**IN THE EMPLOYMENT RELATIONS AUTHORITY**
**CHRISTCHURCH**

[2014] NZERA Christchurch 159
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| | BETWEEN | SHARON GUISE<br>Applicant |
| | A N D | ALLIED SECURITY LIMITED<br>Respondent |

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| Member of Authority: | M B Loftus |
| Representatives: | Rachelle Boulton and Danielle Mills-Godinet, Counsel for Applicant<br>Chris McDowall, Advocate for Respondent |
| Investigation Meeting: | 26 August 2014 at Christchurch |
| Submissions Received: | At the investigation |
| Date of Determination: | 13 October 2014 |

## DETERMINATION OF THE AUTHORITY

### Employment relationship problem

[1] The applicant, Sharon Guise, claims she was unjustifiably dismissed, albeit constructively, by the respondent, Allied Security Limited (Allied), on 18 December 2012.

[2] Ms Guise also seeks a penalty for what she contends was Allied's deliberate breach of the requirement it act in good faith pursuant to s.4 of the Employment Relations Act 2000 (the Act).

[3] Allied claims Ms Guise's termination was mutually agreed and occurred in accordance with a clause in her individual employment agreement.

**Background**

[4] Ms Guise was employed by Allied Security as a security guard. She commenced on what Allied describes as a *full time employment contract* in November 2011. Contained therein, and pertinent to this claim, is clause 17.1. It reads:

> *The employee acknowledges that the client may request the employer cease provision of the services of the employee at any time.*
>
> *If requested to cease supply of the employee's services the employer will act reasonably to assist the employee in finding alternate work with the employer where practical.*
>
> *The employer or employee may decide to end the employment at this point as they decide. If the employment is terminated this will be effective immediately and clause 16(1-8)* [termination] *may not apply at the employers sole discretion.*
>
> *If no alternative work is available and the employee is not terminated the employee will remain as an employee of the employer and move to the employment "on a casual basis" and may be offered work on a time by time arrangement.*
> *The employer will not be liable for any wage or salary payments nor any termination payment as above clause 16(1-8).*
>
> *Payment for wages and salary will be on a work performed basis at all times and if no work is performed no payments will be made nor required.*

[5] Ms Guise's engagement at her original place of employment was not trouble-free. After various disagreements with colleagues and a claim she had been sexually harassed, she and Allied agreed a transfer to Christchurch Polytechnic Institute of Technology (CPIT). Once there she was regularly rostered to a set shift working 43 hours a week.

[6] While Mr Black's (a former Allied manager) statement of evidence infers the problems continued, he did not give evidence to support his claims and documentary evidence would suggest the contrary. Amidst a chain of email's discussing Ms Guise's sexual harassment complaint and a possible increase to her hours, is Mr McDowall's comment:

> *... the client has requested you remain on your current shifts as your presence on those shifts has ceased a whole lot of issues that had been occurring previous.*

[7] On 10 December 2012, Ms Guise was approached by Mr Black who told her he had received a complaint about her conduct. It was alleged Ms Guise had locked a door which blocked access to toilets for those attending a CPIT staff Christmas party and then refused to unlock it when asked. Ms Guise's response was she was acting as instructed by CPIT's security manager.

[8] A week later, Ms Guise was involved in a verbal altercation with an Allied colleague. Mr Black's statement says while this was one of many such events it was of increased concern as he had spoken to staff about CPIT's dissatisfaction with internal arguments in view of its staff and students only two weeks earlier. Ms Guise denies she had been involved in any earlier altercation and she denies any knowledge of the meeting to which Mr Black refers.

[9] Irrespective of which is correct, this last incident was to have repercussions. It was witnessed by one of CPIT's security staff who wrote to his manager saying:

> *Subject: Shit storm at sully*
>
> *Sorry for emailing you on such a fantastic day but a shit storm has arisen. I am currently sitting here as I write this email and listening to two of the guards having a screaming match in the staffroom. They have been exchanging harsh words and profanities and it is not acceptable if any staff were to walk into the staffroom and hear that then Allied would look like a pack of knobs for want of a better word. I would really like this dealt with as it is unprofessional and immature.*
>
> *I think it is time that the female guard be removed offsite as she is the one stirring up the other guards. I may be stepping over the line by saying that but I do not want the place that I work at to be a haven of anger.*

[10] The CPIT security manager who received the email, responded:

> *Sorry Scott,*
>
> *But it looks as if she is towards the end of her stint at CPIT.*
> *Her general arrogance towards staff and students has caused a number of upsets and now she appears to be into your staff as well.*
> *Not quite the relationship we would engender between all staff, and contractors at CPIT.*

[11] He then forwarded the above to Mr Black along with a covering note which reads:

> *Hi Matthew,*
> *As below you can see that even with extensive encouragement she still maintains an intractable stance, that does not suit our campus staff or Students.*
> *I would rather you employed her elsewhere in a more suitable place than have her here at CPIT any longer.*
> *We hope her replacement here will be easier to work with.*
>
> *Thanks*

[12] In the interim, and between the two incidents, Ms Guise noticed an advertisement for security staff placed by Allied. She initially claimed the advertised job was hers given identical hours which were unique to her. As the evidence unfolded she conceded the advertised job was not hers and the hours not identical but her erroneous belief affected her actions at the time.

