

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON OFFICE**

BETWEEN Jackie Hay (Applicant)
AND Security Providers Ltd (Respondent)
REPRESENTATIVES David Perreux for the Applicant
Dave McLeod for the Respondent
MEMBER OF AUTHORITY P R Stapp
INVESTIGATION MEETING Napier, 27 October 2005
DATE OF DETERMINATION 29 November 2005

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

1. Jackie Hay commenced employment with Security Providers Limited (“SPL”) on 3 March 2004, as a security officer.
2. Ms Hay says that she left a full time position with another employer to take up the position with SPL. She says the terms were for 40 hours work per week. Johannes Marinus, SPL’s managing director, says that he offered Ms Hay a casual position because he could not guarantee her any full time hours. There was no copy of an intended employment agreement provided by Mr Marinus. Ms Hay says that she continually requested more hours from Mr Marinus as previously agreed.
3. On or about 21 June 2004 Ms Hay and Mr Marinus signed an employment agreement, which was obtained from the Department of Labour web site by one of them. The agreement made provision for a “*full time security officer*”. It also made provision for:

“Employee’s normal hours of work shall be 40 hours per week ...”
4. Ms Hay was paid \$12 per hour under the terms of the agreement as agreed.
5. A notice period of two weeks is implied in the agreement (clauses 11 and 12). The agreement also has an abandonment of employment clause where the employment can be terminated

after three days' absence by the employee from work, providing the employer makes reasonable efforts to contact the employee. The agreement was signed to purportedly apply from the start of Ms Hays' employment (3 March 2004).

6. Mr Marinus says that from 21 June 2004 Ms Hay could work 40 hours per week if she wanted the hours, but instead, she decided to work less hours. He says it was her decision to work less than 40 hours. She says she was never offered work and he avoided providing work for her.
7. Mr Marinus says that Ms Hay told him, his wife Gertruda Bruynes, and another employee, Jerry de Vries, that Ms Hay had decided to reduce her hours and she was overheard by them saying so. Ms Hay denied this, but in context, she says that she did say she might reduce her hours.
8. On 11 November 2004, Mr Marinus required Ms Hay to go home and rest because she was too tired to work her shift. She was not rostered the next day, 12 November 2004. She returned to work on Saturday, 13 and Sunday, 14 November 2004.
9. On Monday 15 November 2004, Ms Hay told Mr Marinus that she would not work the next Saturday for family reasons: she wanted to attend her son's school prize giving in Palmerston North.
10. However, Mr Marinus says he told Ms Hay she would need to fill out a leave form for him to make a decision. He says she was not happy about this and she told him that she was leaving, which she did.
11. Ms Hay says that their discussion involved Mr Marinus getting angry about her decision to decline to work and his reply was, "*if you take Saturday off, don't come back*". Mr Marinus conceded he said this. However, he denied saying, when Ms Hay asked if he was dismissing her, "*yes I am*". He denied that Ms Hay requested her final pay and holiday pay as she was leaving. Mr Marinus says he tried to contact Ms Hay by telephone to find out what she was doing.
12. Ms Hay made an appointment on 16 November to go to Work and Income for assistance and arranged to return her uniform to work on 18 November.
13. Ms Hay returned to work with her uniform on 18 November. There was an altercation that she says involved her being assaulted by Mr Marinus when she turned to leave and him taking

possession of the uniform which dropped to the floor as she was opening the door. Ms Hay was insistent that he give her a receipt for the uniform. He did not provide it quickly enough from the computer for her. Ms Hay says that during the altercation she received scratches on her left arm that were witnessed by a Work and Income case officer, Jackie Withey, who she had a later appointment with, and Senior Constable Lee Snee, when she laid a complaint of assault with the Police. Mr Marinus and Gertruda Bruynes denied that there was any assault.

