

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2013] NZERA Auckland 445
5417286

BETWEEN KEVIN WILLIAM BRETT
 Applicant

A N D NORTH SHORE SECURITY
 COMPANY LIMITED
 Respondent

Member of Authority: Rachel Larmer

Representatives: Gregory Keen, Counsel for Applicant
 Respondent in person

Investigation Meeting: 06 August 2013 at Auckland

Submissions Received: 13 August 2013 from Applicant
 16 August 2013 from Respondent
 21 August 2013 from Applicant

Date of Determination: 27 September 2013

DETERMINATION OF THE AUTHORITY

- A. Mr Kevin Brett is not entitled to compensation on the grounds North Shore Security Company Limited (North Shore Security) failed to provide him with full time work between July 2008 and 10 June 2012 because he did not become a full time employee until 10 June 2012.**
- B. Mr Brett is entitled to an alternative day's holiday for any public holiday he worked after 10 June 2012 if the public holiday would otherwise have been a working day for him.**
- C. North Shore Security is ordered to pay Mr Brett \$1,140.99 for travel time between its office and the Giltrap Holden site at the beginning and end of each shift.**

D. Mr Brett's claims for breach of good faith and penalties do not succeed.

E. Mr Brett's claim for interest does not succeed.

Employment relationship problem

[1] Mr Brett works for North Shore Security as a casual security guard. When he started work the parties entered into a written employment agreement dated 10 September 2005 which records the casual nature of Mr Brett's employment.

[2] The employment agreement provides Mr Brett would work on an *as required basis* on any days of the week which suited the employer's requirements. The first clause of the agreement identifies that the parties had entered into casual employment. Mr Brett also signed a declaration clause which says "*I understand and fully accept the conditions of casual employment detailed above*".

[3] On 27 June 2008 North Shore Security and Giltrap Holden entered into a Supply of Security Services Agreement which was to be for a 12 month period, unless terminated earlier by either party on one months' notice. Mr Brett claims that in early July 2008 he was offered and accepted permanent fulltime employment on the Giltrap Holden site. North Shore Security denies making such an offer.

[4] Mr Brett claims the offer of full time permanent work was made by Mr Carwyn Winiata¹ the Operations Director of North Shore Security in the presence of another then employee Mr Sene Fruean. Mr Brett says he worked on the Giltrap Holden site for about a week and a half then suffered an injury which resulted in him having time off work on ACC. Mr Brett believes Mr Winiata punished him for not being able to work by removing his full time hours and reducing the amount of work offered to him in future.

[5] Mr Brett claims:

(a) Compensation on the grounds North Shore Security failed to provide him with full time work between July 2008 and 10 June 2010. He seeks to

¹ Sole director of North Shore Security. Also sole director and shareholder in the company which is the sole shareholder of North Shore Security.

be awarded what he would have earned if he had worked full time hours over that period;

(b) he is entitled to 23 alternative day holidays for the public holidays he worked from 08 June 2009 to date;

(c) wage arrears of \$5,017.50 to compensate him for travel time involved in uplifting and returning keys for the Giltrap Holden site from North Shore Security's office at the beginning and end of each shift over the period 07 March 2011 to 10 June 2012;

(d) North Shore Security breached its good faith obligations towards him by:

(i) Punishing him for his ACC injury by reducing his shifts;

(ii) Implementing a system from August 2008 where Mr Brett was the last employee to be allocated shifts at the Giltrap Holden site;

(iii) Making it clear to other staff, primarily Robert Henry, that bullying and intimidatory behaviour towards Mr Brett was acceptable;

(iv) Mr Winiata bullying and intimidating him.

(v) that a penalty be imposed on North Shore Security for its breach of good faith;

(vi) he should be awarded interest on any wage arrears.

[6] Mr Brett's breach of good faith and penalty claims were filed the day before the Authority's investigation meeting. North Shore Security agreed these new claims should be dealt with at the same time as the claims Mr Brett had identified in his Statement of Problem so that the parties could put all historical matters behind them and focus on their on-going employment relationship.

