

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 36/08
5089213

BETWEEN DAVID KEITH BAKER
 Applicant

AND THE WAREHOUSE LIMITED
 Respondent

Member of Authority: Leon Robinson

Representatives: Scott McKenna for Applicant
 Penny Swarbrick for Respondent

Investigation Meeting: 25 October 2007

Further information: 8 November 2007

Determination: 8 February 2008

DETERMINATION OF THE AUTHORITY

The problem

[1] The applicant Mr David Keith Baker ("Mr Baker") was formerly employed by the respondent company The Warehouse Limited ("The Warehouse"). Mr Baker claims he has personal grievances for unjustifiable dismissal and unjustifiable disadvantage. He also claims remedies in respect of an alleged breach of his employment agreement.

[2] The parties were unable to resolve the problem between them by the use of mediation.

The facts

[3] Mr Baker commenced employment at The Warehouse's Te Awamutu store in April 1995 in a position expressed as *Store Security and Loss Prevention Officer*.

[4] The terms of the initial employment were recorded in an employment contract entitled *Loss Prevention Officer Employment Contract*. Annexed to that contract was a job description which described the position as *Store Security Officer* and set out the duties of that position. The parties signed the job description on 3 May 1995.

[5] Provided to the Authority is a generic job description for the position titled *Loss Prevention Officer*. It describes loss prevention responsibilities comprising 65% of the total job, 20% allocated to customer ready standards and the balance for training/professional development. The Authority is not provided with a document specific to Mr Baker although it accepts the document relates to Mr Baker's employment.

[6] It is common ground that Mr Baker was employed on the terms of an individual employment agreement supplemented from time to time by letters of appointment issued by The Warehouse to record changes in duties and/or hours. In 1997 Mr Baker's duties were varied to those of Shop Assistant. Subsequently he resumed a security role regularly undertaking other duties unrelated to that role.

[7] At the time his employment ended, Mr Baker was employed under the terms of an individual employment agreement entitled *The Warehouse Limited Team Member Individual Employment Agreement 1 August 2006* ("the Agreement"). Mr Baker is defined as the *Team Member* party to the Agreement. There is reference to a role of Loss Prevention Officer which is a specialist function to which a team member is appointed¹.

[8] Mr Baker had also signed a *Permanent Employment Agreement Letter of Appointment* dated 15 June 2006. That document confirmed The Warehouse's offer of employment to him as "*Security*" at the Te Awamutu store.

[9] In June 2006 The Warehouse invoked dialogue with its staff in relation to a *service proposition*. This company-wide initiative sought to improve the store's customer service. It aimed to enhance customer service by making it easier and more

¹ Clause 4 *Payrates* and clause 4.1.2 *Definitions*

attractive for customers to shop at the store. Pursuant to this service proposition, the store management resolved to reduce the dedicated loss prevention function and reassign the function to other managers and staff and additionally, to ensure more permanent full-time employees were available at the weekends to service customers.

[10] The store manager of The Warehouse at Te Awamutu is one Mr Willie Hall ("Mr Hall"). Mr Hall tells the Authority that management informed the store staff of the service proposition in a series of meeting with them in mid June 2006. The Authority accepts that staff were advised that changes would be required of some of them. The Authority also accepts that Mr Baker was present at these meetings.

[11] According to Mr Hall and which the Authority accepts, management invited staff to volunteer to change their hours of work. However, there were not sufficient volunteers.

[12] There were then a series of meetings between Mr Hall and Mr Baker. Both gentlemen were uncertain about specific dates. Mr Baker says he took notes after each conversation with Mr Hall but he does not produce those notes. Mr Hall brought his diary to the Authority's investigation meeting and I record here causing Mr McKenna some angst, in the result I further record, quite needlessly. I do not regard the diary entries determinative of matters because while they appear on their face to record events re Mr Baker on specific dates, the chronology of events does not coincide with Mr Hall's own prepared written statement. Having tested both witnesses' respective evidence in questioning of both of them, I make the following findings.