14. In the meantime, Ms Hay sought advice from an employment advocate who wrote to Mr Marinus on 18 November 2004 and 6 December 2004 raising a personal grievance and requesting details about Ms Hay's pay, timesheets and hours of work and claiming that Ms Hay had been dismissed from her employment.
15. Mr Marinus replied in writing on 29 November 2004 claiming that Ms Hay had abandoned her employment. He denied that he had dismissed her.
16. Subsequently, records of pay and timesheets have been provided by SPL and these are detailed in the table below. Also included are the hours and pay Ms Hay has claimed:

Week Ending	Total Hours	Gross Pay	PAYE Tax	Net Pay	Hours Claimed	Pay Claimed
07 03 2004	25	\$ 300.00	\$ 55.63	\$ 244.37	15	\$ 180.00
15 03 2004	21	252.00	44.98	207.02	19	228.00
21 03 2004	-	-	-	-	19	228.00
28 03 2004	14.5	174.00	28.18	145.82	25.50	306.00
04 04 2004	12	144.00	23.32	120.68	28	336.00
11 04 2004	19	246.00	43.65	202.35	21	252.00
18 04 2004	11	132.00	21.38	110.62	29	348.00
25 04 2004	5	60.00	9.72	50.28	35	420.00
02 05 2004 ¹	0	0	0	0	0	0
09 05 2004	22	264.00	47.64	216.38	18	216.00
16 05 2004	39	468.00	92.93	375.07	1	12.00
23 05 2004	30.5	366.00	70.29	295.71	9.50	114.00
30 05 2004	37.25	444.00	87.60	356.40	2.75	33.00
06 06 2004	32	384.00	74.28	309.72	8	96.00
13.06 2004	36.5	438.00	86.27	351.73	3.5	42.00
20.06 2004	27	324.00	60.96	263.04	13	156.00
27 06 2004	28.25	341.00	64.34	276.66	11.75	141.00
04 07 2004	43.25	516.00	103.59	412.41	0	-
11 07 2004	32	384.00	74.28	309.72	8	96.00
18 07 2004	39	468.00	92.93	375.07	1	12.00
25 07 2004	51	612.00	124.90	487.10	0	-
01 08 2004	59	708.00	146.21	561.79	0	-
08 08 2004	62.5	750.00	157.84	592.16	0	-

¹ Agreed did not work.

Week Ending	Total Hours	Gross Pay	PAYE Tax	Net Pay	Hours Claimed	Pay Claimed
15 08 2004	36	432.00	84.94	347.06	4	48.00
22 08 2004	41	492.00	98.26	393.74	0	-
29 08 2004	48	576.00	116.91	459.09	0	-
05 09 2004 ²	61	732.00	151.69	580.31	0	-
12 09 2004	60	720.00	189.45	530.55	0	-
19 09 2004	48	576.00	143.41	432.59	0	-
26 09 2004	39	333.00	63.00	270.00	1	12.00
03 10 2004	42.5	333.00	63.00	270.00	0	-
10 10 2004	35	420.00	93.17	326.83	5	60.00
17 10 2004	6.5	78.00	12.63	65.37	33.5	402.00
24 10 2004	20	240.00	42.31	197.69	20	240.00
31 10 2004	28	336.00	66.13	269.87	12	144.00
07 11 2004 ³	24	288.00	52.97	235.03	16	192.00
14 11 2004	24	288.00	52.97	235.03	16	192.00
Total	\$1,159.75	\$13,619.00		\$10,877.24	375.5	\$4,506.00

17. During the Authority's investigation meeting the respondent produced timesheets. The applicant confirmed each time sheet was correct, but noted that since she had signed them, additions had been made to some of the documents. The additions appear to be to clarify the gross pay, PAYE and nett pay. SPL also produced a Work and Income verification form of Ms Hay's earnings. The employer verified that the applicant's total gross wages for the 26 weeks prior to her ceasing employment was \$9,785. Her total gross wages for the four weeks prior to ceasing employment (excluding holiday pay) was \$942 and that her gross pay for holidays was \$587.10. At the time of verifying these earnings, no holiday pay had been paid to the applicant. This was paid much later upon request from Ms Hay's representative. Ms Hay had not seen and had not signed her final timesheet dated 14 November 2004.

The issues

18. First, was Ms Hay employed from 3 March 2004 as a fulltime security officer to work 40 hours per week? Is she owed any underpayment of wages in the amount of \$4,056 for the 375.5 hours that she did not work?
19. She is also claiming a day in lieu for working on Queens Birthday.
20. Second, is there any significance in Mr Marinus' conclusion on 29 November 2004 that Ms Hay abandoned her employment from 15 November 2004 when she did not return to work,

² \$300 paid in cash on 10/09/2004 and signed for by the applicant

³ Cash paid in full and signed for by the applicant

except to return her uniform on 18 November 2004? Did Mr Marinus make reasonable efforts to contact Ms Hay during this time?

21. Third, was Ms Hay dismissed on 15 November 2004? What did the parties say to each other? Alternatively, did Ms Hay leave her employment of her own accord?