[7] North Shore Security denies all of Mr Brett's claims. It says:

- (a) Mr Brett worked on a casual as required basis until the parties agreed to full time permanent employment which was recorded in an employment agreement dated 10 June 2010;
- (b) Mr Brett was not entitled to an alternative holiday when he worked on public holidays because he was a casual employee with no set days of work;
- (c) It did not know that Mr Brett had an issue with uplifting and returning the Giltrap Holden keys from the North Shore Security office and as soon as it became aware of that it changed the arrangement to accommodate Mr Brett's travel issues;
- (d) It has not breached its good faith obligations. In particular:
 - (i) It did not punish him for his ACC injury by reducing his shifts;
 - (ii) There was no system implemented whereby Mr Brett was the last employee to be allocated shifts at the Giltrap Holden site;
 - (iii) It does not accept or condone bullying or intimidation in the workplace;
 - (iv) Mr Winiata denies ever bullying or intimidating Mr Brett. He says he has just raised legitimate work related issues which Mr Brett has not been receptive to.
 - (v) No penalty is appropriate because good faith has not been breached;
 - (vi) Mr Brett has been paid all wages owing to him so interest is not appropriate.

Issues

[8] The following issues are to be determined:

- (1) Is Mr Brett entitled to compensation because he was not given full time work from July 2008 to 10 June 2012?

- (2) Is Mr Brett entitled to an alternative day holiday for the public holidays he has worked since June 2009?
- (3) Is North Shore Security required to pay Mr Brett for his travel time between the North Shore Security office and the Giltrap Holden site?
- (4) Has North Shore Security breached its good faith obligations to Mr Brett? In particular:
 - (i) Did it punish Mr Brett as a result of his injury in August 2008 by reducing his shifts?
 - (ii) Did it implement a system where Mr Brett was the last employee to be allocated shifts at the Giltrap Holden site?
 - (iii) Did Mr Winiata make it clear to other staff, primarily Robert Henry, that bullying and intimidatory behaviour towards Mr Brett was acceptable;
 - (iv) Did Mr Winiata bully and/or intimidate Mr Brett?
- (5) Should Mr Brett be awarded interest?
- (6) What if any legal costs should be awarded?

Is Mr Brett entitled to compensation because he was not given full time work from July 2008 to 10 June 2012?

[9] Mr Brett says that sometime in early July he had a meeting with Mr Winiata and Mr Fruean during which Mr Winiata referred to him being *fulltime permanently on the Giltrap Holden site*. Mr Brett cannot recall any other details apart from that.

[10] Mr Fruean gave evidence on Mr Brett's behalf. He confirms a meeting in June or July 2008 at which he says Mr Winiata explained to Mr Brett that he would be able to become a full time permanent employee based at the Giltrap Holden site because North Shore Security had secured the Giltrap Holden business.

[11] Mr Brett bears the onus of establishing on the balance of probabilities that his employment changed by mutual agreement from a casual as required basis to fulltime permanent employment. I find he is unable to discharge that onus because:

- (a) The usual contract formation elements of offer, acceptance, intention to create legal relations, certainty of terms and mutual obligations are lacking. That contrasts with the negotiations which occurred when Mr Brett was offered full time permanent work on the Giltrap Holden site on 24 April which he did not accept until 10 June 2012;
- (b) Mr Winiata is someone who keeps detailed records and all employees have a written employment agreement. I do not consider he would be likely to have changed Mr Brett's employment status without recording such a change. The records make it clear that Mr Brett's requests for full time employment were not accepted and Mr Brett was provided with reasons for that decision;
- (c) The parties' subsequent conduct is also consistent with Mr Brett's casual as required status continuing but inconsistent with him being a full time permanent employee. Mr Brett was not put on the roster but was offered work as and when it became available. He was able to refuse an offer of work and on occasion did so. There are file notes and correspondence with Mr Brett in which North Shore Security makes it clear he is a casual employee and that it was unable to change his status;
- (d) Mr Brett is a member of two unions. He engaged his first union to address various employment issues with North Shore Security in early 2010. That resulted in a meeting between Mr Winiata, Mr Fruean, Mr Brett and his union representative in March 2010 to address Mr Brett's employment concerns. That would have been the time for Mr Brett to have raised the alleged change in his status particularly as Mr Fruean was present so he could have been asked about his recollection of the July 2008 discussion. I consider it significant that did not occur;
- (e) Mr Brett did not file his claim relating to his alleged change in status with the Authority until 19 April 2013, almost five years after it had allegedly occurred. I did not find his reasons for this delay convincing;

(f) In correspondence with North Shore Security dated 21 May 2012 Mr Brett's lawyer refers to Mr Fruean having "*the extreme view [...] that Mr Brett should be given whatever he asks for*";

(g) I consider Mr Fruean's evidence was unreliable. I did not find him to be a credible witness. He is a disaffected former employee who left under a cloud and now works for a competitor. It is clear he has considerable animosity towards Mr Winiata which I believe coloured his evidence.