19 or 20 June 2006

[13] On 19 or 20 June 2006 (and possibly even over both days), Mr Hall informed Mr Baker that he would be transferred to nightfill duties. Mr Hall says he told Mr Baker "*security was not deemed a risk in our store*". Mr Baker says that Mr Hall told him, and it is a particular point of grievance for him, that "*store security creates no return and was therefore being done away with*". Mr Baker explained to the

Authority he understood that statement to mean security did not bring cash to the tills. The transfer would change Mr Baker's hours of work from day shift to evening shift. The Authority finds that Mr Baker objected, he indicated his objection and the dialogue then ceased without resolution.

17 July 2006

[14] I find it more likely than not, that on or about 17 July 2006 Mr Hall again raised a transfer to night-fill with Mr Baker. I find that he presented to Mr Baker a document entitled "*Proposed Change of Contract*" and not an employment agreement as Mr Baker attests. This document (dated 14 July 2006) recorded the proposed change of hours for Mr Baker moving to nightfill and shifts commencing at 3.30pm to midnight during the week.

[15] I find that Mr Hall assured Mr Baker he would not be disadvantaged but Mr Hall was not assuaged and quite unequivocally stated "*it was not going to happen*". Mr Hall coached a senior rugby team and Waikato secondary school girls out of hours and the proposed change in hours was not at all convenient for him. Mr Baker tells the Authority he told Mr Hall he would not even consider such hours and he told Mr Hall to take the document away. He further says he told Mr Hall he would not be changing his mind and Mr Hall might as well hold on to the document. Mr Baker further explains to the Authority that Mr Hall was aware of his coaching involvement. That evidence accords with that of Mr Hall who says he sought to invoke dialogue and compromise with Mr Baker but that Mr Baker flatly refused.

15 August 2006

[16] On or about 15 August 2006, though I note Mr Baker says on 8 August 2006, Mr Hall informed Mr Baker that he accepted Mr Baker's objection to nightfill hours and proposed instead that Mr Baker work in the stockroom on his existing days and hours of work. I find that Mr Baker said he could not handle the stockroom work. I find also that Mr Hall was aware that Mr Baker had a pacemaker. I find that Mr Baker did not inform Mr Hall of a back injury. Mr Hall advised they would try to work around the situation and that most of the time Mr Baker would be working on a forklift. Mr Baker protested he would have to lift heavy stock after forklift work. He

says Mr Hall then abruptly told him that was where he was going and the discussion then ended. I prefer Mr Hall's evidence that Mr Baker said he would think about it and the meeting then concluded.

21 August 2006

[17] Both witnesses agree as to the date of events on 21 August 2006. That morning Mr Hall asked Mr Baker if he had thought any more about the stock room position. Mr Baker advised he would not go the stockroom. He also said stockroom staff did not want him there so why should he go there. He asked whether the proposal was a support office decision and Mr Hall told him it was a local decision. Mr Hall again explained the Te Awamutu store was a not a security risk and it could better use Mr Baker's support in other areas of the store.

[18] Mr Baker took advice and at 4.30pm he presented Mr Baker with the following letter:-

21 August 2006

Dear David Baker

Further to the discussion that we have had with you, this letter is to advise you that you will now change from Store Security Officer to Stockroom. Your current days and hours will remain the same. This change will take affect on the 10 September 2006.

This letter therefore gives you two weeks notice of this change as per our contractual obligations in the Collective Employment Agreement Clause 11 which terms and conditions you are employed under.

We look forward to continuing our working relationship with you.

*Regards
Willie Hall
Store Manager
Te Awamutu*

[19] Mr Baker took the letter and went home. He read the letter and did not like its contents. I accept that reluctantly he resolved to resign. He wrote a letter giving notice of his last day of employment as 25 August 2006 and asking that his resignation be kept confidential. He wrote that the manager had left him no alternative but to resign.