What were the arrangements for Ms Hay's employment?

22. How the Department of Labour agreement was produced from the Department's web site, and who obtained it from the site, is disputed by Ms Hay and Mr Marinus. The retrospective nature of the agreement, as it was signed and dated, is also in dispute. Ms Hay says the agreement applied retrospectively to the date she first started work at SPL to get paid 40 hours per week. Mr Marinus says she was only employed to work the hours available and after the agreement was signed he offered her full time hours but she decided later to work reduced hours.
23. Considering the parties' conflict over these matters the agreement is not sufficient to enable me to determine that Ms Hay was employed full time when she started. This conclusion is supported by the hours Ms Hay worked, and that she signed her timesheets without making any written complaint about her hours except for late payments. Subsequently the hours did increase for a period (4 July to 19 September). The terms of the agreement, from the date it was signed, are consistent with more hours being provided. However, from the time the parties signed the agreement Ms Hay's reasonable expectation to be paid full time is affected by the following factors:
- Despite Ms Hay's claims for full time work and Mr Marinus not providing them from the start of her employment, he signed an agreement purporting to be full time and her hours did reflect that from 4 July.
 - She says that she did say she might reduce her hours.
 - There was no express provision about applying the agreement retrospectively and to pay back pay for hours not worked.
 - There is a conflict about who and how they obtained the agreement. The agreement is a standard agreement for the parties using the agreement builder to adapt it for their circumstances.

- Ms Hay signed her time sheets and her only complaint was about late payment (not underpayments).
- That she was sent home on one occasion because of a risk due to her tiredness.

24. I have a real doubt about the parties' intentions to apply the agreement retrospectively to the start of Ms Hay's employment because of the dispute about whom and how they obtained the agreement from the Department of Labour web site. There is also an issue about Mr Marinus' lack of computer literacy skills and having to rely upon Ms Hay and his understanding of the terms of the employment agreement. This is supported by the evidence of his slowness to obtain a receipt from the computer for the uniform Ms Hay returned on 18 November and Mr Marinus relying on the abandonment clause (inaccurately).
25. Furthermore, Ms Hay has relied upon leaving a full time job with another employer to work full time with SPL from the start to support her claim. The weight I have given to this evidence is contrasted again in Ms Hay not formally complaining about her hours, if they were full time, and had variable hours from the start. She signed her time sheets and the only problem she raised was an issue about late payment. She could well have talked to her partner and another witness, both of whom deposed having discussions with Ms Hay about hours of work, but I conclude that their evidence was not independent enough to support her claims. Indeed the respondent's evidence was that Ms Hay wanted to reduce her hours and she conceded that she did say she might reduce her hours. Given these conflicts I hold that the applicant has not established her claim for unpaid wages for hours that were not worked.
26. Therefore, I conclude that Ms Hay was employed to work varied hours at first, but when the employment agreement was signed the situation changed to enable her to work full time from 21 June. However she is not entitled to payment in the weeks where the hours are less than 40 because she did not work and did not sufficiently establish that she was available to work those weeks where there was less than 40 hours worked. She never formally raised any complaint during her employment.
27. She signed her timesheets. Also impacting on the claim is the conflict about whether or not it was her choice not to work all the hours available and she has not established that Mr Marinus deliberately avoided providing her with work. Other deposed evidence from Ms Hay's partner suggested Mr Marinus made too many demands on Ms Hay's time. I have given the benefit to the employer in the absence of the applicant providing sufficient details about Mr

Marinus avoiding providing her with work. Therefore Ms Hay has not established her claim for retrospective payments for hours she did not work.

The discrepancies in the pay records

28. This relates to the pay details and documents available. Ms Hay produced bank statements of SPL's deposits for her pay and manual deposits she made when she had been paid in cash during her employment. She has also produced details provided by the employer to the IRD.
29. Using the payslips and bank statements Ms Hay has calculated that SPL paid her \$10,877.24 net. However she has calculated that she was actually only paid \$9,563.93 net including the cash deposits in her bank statements that she assumed were payments received in cash from SPL. She did not include in her calculation the sums that she used from the cash before banking it.
30. During my questioning, she disclosed that she may have used some cash before banking the money, at least on one occasion for the payment of a bill. I determine that she has not established that SPL has underpaid her, despite a discrepancy in the sums between SPL's records, her deposits and the IRD information provided by her of the details of her gross and net and PAYE payments. It may be a tax issue about correct deductions. Any matters relating to tax are not within the Authority's jurisdiction. No argument has been put before me or a request made to scrutinise the correctness of the actual wage payments against Ms Hay's entitlement. Ms Hay did not reconcile the cash amounts she says she used and the amounts banked in her total but accepted the cash record on the timesheets. These factors might explain the differences. I am not prepared to make any orders in this matter.

