

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

CA 103/08
5097956

BETWEEN RON DUDLEY
 Applicant

AND SUB FIVE PRIVATE
 SECURITY LIMITED
 Respondent

Member of Authority: James Crichton

Representatives: Ian Thompson, Advocate for Applicant
 Barry Kay, Advocate for Respondent

Investigation Meeting: 3 July 2008 at Christchurch

Determination: 18 July 2008

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant (Mr Dudley) alleges that he was unjustifiably constructively dismissed by the respondent (Sub Five) and that he suffered disadvantage as a consequence of an unjustified action of Sub Five.

[2] Sub Five resists those allegations, denies that Mr Dudley was dismissed at all and alleges that Mr Dudley in fact abandoned his employment.

[3] Mr Dudley was employed by Sub Five pursuant to a written employment agreement which describes his position as that of a security guard. However, Mr Dudley contends that he was engaged by Sub Five not as a security guard at all but as a supervisor at a particular site, one of Christchurch's large malls.

[4] Mr Dudley commenced his employment on 19 April 2007 but on 17 June 2007, having finished his day shift for that day, he was confronted with a new roster for the week beginning Monday, 18 June, the effect of which was to significantly

change his shift rotation and, critically for Mr Dudley, allocate him days he had not previously worked.

[5] Mr Dudley immediately engaged with his employer and there were a number of discussions between the parties with a view to trying to resolve the difficulty that had arisen. It became clear that Sub Five had changed the shift rotation in order to meet its client mall's needs and the particular shift pattern which previously was available and which suited Mr Dudley's domestic and family arrangements was, as a consequence, no longer available.

[6] The evidence supports the view that Sub Five endeavoured to meet Mr Dudley's needs but the parties were unable to arrange matters satisfactorily and in the result the employment relationship came to an end. Mr Dudley then pursued his personal grievance which was raised by letter dated 27 June 2007.

Issues

[7] It will be convenient to examine whether Mr Dudley has been disadvantaged by some unjustifiable action of Sub Five and then to examine whether Mr Dudley has been unjustifiably constructively dismissed.

The disadvantage claim

[8] I am satisfied on the balance of probabilities that Mr Dudley has proved his claim of having suffered a disadvantage as a consequence of an unjustified action by his employer, Sub Five. I reach this conclusion because of the way in which the roster change for D shift was managed by Sub Five on and around 17 June 2007.

[9] For reasons to do with the overlapping nature of D shift and the nature of the duties required of a D shift worker, the shift is often referred to as supervisory in nature. When a D shift staff member is working at the mall, other staff on different shift rotations will also be on duty but the staff member on the D shift roster is often referred to as the *supervisor role* simply because the D shift worker is responsible for carrying the Sub Five cellphone and holds the main Sub Five radio telephone while on duty. Despite the description of the role as a supervisor, the rate of pay is the same as for other employees of Sub Five and the classification that appears in the employment agreements is uniformly that of security guard.

[10] When Mr Dudley was engaged by Sub Five in April 2007, he was interviewed by the then operations manager and told that he would be fulfilling a role in Riccarton Mall as a supervisor and that description obviously stuck with him.

[11] However, Mr Dudley readily conceded at my investigation meeting that his employment agreement clearly referred to him as a security guard and he acknowledged that his rate of pay was exactly the same as other security guards' rates of pay within the Sub Five workplace.

[12] What happened on 17 June 2007, which was a Sunday, was that Mr Dudley finished his day shift and saw a roster which appeared to provide for a change in his duties to another shift pattern. He had had no previous notification of this change and he, not unnaturally, took umbrage.

[13] Mr Dudley eventually managed to contact management at Sub Five and ultimately had meetings with Mr Barry Kay who is a director of Sub Five and who appeared at the Authority's investigation meeting on behalf of Sub Five and gave evidence as well. Both Mr Dudley and Mr Kay impressed me as straightforward, down to earth witnesses who were telling me the truth. In particular, Mr Kay readily acknowledged that Sub Five had not adequately communicated the necessity for a change in Mr Dudley's roster but he also amply demonstrated the extent that he personally went to to put matters right after the initial mistake had been made.

[14] Once there were discussions between Mr Kay and Mr Dudley, Mr Kay satisfied me that he went to considerable lengths to explain to Mr Dudley why there had been a sudden change and sought to retain Mr Dudley's services by trying to meet his needs as far as that was possible.

[15] Mr Kay told Mr Dudley that the reason there had been a change was the wish of Sub Five's client, Westfield Mall, to align the D shift roster to the working pattern of Westfield's security manager. This necessitated a change in the roster pattern such that D shift would start a day later and finish a day later so that the D shift worker would get his two days off on two different days from those that applied up until 17 June 2007.

[16] Mr Kay made clear to Mr Dudley and to the Authority in evidence that there was no prospect of Sub Five being able to continue Mr Dudley, or indeed anybody

else, working the original shift pattern because it simply did not suit the client any more.

[17] In the result, despite Mr Kay's extensive efforts to meet Mr Dudley's needs, Mr Dudley seemed wedded to the idea that he had been appointed to a particular role and a particular span of working hours and he had no need to accept any change.

[18] I find that that is not the legal position. Mr Dudley accepted that his employment agreement referred to him as a security guard and contained clear provisions which allowed the employer to make changes to the way in which Mr Dudley (or indeed anybody else employed as a security guard) was deployed in a particular work environment.

[19] Despite Mr Dudley's belief that he had been appointed as a supervisor at Westfield Mall and that that was a permanent position to which he could expect a long term commitment, that is clearly not what his employment agreement says and it is not the custom and usage of the security industry. Sub Five is able to move staff to meet the needs of its clients and the employment agreement specifically contemplates precisely that situation.