[20] Mr Baker returned to the store and handed his letter of resignation to Mr Hall. He told Mr Hall he was resigning and I find, taking legal action. Mr Hall said they would have to talk about the situation but Mr Baker said he did not want to talk. Mr Hall disagreed and said they had to, but Mr Baker said not that day. Mr Hall told Mr Baker he was not expected to carry out all the heavy lifting in the stockroom but rather, he was a third person who could assist with splitting and forklift driving. That did not placate Mr Baker. Mr Hall said he would hold the resignation letter for a week. Mr Baker then left.

25 August 2006

[21] On 25 August 2006 Mr Baker went into the store with his grandson and told Mr Hall he had thought about matters but he was not going to stay. Mr Hall did not want to accept Mr Baker's resignation and asked what Mr Baker would do. Mr Baker said he had applied to Armourguard and believed had would be successful. Mr Hall again said he did not want Mr Baker to go. He asked Mr Baker if he was sure and Mr Baker said he was.

[22] Mr Baker's last day at The Warehouse was 29 August 2006.

The merits

[23] Mr Baker says he was dismissed - but there was no actual dismissal. It is clear however that he resigned. It has been submitted that Mr Baker's initial resignation of 21 August 2006 lapsed and that there was a fresh resignation on 25 August 2006. Issues arise out of that submission. I have no doubt, that but for the letter of 21 August 2006, he would not have resigned. It is only if the action of the 21 August 2006 letter constitutes a breach of some legal duty that Mr Baker is able to contend he was constructively dismissed. There would then arise a further question as to whether any such constructive dismissal was unjustifiable.

[24] The Authority is permitted to find a grievance other than that alleged². It is not bound to treat a matter as being a matter of the type described by the parties, and may, in investigating the matter, concentrate on resolving the employment relationship problem, however described³. That is what I proceed to do now.

[25] When he wrote to Mr Baker on 21 August 2006, Mr Hall relied on clause 11 of the *collective employment agreement* as The Warehouse's contractual entitlement to vary Mr Baker's duties from store security officer to stockroom and giving him two weeks notice of the change. I assess the justification of that position. The clause in the Agreement stipulates:-

11. *Variation of Duties*
As part of multi-skilling our people, Team Members may be required to work in varying positions in different departments from time to time. The Warehouse shall ensure that Team Members have adequate training and supervision to carry out such work.

[26] The *Permanent Employment Agreement Letter of Appointment* contains the identical provision as follows:-

This is to confirm our offer of employment to you as a Security in our Te Awamutu branch. As part of multi-skilling our people, team members may be required to work in varying positions in different departments from time to time. The Warehouse shall ensure that team members have adequate training and supervision to carry out such work.

[27] It is also now submitted to the Authority that clause 11 of the Agreement entitles The Warehouse to require Mr Baker to undertake duties in the Stockroom. It is also submitted that The Warehouse has a policy of multi-skilling its employees. These two submissions together give rise to a conclusive submission that the clear meaning and intention of clause 11 is that employees may be required to work in different departments irrespective of where they were first engaged.

[28] It is not disputed that Mr Baker worked in Security or as a loss prevention officer. That was in terms of the submission, his initial engagement. That is corroborated too in subsequent documents but in particular, the not disputed job

² s122 *Employment Relations Act 2000*

³ s160(3) *Employment Relations Act 2000*

description provided to the Authority. A loss prevention officer role is referred to in the Agreement as a *specialist function* and also that a team member is *appointed* to such a specialist function. I find that Mr Baker was under the express terms of the Agreement, a person appointed or employed directly into a specialist function⁴.

[29] The Warehouse purported to re-assign him to the stockroom, and I note, without disadvantage to him in terms of hours of work and pay rates. As a specialist function, the Agreement recognises such a role only where it is sole charge only.

[30] The Warehouse argues its employees are all employed primarily as Team Members with some appointed to specialist functions but all remain designated Team Members. It says clause 11 licences it to direct Team Members from time to time to work in different departments. In essence, the submission amounts to this - that a change in duties (varying positions in different departments) is not a change of job or put another way, is not a different job. But what does the Agreement mean when it refers at various clauses to "Position"⁵. While it refers to "specialist functions" it does not define what is meant by "position". In arguing that all employees are Team Members does The Warehouse contend that there is only one "position" of *Team Member*? I am doubtful about this⁶.