Claim for Queens Birthday 6 June 2004

31. Queen's Birthday on 6 June 2004 was a public holiday and taken on Monday, 7 June 2004. Ms Hay says she worked during this day. However, the timesheets show no hours recorded for the day whereas they record hours of work for other days. She has not satisfied me that she would have actually worked on the day, but she has been paid for that day. I am further supported by her concession that the evidence suggests it is possible she did not work that day. The claim is dismissed.

Was Ms Hay dismissed on 15 November 2004 or did she leave or abandon her employment?

32. Mr Marinus has relied upon a reason to explain the ending of the employment relationship, ie that Ms Hay abandoned her employment. Ms Hay went to work was on 15 November when she left. The parties met on 18 November. The explanation of abandonment does not satisfy me as to the reason for the termination.
33. Ms Hay certainly did not abandon her employment. Mr Marinus informed Work and Income of the reasons for her termination on 17 November 2004 and the parties met on 18 November (both being inside the 3 days required under the employment agreement). These factors hardly relate to an abandonment of employment. It is probable that Mr Marinus has simply relied upon a term in the contract as a way of explaining what he thinks happened.
34. The reason for the termination has more to do with Ms Hay's decision to take Saturday 22 November off work and Mr Marinus's decision that she had to apply to him for the leave to make a decision instead of making the decision immediately. He was entitled to do this since the annual leave would have to be in advance and to cover her roster. His request however does not seem reasonable if it had not been required before, and where they dispute the circumstances of the existence of the forms, and access to them. Neither party was in a position to put demands on each other because the applicant was not entitled to any annual leave and Mr Marinus claimed the applicant chose not to work the full hours available and he had condoned her working less than 40 hours. Nevertheless Mr Marinus and Ms Hay have a dispute about what they said to each other on 15 November.
35. Mr Marinus conceded that he made the comment "*if you take Saturday off, don't come back*" at which point Ms Hay says that she was dismissed. She went to Work and Income, she got a representative and arranged to return her uniform. Ms Hay's representative wrote to Mr Marinus on 18 November with a general allegation and request for information. Mr Marinus made no immediate contact with the representative considering his later view that the applicant had abandoned her employment. Mr Marinus replied in a letter dated 29 November, which Ms Hay says was received on 6 December. Her representative provided more details of Ms Hay's allegation on 6 December. The timing of the exchange of letters does not assist me determining the matter.
36. I am obliged to consider whether Ms Hay repudiated her agreement with SPL by deciding to leave her employment that might have involved any anticipatory breach to leave regardless of Mr Marinus's request for Ms Hay to apply for leave. I am satisfied that she did not repudiate

her employment because Mr Marinus says she did not ask for her wages and holiday pay upon leaving. The request for pay details etc came via the applicant's representative later and does not clarify the position in regard to any request on 15 November.

37. The factors that relate to Ms Hay repudiating her agreement are:
- Mr Marinus says that she said she was leaving. She accepted she said this (her written response). She did leave but because it related to a dispute over being dismissed makes it inconclusive that it was at her initiative to leave permanently.
 - Ms Hay decided to take time off work a week before her son's prize giving, which was on a day that she was rostered to work. She did not welcome Mr Marinus' request for her to apply to him for leave and disputes that he requested her to apply on a form. She accepted telling Mr Marinus she was leaving but she says only after receiving confirmation of being dismissed.
 - Mr Marinus says she requested her final pay and holiday pay. This was denied by Ms Hay and she did not get paid until after the intervention of her representative and when it became part of the wider claims against SPL.
 - Mr Marinus denied that he confirmed dismissing her. However he did concede that he said "*if you take Saturday off, don't come back*". The favourable interpretation of this comment for Mr Marinus is that he gave her an ultimatum and that she had at least five days to decide what to do. Instead she left work and did not return except to return her uniform that is consistent with an immediate ultimatum.
 - Ms Hay returned her uniform by arrangement (that was not challenged).
38. On balance it is probable that Ms Hay did not repudiate her agreement although her actions have contributed to the stand off and her termination from her employment. The next consideration is whether or not Ms Hay was dismissed.
39. I have to weigh the reliability of the witnesses' evidence. I am not satisfied that Gertruda Bruynes heard what was actually said on 15 November at the time or is independent enough for me to give her evidence weight where her written evidence was more of an opinion than establishing a fact. I have also given her evidence less weight elsewhere.
40. Mr Marinus says that he made attempts to contact Ms Hay by telephone. He was supported by Gertruda Bruynes that he made the calls. However I hold he did not do enough to contact

