experienced while guarding outside a client's premises in mid-winter. When he reported that he was feeling unwell and needed to stop work, he was told he would have to continue on duty for about 20 minutes, until a replacement guard could be found and sent to relieve him.

[66] This was an unsatisfactory situation and potentially a breach of health and safety requirements. If Mr Alfuzai had had to leave his post before a replacement arrived, to go and seek warmth and shelter or to recover, any disciplinary action taken against him is unlikely to have been justifiable.

[67] The Authority recommends that Cityguard review its planning for this situation and also the use to be made of clients' facilities by any guard who succumbs to illness while on duty. Cityguard cannot reasonably expect an employee who is feeling ill to endure pain or discomfort and risk their health further by remaining on duty, while remaining exposed to the elements.

[68] Mr Alfuzai did potentially suffer a disadvantage in his employment, but the matter should have been discussed at the Explanation Meeting that Mr Alfuzai avoided attending. Without any attempt at prior discussion, it should not have just been rolled up with a range of other matters, to support a claim for a disproportionate settlement pay-out of \$30,000.

[69] To give security, patrolling by security officers was carried out in pairs at Westhaven Marina after 6pm. In daylight this was not needed. Communications were provided by radio telephone or VHF radio, and it was intended by Cityguard that this equipment would be made available to employees. The Handbook (pages 8 and 9) has extensive provisions covering communications.

[70] Again, this was a matter for an Explanation Meeting if the rules were not being followed or the equipment was not being made available.

7. Threat of dismissal by HR

[71] The Authority accepts the evidence of Saili Potdar that she discussed with Mr Alfuzai his reluctance to return to work at a particular client's site. That raised a question about the availability of alternative work. She said that Mr Alfuzai had not been asked to resign but had limited his options because at Newmarket, where Cityguard had clients, there was no communications equipment.

[72] Ms Sali said Mr Alfuzai's employment was not terminated. He was offered the alternative of casual work if he did not want to continue under the conditions of the IEA. He was put on a roster to work as soon as he returned from sick leave.

8. Personal day-off

[73] It was reasonable for Cityguard to make arrangements to contact him when necessary, by cell phone or email during his day off. Mr Alfuzai provided his personal email address and in doing so consented to being contacted in that way. Any intrusion on his private time would have been minimal. There was no unreasonable or unfair behaviour by the employer.

9. Removal from roster

[74] This is covered under item 10. below.

10. Conversion from full-time to casual contract

[75] The Authority accepts the evidence of Cityguard that the HR Coordinator Ms Potdar, contacted Mr Alfuzai on the morning of 25 October 2022. She asked him if he was able to return to work and discuss shifts available to be offered to him. He had declined shifts with two clients he had previously been assigned to. Mr Alfuzai asked if he could take a 'suited' guarding position. The Authority finds that when it was confirmed there was only a part-time evening role available for a suited guard, he agreed to take that.

[76] The Authority accepts that Ms Potdar said to Mr Alfuzai that Cityguard could not offer guaranteed hours, but she had suggested a variation of the IEA to casual hours for one month. The Authority accepts that Mr Alfuzai agreed, saying 'that is fine with me, yes that is fine with me.'

[77] The Authority was shown an email Ms Potdar sent to Mr Alfuzai on 26 October 2022. It is clear that Cityguard was trying to co-operate with him to find shifts and clients that suited him. Mr Alfuzai was encouraged to visit the office and provide

advice and information. Plainly, Cityguard was trying to accommodate him and continue his employment.

[78] Following this discussion Mr Alfuzai advised he was withdrawing his settlement offer and making an application to the Authority. Two days later he called in sick and did not return to carry out any shifts he had been rostered onto. He then advised Cityguard he considered it had dismissed him.

11. False allegations from client

[79] This matter too should have been discussed at an Explanation Meeting. In the invitation to the Explanation Meeting, Mr Alfuzai was given in detail the concerns raised by the client, which may have been about him or about a different security officer. He did not take the opportunity provided for him to explain and to reject any allegations against him.

Dismissal – actual or constructive

[80] The Authority is satisfied that Mr Alfuzai's employment did not end at the initiative of the employer by his dismissal. Cityguard did not send him away but tried to find other work at his request and to suit his requirements.

[81] It has not been alleged that he was constructively dismissed. An amended statement of problem Mr Alfuzai's lawyer at the time had drafted, did not claim that form of dismissal had occurred. From the evidence, the Authority finds that he was not given an ultimatum of resigning or being dismissed. Neither did Cityguard follow a course of conduct intended to induce him to resign unwillingly, and it did not breach any duty to such a serious degree that it should have been foreseeable he would resign.

Disadvantage

[82] Potentially, Mr Alfuzai could have been disadvantaged in his employment or conditions of employment, in relation to being required to remain on duty after becoming unwell and by any failure to provide adequate communication equipment where necessary.

[83] If there was any disadvantage, and if Cityguard's actions were not those that a fair and reasonable employer could have carried out in the circumstances, the remedy for the grievance did not require payment to reimburse lost wages or compensate for hurt feelings and humiliation.

[84] Mr Alfuzai did not lose wages because of illness suffered while on duty. He had not qualified for paid sick leave. He did not lose wages because of any deficiency in the communications equipment provided.

[85] Cityguard acted in good faith, as it was required to do under the ER Act, by being responsive and communicative. It sought to address matters of mutual concern by having an Explanation Meeting with Mr Alfuzai, but he unreasonably shunned the process.

[86] The remedies for a grievance under s 123 of the ER Act are discretionary. In the view of the Authority, it was premature for Mr Alfuzai to seek compensation of \$30,000 before exploring the possibility of resolving his problems through the Explanation Meeting procedure which he was required to participate in.

[87] The Authority has recommended to Cityguard that it reviews its Handbook in two areas. That could have been of practical benefit to Mr Alfuzai if he had continued in employment.

[88] The Authority agrees with the summary given by Cityguard in its statement in reply, that Mr Alfuzai

..... by his non-attendance at meetings, his reluctance to enter into discussions, his indecision about his employment status, his settlement offer while still an employee, his unilateral changing of conditions that he himself had set, and his statement that all further interaction is to be via third parties, has continually frustrated all attempts at resolution of his claim.

[89] The Authority finds that Mr Alfuzai does not have a personal grievance of any kind, dismissal, disadvantage or other.

[90] The Authority also finds that Cityguard did not breach any of the IEA or ER Act requirements for rest and meal breaks to be provided to Mr Alfuzai as an employee. There is no basis for making an order for payment of a penalty.

Conclusion

[91] In summary, no orders are required to be made against Cityguard to resolve the employment relationship problem of Mr Alfuzai.

Costs

[92] As Cityguard was not legally represented, the question of costs does not arise in the result determined by the Authority.

Alastair Dumbleton
Member of the Employment Relations Authority