[31] In the result however I do not consider I need to resolve those issues. The permissive clause 11 is prefaced with the opening phrase "*As part of multi-skilling our people*". Those words must have some significance. I conclude they do in terms of qualifying that which follows them. Parties to agreements must be taken to have chosen their words deliberately and also, to mean what they say. I consider the power The Warehouse reserves to itself by Clause 11, is directed at reassignment solely for the particular purpose of multi-skilling. That is what the words say, and is the qualification for the power to vary duties.

[32] On this analysis, I conclude that the power to reassign is not an unfettered

⁴ Clause 4.1

⁵ See for example clause 11 itself and also 10.1 *Redundancy*

⁶ Such a position would arguably render the *Redundancy* provision itself, redundant

licence to unilaterally vary terms of appointment and contractual entitlements flowing from those accepted at initial engagement, irrespective of whether rates of pay and hours of work remain unchanged. Nor is it a licence for the purposes of re-organisations. The power is limited expressly where it is desired or intended primarily for purposes of multi-skilling Team Members.

[33] I am unable to say that Mr Baker's directed reassignment to the stockroom was directed for the particular and primary purpose of multi-skilling him. I find accordingly. It was not about that all. Rather, I conclude it was particularly and entirely a consequence of the implementation of the *service proposal*.

[34] I find that Mr Baker was contractually entitled to maintain the duties and description of his work as set out in the Job Description provided to the Authority in respect of a loss prevention officer.

Redundancy

[35] In general terms and in terms of the Agreement itself, I find the service proposal arguably constituted a "re-organisation" of The Warehouse's business. If that is correct then situations of re-organisation have been agreed by the parties to be provided for according to Clause 10 on redundancy. But the Warehouse did not invoke those provisions when as a result of the service proposal Mr Baker was no longer required to perform his work as a loss prevention officer. But nor did Mr Baker raise the issue.

[36] I consider that Mr Baker's situation is more aligned within the redundancy provisions of the Agreement and was not a situation contemplated as a variation of duties at Clause 11. Although I accept Mr Baker did not agree at all with The Warehouse's actions and the direction that he work in the stockroom, I note that he did not invoke the dispute resolutions provisions of the Agreement and nor did he argue he that the redundancy provisions were applicable, as he does now before the Authority. Instead, and I find the same, he disengaged entirely from any dialogue with Mr Hall who I accept genuinely sought to accommodate Mr Baker. Both parties to this employment relationship were obliged to act towards each other in good faith,

in an active and communicative way. When he did give notice that he was pursuing legal advice, that was without any attempt at resolving matters informally with The Warehouse.

[37] Mr Baker claims, amongst other things, redundancy compensation under the Agreement. That was one possible outcome of the application of the redundancy provisions of the Agreement but it was by no means a certainty such as to found an automatic claim to the same now. His justifiable redeployment was also a possible outcome. I have contemplated whether of my own motion I ought to resolve this employment relationship problem by ordering compliance with clause 10 of the Agreement in relation to redundancy with a view to the process promulgated therein being permitted to run. The grant of an order of compliance is a matter of discretion for the Authority.

[38] Relevant in the question as to whether to exercise the discretion is the delay in lodgement by Mr Baker. He did not lodge his employment relationship problem in the Authority until 1 June 2007. That was eight months after he had departed from The Warehouse. I record there is no issue taken in relation to submission of Mr Baker's grievance. The passage of time is material, for the situation now is obviously very different from what it was in August 2006. If Mr Baker considered he was entitled to redundancy compensation, he ought to have made diligent application without undue delay for a compliance order. But that said, I find that Mr Baker did not contend that he was redundant at the time or that he was entitled to compensation. It is only now that he does. I do not consider compliance now will be a worthy substitute for a compliance order granted at the time. I therefore decline to order compliance of my own motion considering the same to be inappropriate. I decline to order The Warehouse pay Mr Baker redundancy compensation for that was by no means a certainty.