[13] Ms Guise goes on to say Mr Black telephoned some 90 minutes prior to her commencement time on 17 December 2012. She says he advised she had been removed from CPIT due to *client frustration*. She says she asked for further particulars but none were forthcoming. She says she then asked if she could work at another Allied site but was told nothing was available as the Christmas rosters had been done. She says she was told she was to be stood down for two weeks and would then be re-employed on a casual basis.

[14] Ms Guise says this raised money concerns. She would have no pay for the next fortnight followed by uncertainty as to the availability of casual work. She therefore asked if she could have her lieu days paid out and was told no. She then asked if she could have her holiday pay. She says Mr Black again said no as *you are not on holiday, you have been removed from site.*

[15] Ms Guise says her response was she then had no choice but to resign, to which Mr Black advised the resignation would have to be in writing and give two weeks' notice. Ms Guise says she asked if the notice could be waived as she needed money to survive to which Mr Black said she would have to email her resignation to Mr McDowall and ask the notice be waived.

[16] Ms Guise followed the conversation with an email to Mr Black advising she was resigning with immediate effect. Mr Black responded with:

> *Sharon you need to acknowledge there is a 2 week notice period in your resignation letter. I'll then ask my manager if its okay to forego that.*

[17] Ms Guise then sent a second resignation reading:

> *I hereby resign my position as a security guard for allied security. I wish this to be effective immediately and acknowledge there is a two week notice period and ask for this to be waived.*

[18] There is some confusion as to exactly when these emails were sent as while both parties produced versions with the same text the dates and times differ. On this I prefer Ms Guise's version as Allied's suggests the second resignation acknowledging the notice period preceded the request. Her version suggests the resignation was initially confirmed in writing around lunchtime on 18 December.

[19] Mr Black then consulted Mr McDowall about waiving the notice period. Mr McDowell advised Mr Black suggest Ms Guise reconsider but added that if she was adamant she wished to go, she could. Mr Black did as instructed but Ms Guise confirmed the resignation. She says she did so as it was the only way she could access much needed money prior to Christmas.

[20] She adds that when she received her final pay there was a deficiency of $579.50 which related to unpaid time in lieu.

**Determination**

[21] As already said, Ms Guise claims she was constructively dismissed. Essentially she says Allied's actions constituted a fundamental breach which deprived her of a previously guaranteed income.

[22] In *Auckland etc. Shop Employees etc IUOW v Woolworths (NZ) Ltd* (1985) ERNZ Sel Cas 136; 2 NZLR 372 (CA) the Court of Appeal held constructive dismissal includes, but is not limited to, cases where:

a. An employer gives an employee a choice between resigning or being dismissed;

b. An employer has followed a course of conduct with the deliberate and dominant purpose of coercing an employee to resign.

c. A breach of duty by the employer causes an employee to resign.

[23] There must also be a causal link between the employers conduct and the tendering of the resignation (*Z v A* [1993] 2 ERNZ 469).

[24] While a simplistic summary of significantly more complex law, the underlying assumption is actions or words of the employer induced a subsequently proffered resignation.

[25] That a unilateral and substantial variation to an employee's terms and conditions is a breach that can render a subsequent resignation a constructive dismissal is well established. That a reduction in pay can constitute such a breach is also well established (*Gorrie Fuel (SI) v Gittoes* EmpC Christchurch CC21/07, 8 November 2007).

[26] Here there was to be a complete removal of pay with no guarantee of any level of restitution at a later date. That, in my view, would in the normal course of events be more than enough to warrant the response of resignation and, here, there can be no doubt about the casual link. Ms Guise's evidence she made it clear she needed money and could only access it by resigning to get outstanding leave payments was both credible and uncontested.

[27] Ms Guise was, I conclude, constructively dismissed. Indeed, and not withstanding that conclusion, I observe it is highly possible this is an actual dismissal and not a constructive one.

[28] The simplest way to view an employment agreement is to describe it as an exchange of labour for reward. For an employer to arbitrarily cease to provide its consideration (the remuneration) amounts, in my view, to total repudiation. It constitutes a sending away and therefore a dismissal.

[29] Irrespective of how I view this, I conclude Ms Guise was dismissed. That raises the question of whether or not Allied can justify the dismissal.

[30] Section 103A of the Employment Relations Act 2000 ('the Act'), states the question of whether a dismissal is justifiable:

> ... *must be determined, on an objective basis,* [by considering] *whether the employer's actions, and how the employer acted were what a fair and*

*reasonable employer could have done in all the circumstances at the time the dismissal ... occurred.*

[31] In applying the test the Authority must consider whether, having regard to the resources available to the employer, it sufficiently investigated the allegations.