Ms Hay, or produce enough evidence to establish the extent of his telephone calls, despite being supported by Gertruda Bruynes. The purpose of the telephone calls seems related to Mr Marinus's decision to use the abandonment clause and not necessarily to reassure the applicant what his position on her employment was.

41. The parties appear to have made no attempt to resolve the issue or clear the air on 18 November when they met because that meeting was acrimonious, and by that stage neither party seemed prepared to move their ground. Furthermore that meeting involved Ms Hay returning her uniform and her employer taking no action to reassure her about any availability of her job.
42. Furthermore if Ms Hay has been an opportunist, on her wages claim and the claim for a day in lieu on Queens Birthday, this does not make her evidence unreliable, given she honestly tried to explain her claim. She genuinely believed she worked on Queens Birthday although her evidence has fallen short of establishing it.
43. There are discrepancies in the wage records but there is not enough evidence to make any conclusion that there is something deliberately wrong or that they are simply mistakes and inaccuracies. Mr Marinus made his concession about saying "*if you take Saturday off, don't come back*" at the Authority's investigation meeting and in my opinion he could have reasonably provided this in his written statement to be reliable.
44. A fair and reasonable employer would have attempted to provide Ms Hay with reassurances about her employment on 15 November and 18 November. The evidence suggests that Mr Marinus did not provide Ms Hay with such reassurances and his attempts to contact her were inadequate and without a clear purpose I hold.
45. I therefore conclude that Ms Hay was dismissed from her employment with SPL and that it was unjustified in that the employer has relied upon the grounds of abandonment (inaccurately). I hold his words were sufficient to dismiss Ms Hay, notwithstanding whether or not the words were qualified with another comment later. They have an immediacy about them that supports Ms Hay reasonably coming to a conclusion that she was being dismissed. Ms Hay came to a reasonable conclusion that she was being dismissed and this was reflected in her representative's letters dated 18 November and 6 December.
46. Ms Hay is entitled to remedies for her personal grievance. She has requested lost wages. She was out of work for 4 weeks from 15 November 2004 to 8 December 2004. She has claimed \$1,920 for the four weeks.

47. She obtained part time work that started on 8 December, and had 2 part time jobs from 19 January 2005. She has claimed a loss of \$1,551 pay difference.
48. I am satisfied her evidence establishes these claims above. The applicant's decision not to work on the Saturday and her reaction to being required to fill out a leave form to take leave was an aggravating feature to cause Mr Marinus' reaction. Thus the applicant has contributed to the situation giving rise to the personal grievance. The responsibility rested on the employer to respond to the situation more appropriately and to manage it. Therefore, Jackie Hay is entitled to the sum of \$3,471 total loss of wages, for the two claims above. But I have discounted this by 30% for contribution.
49. Further, this is a matter for compensation as claimed, but at the lower end of the scale because the evidence from Ms Hay was minimal. I accept that there was an impact on her having to get assistance from Work and Income, there was a financial impact and her feelings were affected by Mr Marinus telling her "*if you take Saturday off, don't come back*". The altercation on 18 November related to Ms Hay returning her uniform and Mr Marinus' slowness to provide her with a receipt. It was an aggravating feature linked to the dismissal on 15 November where the applicant raised it with Jackie Withey and Senior Constable Lee Snee, and whatever happened, she left the office upset and agitated. Considering the applicant's contribution I have deducted 30% from \$4,000 compensation for humiliation, loss of dignity and injury to feelings awarded under section 123 (c) (i) of the Act.
50. Since the employment relationship problem really relates to a personal grievance I am not disposed to resolve the problem by penalties and interest because they would not be appropriate in the circumstances. The underpayment of wages claim is dismissed. The claim for Queens Birthday statutory holiday pay for a day in lieu is also dismissed.
51. In conclusion I order Security Providers Limited to pay to Jackie Hay the sum of \$2,429.70 lost of wages and \$2,800 compensation for her personal grievance.
52. Costs are reserved.