[39] Concentrating on resolving the problem at hand, I conclude that the letter of 21 August 2006 was unjustifiable in that The Warehouse was incorrect to rely on Clause 11 of the Agreement as the basis for it to unilaterally direct Mr Baker to work in the stockroom. He was engaged as a loss prevention officer according to the application

job description. Clause 11 of the Agreement did not give licence to The Warehouse to unilaterally vary Mr Baker's duties because that provision applied only where the intended variation in duties was for the primary purpose of multiskilling the employee. The intended variation of duties was entirely a result of the service proposal and therefore arguably constituted a re-organisation of the business.

[40] I have ascertained that in a letter of 12 September 2006, Mr Baker by his solicitors raised a personal grievance for unjustifiable constructive dismissal. The well settled tests for constructive dismissal are:-

- (i) Did the employee resign?
- (ii) Was the resignation caused by a breach of duty on the part of the employer?
- (iii) If it was, whether a substantial risk of resignation was reasonably foreseeable, having regard to the seriousness of the breach.

[41] Mr Baker did resign. His resignation letter is conclusive evidence of that. I find that his resignation was entirely a result of the directed change to the stockroom. That action and decision was not permitted in terms of the Agreement and was unjustifiable. As such The Warehouse's action constituted a breach of duty to Mr Baker. I find that Mr Baker was justified in affirming The Warehouse's repudiatory breach inherent in the letter of 21 August 2006 and regarding the employment relationship at an end as a consequence.

[42] I consider that because Mr Hall was explicitly aware of Mr Baker's stated concern for his health by reason of his pacemaker, that it was reasonably foreseeable for the Warehouse through Mr Hall to have appreciated that there was a substantial risk that Mr Baker would resign.

The determination

[43] **I therefore find that Mr Baker was constructively dismissed and such dismissal was unjustifiable.** Mr Baker is entitled to remedies in settlement of that personal grievance.

The resolution

[44] Having made the above findings and in considering both the nature and the extent of the remedies to be provided, I am bound by section 124 of the *Employment Relations Act 2000* to consider the extent to which Mr Baker's actions contributed towards the situation that gave rise to the personal grievance, and if those actions so require, to reduce the remedies that would otherwise have been awarded accordingly.

[45] Mr Baker did not engage in discussions with Mr Hall. More than once he simply withdrew from any discussion. Having regard to the Authority's finding that The Warehouse's breached its duty to Mr Baker, it must follow that he cannot be criticised for failing to engage. He elected to affirm repudiatory conduct. In these circumstances I do not consider Mr Baker's disengagement can be properly regarded as blameworthy conduct and which would require a reduction in remedies to be awarded to him. **I find that Mr Baker did not contribute to the situation that led to his personal grievance.**

Reimbursement

[46] I understand that Mr Baker secured alternative security work which exceeded his remuneration at the Warehouse. **Accordingly I find he suffered no loss of income and there will be no orders for reimbursement.**

Compensation

[47] Mr Baker's service with The Warehouse was some eleven years. Mr Baker tells the Authority he thought the situation he found himself at The Warehouse would be the end of his working career. He was most particularly aggrieved by a statement he says Mr Hall made to him that "he gave no return" which really upset him. He tells the Authority he is still "not over" that comment and that he thought it simply dismissed his entire eleven year service contribution to The Warehouse. Mr Hall says he put the matter more diplomatically. This is the extent of Mr Baker's evidence in support of his claim for \$10,000.00 compensation.

[48] I accept that Mr Baker has suffered hurt and humiliation arising out of the personal grievance I have found. Having regard to his evidence, his length of service

and the nature of the personal grievance I award him \$7,000.00 compensation. **I order The Warehouse Limited to pay to David Keith Baker the sum of \$7,000.00 as compensation.**

Costs

[49] In the event that costs are sought, I invite the parties to resolve the matter between them, but failing agreement, Mr McKenna is to lodge and serve a memorandum as to costs within 14 days of the date of this Determination. Ms Swarbrick is to lodge and serve a memorandum in reply thereafter but within 28 days of the date of this Determination.

Leon Robinson
Member of Employment Relations Authority