[20] In my opinion, the evidence does not support Mr Dudley's conclusion that he was appointed by the operations manager of Sub Five to a permanent position as a supervisor at Westfield Mall. The evidence supports the conclusion that Mr Dudley was appointed to a permanent position as a security guard for Sub Five and he was deployed as a member of D shift (the supervisory shift) at Westfield Mall for the first period of his employment.

[21] However, I think Mr Dudley is quite correct in his anxiety about the suddenness of the change to a new shift pattern for him and the lack of any notification to him. Mr Kay readily accepted at the investigation meeting (as he had previously in correspondence to Mr Dudley) that Sub Five had not communicated its need to change the roster arrangements in any way adequately enough. That is an honourable admission for Mr Kay to make and it is proper for him to do so. In my opinion, Sub Five ought to have made a better job of communicating with its staff about roster changes, which after all would have significant impact on the wellbeing of staff and of their ability to engage with family and friends in a predictable sort of fashion.

[22] Because of this failure to properly alert Mr Dudley to the changes and the reason for them, I find that Mr Dudley has a personal grievance by reason of having suffered a disadvantage as the consequence of an unjustifiable action of his employer. As a consequence, Mr Dudley is entitled to the consideration of remedies.

The termination

[23] Mr Dudley claims that he was unjustifiably constructively dismissed because his employer, Sub Five, unilaterally changed his shift pattern thereby leaving him no opportunity but to consider his employment as at an end.

[24] Sub Five says that Mr Dudley abandoned his employment after Sub Five had made every effort to retain Mr Dudley's services.

[25] In its evidence before the Authority, Sub Five made it clear that the employment agreement between itself and Mr Dudley allowed Sub Five to change the shift patterns and rosters and that that was a habitual experience in the security industry. Mr Kay, for Sub Five, indicated in his evidence that the roster that Mr Dudley had worked up until 17 June 2007 simply did not exist on the same cycle as it had previously, because of the need to marry that so-called D roster to the work pattern of relevant Westfield staff.

[26] Mr Kay told me that Mr Dudley was adamant that he could not work on Tuesday which, under the new arrangements, would have been required if he was to retain his employment on that shift. Mr Kay also told me that Sub Five's preference was that Mr Dudley remain on the D shift that he had been working prior to 17 June because it was satisfied with his work and the contribution he was making.

[27] It was very clear from Mr Kay's evidence that the preference of Sub Five was that Mr Dudley remain on that D shift (the supervisory shift) but that seemed problematical for Mr Dudley because he had family commitments on Tuesday which meant that he could not work on that day.

[28] To try to meet Mr Dudley half way, Sub Five then produced further options for Mr Dudley to consider which would have had the effect of having him remain in employment with Sub Five but working different roster patterns.

[29] Mr Kay indicated that he received no response in the end from Mr Dudley and found that Sub Five had to chase Mr Dudley in order to get his response. In the end, the exigencies of the business were such as to require Sub Five to fill slots on rosters and, having not had a response from Mr Dudley, that is in fact what happened.

[30] In the final analysis, Mr Dudley met with Mr Kay and indicated that he was now ready to work the new roster for his old D shift but by then it was too late and a replacement person had been engaged.

[31] I do not think that this sequence of events provides the factual matrix for a constructive dismissal. Indeed, in my opinion, Sub Five did everything it reasonably could have to meet Mr Dudley's needs, having recognised that the original shift roster he worked was no longer an option.

[32] Sub Five's view was that Mr Dudley had developed a fixed commitment to the original cycle of the D shift roster and believed that that was what he was appointed to on a permanent basis. I have come to the conclusion that the evidence supports that conviction and that in truth once Mr Dudley became convinced that his position on D shift was somehow permanent and that the employer had no ability to move him around, Mr Dudley became resistant to change and was not prepared to contemplate anything that the employer put up.

[33] I am satisfied that the employment agreement employed Mr Dudley as a security guard and nothing more with no particular location or duties contemplated. It follows that Mr Dudley was able to be moved around as the needs of the business dictated and that that is precisely what Sub Five sought to do. Indeed, Sub Five, in my judgement, went out of its way to try to retain the services of Mr Dudley, who it clearly thought highly of. Despite its efforts, Mr Dudley refused to engage with it and eventually, I find, he abandoned his employment. It follows I am not persuaded that Mr Dudley was constructively dismissed.

Determination

[34] Mr Dudley has satisfied the Authority that he had a personal grievance by reason of having suffered a disadvantage as a consequence of an unjustified action of Sub Five, his former employer. He is entitled to have remedies considered in that regard.

[35] However, it is my considered view that Mr Dudley's behaviour contributed to the greatest extent possible in the breakdown of the employment relationship. In my view, once Sub Five breached its obligations to Mr Dudley by failing to alert him to the upcoming roster change (as a good employer would), it immediately accepted that it had been less than satisfactory as an employer and did everything in its power to try to put things right.

[36] However, Mr Dudley was not minded to engage in any collaborative way and seemed fixed on defending his belief that he had been promised a full time job in D shift on a particular shift roster which suited him. As I have found, nothing could be further from the truth in terms of the legal position and accordingly it is my view that Mr Dudley's contribution to his personal grievance is 100%.

[37] It follows that although Mr Dudley has been successful in his personal grievance claim, I find that his behaviour contributed completely to the circumstances to the extent that he is entitled to no remedies.

[38] Mr Dudley's claim for being constructively dismissed from his employment has not been made out and so no remedies are able to be considered there.

Costs

[39] Costs are to lie where they fall.

James Crichton
Member of the Employment Relations Authority