[12] I am not satisfied on the balance of probabilities that Mr Brett's employment status changed from that of a casual employee who worked on an as required basis to fulltime permanent employment. Mr Brett's claim for compensation does not succeed.

Is Mr Brett entitled to an alternative day holiday for the public holidays he has worked since June 2009?

Public holidays between 08 June 2009 and 10 June 2013

[13] Under s.56(1) of the Holidays Act 2003 an employee who is required to work on any part of a public holiday which falls on a day that would otherwise be a normal working day for them must be provided with an alternative holiday in addition to being paid for the hours worked.

[14] Because Mr Brett worked on a casual as required basis until 10 June 2012 he did not have normal working days. That means any public holiday he worked before then would not "*otherwise be a working day*"² for him, so the s.56(1) entitlement to an alternative day holiday does not arise. I find Mr Brett does not have an alternative day entitlement for working on any public holidays which occurred before 10 June 2012.

Public holidays after 10 June 2012

[15] When Mr Brett became a permanent fulltime employee on 10 June 2012 he had usual days and hours of work. Mr Brett has worked four public holidays since then (Labour Day 2012, Auckland Anniversary 2013, Waitangi Day 2013 and Queens Birthday 2013).

[16] It is unclear from the information before the Authority whether any of the four public holidays Mr Brett worked fell on days that would otherwise have been a

² S.56(1) Holidays Act 2003.

working day for him. If so Mr Brett is entitled to an alternative day holiday. If that has not already occurred then Mr Brett must be credited with an alternative day holiday in accordance with s.56(1) of the Holidays Act.

Is North Shore Security required to pay Mr Brett for his travel time between the North Shore Security office and the Giltrap Holden site?

[17] Mr Brett claims he has been short paid one and a half hours per day for the 223 days he worked between 07 March 2011 and 10 June 2012. He claims wage arrears of \$5,017.50 (334.5 hours x \$15 per hour).

[18] The extra time Mr Brett claims he has been short paid relates to the time he says it took him to get from North Shore Security's office to uplift keys to the Giltrap Holden site before he started his shift and then at the end of his shift from the Giltrap Holden site to North Shore Security's office to return the keys.

[19] Mr Brett's evening shift at Giltrap Holden starts at 8pm but he is claiming he should be paid from 7.15pm to account for his travel from the office to the site. Mr Brett's Giltrap Holden shift ends at 6am but he is claiming he should be paid until 6.45am to account for his travel back to the office.

[20] The North Shore Security is located at 23 William Pickering Drive, Albany and Giltrap Holden is located in Diana Drive, Glenfield. This is a distance of 5.3 kms. Mr Winiata says other staff got to and from the Giltrap Holden site within 5 to 10 minutes. Mr Brett claims it took him between three-quarters of an hour to one hour to do so because he relied on public transport. Mr Brett says that in the weekends he would have to walk between the two places and it would usually take him an hour and a quarter to do so.

[21] North Shore Security paid Mr Brett for the shifts he worked. It did not pay him for the time it took him to get to and from its office and the Giltrap Holden site. Prior to 07 March 2011 staff collected the keys when they arrived at the Giltrap Holden site at the start of their shift. Mr Winata says that practice was not working effectively due to problems with staff arriving late and being poorly presented.

[22] North Shore Security believed the situation would be improved if staff were inspected and accounted for immediately before beginning their shift. This enabled

Mr Winiata to identify and address problem areas quickly so from 07 March 2011 staff were told to report to and from the office at the start and end of each shift.

[23] Mr Winiata says he was not aware that Mr Brett was taking one and a half hours each day travelling to and from the office and the Giltrap Holden site. Mr Brett's claim for wage arrears was not raised with North Shore Security until 06 June 2012 at which point Mr Winiata changed the arrangement to better suit Mr Brett. I record my concern about Mr Brett not raising his transport difficulties with North Shore Security at the outset.

