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Burch v Rush Security Services Limited [2011] NZERA 4; [2011] NZERA Auckland 4 (10 January 2011)

Last Updated: 19 January 2011

IN THE EMPLOYMENT RELATIONS AUTHORITY AUCKLAND

[2011] NZERA Auckland 4 5313841

BETWEEN GRANT BURCH

Applicant

AND RUSH SECURITY SERVICES

LTD

Respondent

Member of Authority: Representatives:

Investigation Meeting: Determination:

Dzintra King Applicant in Person

Larissa Rush and Darien Rush, Advocates for Respondent

17 December 2010

10 January 2011

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The applicant, Mr Grant Burch, says he has been unjustifiably dismissed by the respondent, Rush Security Services Ltd. He seeks six months' lost wages and \$10,000 compensation.

[2] Mr Burch also claims that the respondent had breached ss69ZD and 69ZE [Employment Relations Act 2000](#) in that he had not been provided with rest and meal breaks. He said the respondent failed to provide him with a relief operator on 26 and 27 June and that that resulted in his leaving the control room unattended. He said he had been placed in an untenable position because no relief had been provided.

[3] The respondent says the dismissal was justified and that Mr Burch had access to facilities to take requisite breaks; and did so.

[4] Mr Burch was employed as a senior Alarm and Video Monitoring Operator on 12 October 2009. His employment was terminated on 30 June 2010.

[5] Mr Burch attended a pre-employment interview with Ms Larissa Rush on 31 October 2009. Ms Rush asked Mr Burch if he was a smoker. This was asked because the respondent had had a problem previously with an operator who smoked leaving his post.

[6] Mr Burch said smoking had been raised but there was no real discussion about it. He said he was in the process of quitting. Ms Rush deposed that Mr Burch was told that the requirements of the position were such that he would not be able to leave company premises during his shift and therefore would not be able to smoke for a minimum of twelve hours. Ms

Rush told him it was important that he took this requirement into account before accepting the position.

[7] Mr Burch advised that he understood the requirement and would comply with it.

[8] I prefer Ms Rush's evidence regarding the conversation on 31 October. There would have been no point in the issue of smoking being raised had there not been consequences flowing from the requirement that the incumbent could not smoke (which would require him or her to leave the building) during the shift.

[9] On May 2010 the cleaners reported that the premises had been left unattended during Mr Burch's shift.

[10] Mr Darien Rush, the Chief Executive Officer, spoke to Mr Burch about this. Mr Burch said he was unaware that he was not allowed to leave the building unattended. Mr Rush emphasised that he could not leave the building unless another fully trained operator was on duty as back up. Mr Rush stated that leaving the building unattended was a serious offence and anyone found in breach would be dismissed,

[11] Mr Burch said he understood and would not do it again.

[12] On Sunday 27 June 2010 Mr Rush found the premises unattended. He searched the building and then looked outside. As he was walking out Mr Burch walked in. Mr Burch said he had been outside smoking.

[13] Mr Rush told Mr Burch that he had previously told him that he was not to leave the building. Mr Burch confirmed that that was the case. Mr Rush advised Mr Burch that the issue would be addressed on the following Monday.

[14] Mr Rush then reviewed the CCTV footage and found that Mr Burch had left the building unattended on Saturday 26 June as well.

[15] On 28 June Mr Burch was given a notice of a disciplinary hearing to be held on 30 June to address serious misconduct issues including failure to follow management directives and leaving the company premises unattended. Mr Burch was advised he could have a support person present and that dismissal was a possibility.

[16] Mr Burch was rostered to work on 29 and 30 June. On 29 June he phoned and said he would not be at work as he needed to consult a lawyer. Mr Burch did not work his 30 June shift either.

[17] He did attend the disciplinary meeting at 4pm on 30 June. Ms Rush and Mr John Cleary, the company's business advisor, attended.

[18] Mr Burch accepted that Mr Rush had spoken to him about leaving the company premises unattended and that he was aware this was prohibited. He said he had complied for two weeks but then he breached the instruction as he needed to smoke.

[19] Mr Burch said he took the phone with him when he left the building and said he would leave the company premises again.

[20] The company's House Rules, which Mr Burch signed, provide that leaving the control room constitutes serious misconduct

[21] Ms Rush decided that she would terminate Mr Burch's employment. She took into account his unapologetic position and his assertion that he would repeat the behaviour.

[22] Mr Burch maintained that the respondent had not followed its disciplinary procedure as he had not been given warnings. The procedures provide for termination without a warning.

[23] The House Rules provide that serious misconduct includes leaving the Control Room unattended at any time whilst on duty.

[24] The Standing Orders provide that no officer is to leave the workplace or area without the express permission of a supervisor or management.

[25] Control Room Operators process alarm activations which include panic, duress and burglary alarms and phone and radio calls of an emergency nature. Mr Burch had access to a lunch room and toilets and if an alarm was activated while he was in either the lunch room or the toilet a voice alarm would be played to alert him.

[26] Mr Burch recalled the conversation with Mr Rush and said it was his understanding that Mr Rush would sort something out to ensure he could his breaks without leaving the Control Room unattended.

[27] Mr Burch says he should have been given a first warning, not been dismissed as he had the phone and RT on his person.

[28] Mr Burch was able to have breaks. The employer had facilities for the purpose of that and Mr Burch accepted he had

made use of those facilities. Mr Burch's real issue is that he was unable to smoke.

[29] It was not for Mr Burch to unilaterally determine that he could go outside and smoke while taking the phone and RT with him. He had been told that he could not smoke before he accepted the position and accepted it on that basis. He had been told that he was not to leave the building or dismissal could result; and despite that, left the building again.

[30] Given the nature of the business Mr Burch had to be present in the control room or be in the building in the lunch room or toilet and able to access the control room if an alarm was activated.

[31] Mr Burch said the Standing Orders did not apply to him because they were for guards and patrolmen. The Standing Orders are for all staff of the Operations Division. The document states that it is "issued as a Guidance Document for all Officers and staff within the Division". Mr Burch had signed his acceptance of those orders. Even if the Orders did not apply to him, he had been clearly informed, and given lawful and reasonable instructions, that he was not to leave the building during his shift.

[32] Mr Burch asserted during the hearing that his supervisors were aware he was taking breaks outside the premises. He accepted he had not raised this during the disciplinary interview.

[33] Mr Burch was inducted into the company policies and procedures and was told where the lunch room and toilets were. The fact that he was not to leave the building was covered during the induction.

[34] The respondent was justified in dismissing Mr Burch. Mr Burch does not have a personal grievance.

Costs

[35] The respondent has asked for costs of \$4,025. I do not have any documentation regarding costs. The respondent should supply any documentation and any further submissions on the issue of costs within 28 days of the date of this determination. If the applicant wishes to respond he should do so within 14 days of receipt of the respondent's information.

Dzintra King

Member of the Employment Relations Authority

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