[32] Allied's resources are not, in my view, an issue. This is a substantial employer with knowledge of what is required when it addresses concerns with its employees. Those requirements are, as a bare minimum, that the employer put its concerns, allow an opportunity to respond and consider the response.

[33] There can be no doubt that did not occur in this instance. There was no challenge to Ms Guise's evidence about her discussion with Mr Black. In fact Allied never suggested it tried to comply with the above requirements. Its response is it did not have to given clause 17.1 of the employment agreement.

[34] The argument fails to persuade me. Applied the way Allied seeks the clause would allow the company to arbitrarily remove someone from their employ or, at best, disadvantage them in respect of hours of work (and therefore pay) without adhering to statutory requirements.

[35] Those are the requirements of ss.4 and 103A of the Act. Section 4 imposes a duty of good faith. That includes a requirement an employer consult an affected employee when considering a decision that may have an adverse outcome with respect to the continuation of employment.

[36] These requirements are mandatory. They are, in both sections, introduced by the word *must*. An employer cannot contract out of these requirements. Contracting out is what Allied seeks and clause 17.1 is, therefore, unenforceable. The dismissal must then be unjustifiable.

[37] Even if that were not the case Allied would be unable to justify its actions. The evidence shows Allied simply bowed to pressure from CPIT and acted without first conducting its own inquiry or investigation (*G & H Trade Training Ltd v Crewther* [2002] 1 ERNZ 513). Furthermore the lack of inquiry means I have no evidence of wrongdoing on Ms Guise's part or, at least, wrongdoing that may have warranted dismissal. Similarly there is no evidence Allied investigated whether or not it could provide alternate work for Ms Guise as clause 17.1 suggests it must.

[38] For the above reasons I conclude the dismissal unjustified which raises the issue of remedies. Ms Guise seeks wages lost as a result of the dismissal and $10,000 as compensation for hurt and humiliation.

[39] Section 128(2) of the Act provides the Authority must order payment of a sum equal to the lesser of that actually lost or 3 months ordinary time remuneration. That may be increased in the event a successful applicant can show they tried to mitigate their loss.

[40] Ms Guise obtained full time replacement employment on 29 July 2013. In the interim she performed work for another security firm on a casual basis. She calculates the difference between her earnings in that role and what she would have received had she remained with Allied is $8,771.01 and claims the amount in full.

[41] As Ms Boulton accepted in submissions, Ms Guise did not fully mitigate the loss and there was no evidence of attempts to do so beyond her relatively successful attempt in obtaining the casual replacement. In such circumstances I know of no reason why the statutory award should be extended. On the information Ms Guise provided I calculate the loss as $4,911.76 gross. That is payable.

[42] Turning to the claim for compensation. Ms Guise seeks $10,000. She supported her claim with both written and oral evidence about the negative effects of the dismissal and this was supported by that of a friend who commented on the effect dismissal appeared to have on Ms Guise. Against that I have to balance the fact Ms Guise's own evidence lacked depth and her hurt did not preclude her from finding replacement work with alacrity. Having considered the evidence I consider an award of $4,000 to be appropriate.

[43] The conclusion remedies accrue means I must, in accordance with s.124 of the Act, address whether or not Ms Guise contributed to the situation in which she found herself. Allied's failures (see [37] above) means there is no evidence upon which I can make a finding of contribution. The answer is therefore no.

[44] There is then a claim Ms Guise's final pay was 39 hours short (exhibit 'CC'). This is based on the premise she worked either 9 or 12 hours on statutory holidays 12 but only 8 were paid in lieu. The Holidays Act 2003 requires a day in lieu be paid at the employees' relevant daily pay. In the absence of either a roster to show what

Ms Guise would have worked on the relevant days, wage records or a challenge to the claim it is upheld (s.132(2) of the Act). A further 39 hours are payable.

[45] Finally there is a claim for a penalty given Allied's alleged failure to deal with Ms Guise in good faith. The alleged failures, which were established, are those that ensured Ms Guise's personal grievance application succeeded. A penalty would therefore constitute a second impost for the same failure. It is a double jeopardy situation and will not be considered further.

**Conclusion and Orders**

[46] For the above reasons I conclude Ms Guise has a personal grievance as she was unjustifiably dismissed.

[47] As a result the respondent, Allied Security Limited, is ordered to pay the applicant, Ms Sharon Guise, the following:

i. $4,911.76 (four thousand, nine hundred and eleven dollars and seventy six cents) gross as recompense for wages lost as a result of the dismissal; and

ii. A further $4,000 (four thousand dollars) compensation for humiliation, loss of dignity and injury to feelings pursuant to section 123(1)(c)(i) of the Act; and

iii. A further $594.75 (five hundred and ninety four dollars and seventy five cents) being outstanding payment in lieu of public holidays.

[48] Costs are reserved.

M B Loftus
Member of the Employment Relations Authority