[24] However, I consider that because it was a requirement for Mr Brett to report to the North Shore Security office before and after each shift he can be said to have been working from and until that time. I therefore find Mr Brett is entitled to be paid from the time he started work up until when he finished work, rather than just for the time he was actually on the Giltrap Holden site.

[25] I do not accept Mr Brett should be paid for one and a half extra hours of travel time per day. I consider that amount of time is excessive and unreasonable and North Shore Security did not know that was what was happening.

[26] I find that Mr Brett is entitled to be paid for 20 extra minutes per day (10 minutes from the office to site and 10 minutes back from the site to the office at the end of each shift) for the 223 days he worked between 07 March 2011 and 10 June 2012.

[27] North Shore Security is ordered to pay Mr Brett \$1,114.99 to compensate him for the additional hours he worked associated with picking up and returning the keys and work cell phone to and from the office before and after working his shifts at the Giltrap Holden site.

Has North Shore Security breached its good faith obligations to Mr Brett?

[28] Mr Brett relies on the following three allegations as breaches of good faith which he says should result in a penalty:

- (i) Deliberate punishment of Mr Brett for having an injury by reducing his shifts per week;

- (ii) Implementing a system whereby Mr Brett would be the last employee to be allocated shifts at the Giltrap Holden site;
- (iii) Mr Winiata making it clear to other staff, primarily Robert Henry, that bullying and intimidatory behaviour of the applicant was acceptable. Mr Winiata also engaging in bullying and intimidatory behaviour towards Mr Brett on occasions.

Was Mr Brett punished for having an injury?

[29] This claim has not been proven on the balance of probabilities. I accept Mr Winiata's evidence that Mr Brett was not punished a result of him having an accident and going on ACC in August 2008. As a casual employee with no set or fixed days or hours of work North Shore Security was entitled to offer Mr Brett as many or as little number of shifts per week as suited its operations. Acting consistently with the casual as required arrangement cannot be said to amount to punishment of Mr Brett as he claims.

Was there a system implemented whereby Mr Brett would be the last employee to be allocated shifts at the Giltrap Holden site?

[30] The evidence did not establish that any such system had ever been implemented. There was no reliable evidence that Mr Brett would be the last employee to be allocated shifts at the Giltrap Holden site. It was clear he was often offered work at that site.

Did Mr Winiata bully and intimidate Mr Brett and/or did he make it clear to other staff, primarily Robert Henry, that bullying and intimidatory behaviour towards Mr Brett was acceptable?

[31] This claim has not been proven on the balance of probabilities. I accept Mr Henry's evidence that Mr Winiata did not ever indicate that bullying and/or intimidatory behaviour to Mr Brett, or any other employee was acceptable. I accept Mr Winiata's evidence that he has not bullied or intimidated Mr Brett. It appears that Mr Brett has taken exception at Mr Winiata raising legitimate work related issues with him.

[32] Mr Winiata feels Mr Brett has constantly threatened him with legal action and the intervention of high powered legal friends (one of whom is a Queens Counsel) as a result of Mr Winiata's attempts to manage Mr Brett and address work related

concerns. The information presented to the Authority suggests Mr Winiata's view about that appears to have some merit.

[33] I discussed with the parties during the Authority's investigation meeting ways in which they could improve their communications and reminded them mediation is available from Mediation Services should problems arise.

[34] I do not consider North Shore Security breached its good faith obligations to Mr Brett.

Should a penalty be imposed on North Shore Security for a breach of good faith?

[35] Good faith has not been breached so a penalty cannot be imposed.

Should Mr Brett be awarded interest?

[36] An award of interest is discretionary. I consider it would be unjust to award Mr Brett interest because he did not raise concerns about the reporting to the office at the beginning and end of each shift until 06 June 2012. As soon as it was brought to North Shore Security's attention Mr Brett's travel problem was resolved. I decline to award interest.

Costs

[37] The parties are encouraged to resolve costs by agreement. If that is not possible then Mr Brett has 14 days within which to file a cost application, North Shore Security has 14 days within which to respond, with Mr Brett having a further 7 days to reply.

Rachel Larmer
Member of the Employment Relations Authority