IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2013] NZERA Auckland 311
5399870

	BETWEEN	RONGOMAI HOKIANGA Applicant
	AND	ARMOURGUARD SECURITY LIMITED Respondent

Member of Authority:	R A Monaghan
Representatives:	R Hokianga in person A Bennett, counsel for respondent
Investigation Meeting:	1 July 2013 at Rotorua and 8 July 2013 at Wellington
Submissions received:	12 July 2013
Determination:	22 July 2013

DETERMINATION OF THE AUTHORITY

A. Mr Hokianga's dismissal was justified.

Employment relationship problem

[1] Armourguard Security Limited (Armourguard) employed Rongomai Hokianga as a part time security officer at its Rotorua branch. It dismissed him on the ground of serious misconduct for his failure to honour conflict of interest provisions in the parties' employment agreement.

[2] Mr Hokianga had been a member of the armed forces, and was interested in security education and training. In 2011 he was seeking to establish a private training establishment, and was carrying out preliminary work with a view to applying for NZQA accreditation. He says he raised his interests in training with the then-branch manager Henry Betham.

[3] On 29 April 2011 he and his wife registered a company named Astra Group Education Services Limited (Astra Group), with both of them as the directors. Mr Hokianga was originally registered as the sole shareholder, although his wife replaced him shortly afterwards. The training services were to be provided through that company.

[4] For accreditation purposes Astra Group was obliged to show a commitment to providing a pathway to employment, whether with it or another security organisation, so Mr Hokianga was developing an employment programme he called the Totara Development Programme. The programme aimed to provide work experience to trainees. It emphasised building rapport with local business owners, and ultimately building trust in security staff and their ability to work in high profile positions

[5] For accreditation purposes Astra Group was also required to show an adequate level of interest in the programme, and provide evidence of that interest in its application for accreditation. In an attempt to gauge the level of interest Mr Hokianga prepared and sent a generic letter dated 1 August 2011 to 'Chief Executive Officers' and 'General Managers.' The mailing list for the letter comprised Wellington-based government departments. One of the recipients was the Ministry of Social Development, which was a client of Armourguard's in Rotorua.

[6] The letter began:

> *Astragroup Education Services Limited is proposing to deliver security services free of charge to selected businesses in the Bay of Plenty, Rotorua area. Our aim is to provide your business with guard services, mobile services, security surveys or a combination of these services as part of our Totara Development Program.*
>
> *The Totara Development Program is an eight week placement program conducted on a quarterly basis in total 32 weeks of free security services for your business. …*

[7] The letter ended by advising that placements would be supervised, and Mr Hokianga could be contacted for further details. It read as if an offer of free security services was being made to agencies which included Armourguard's clients. It did not limit itself to saying expressions of interest in such a programme were being sought. Mr Hokianga signed it as the managing director of Astra Group.

[8] The letter was drawn to Armourguard's attention. The Rotorua branch manager who had commenced in that position in July 2011, Daniel Matata, began an investigation.

[9] Mr Matata met with Mr Hokianga on 26 August 2011. Although Mr Hokianga had very recently made unrelated complaints concerning terms and conditions of his employment, Mr Matata explained that the meeting was to discuss the 1 August letter. He asked Mr Hokianga to explain his interest in Astra Group, what Astra Group was, and what was being offered in the 1 August letter. He was not satisfied with the responses, and convened a formal disciplinary meeting on 2 September 2011.

[10] During the 2 September meeting Mr Matata explained his concerns that: Astra Group appeared to be in competition with Armourguard; an offer of free security services to Armourguard's clients could lead to a reduction in the work available to Armourguard; this appeared to be a conflict of interest; and Mr Hokianga had not approached him to discuss the venture.

[11] Mr Hokianga did not provide Mr Matata with the account set out in this determination. When asked questions aimed at clarifying his plans or explaining the letter, he tended to respond by asking Mr Matata what he thought. He did not respond at all to some questions.

[12] Mr Matata found this unsatisfactory, and a further meeting went ahead on 8 September. The questions asked, and the responses received, were essentially the same as those covered in the 2 September meeting.

[13] Mr Matata concluded that Mr Hokianga had failed to honour his conflict of interest and disclosure obligations. This constituted serious misconduct, and Mr Hokianga was summarily dismissed as a result.

[14] Mr Hokianga does not accept there was any conflict of interest or any breach of the employment agreement. He says he disclosed his intentions to Mr Betham, or alternatively that Armourguard was made aware of his plans during a conversation also heard by his wife. He says Mr Betham should have briefed Mr Matata when Mr Matata took over as branch manager. Accordingly he does not accept his dismissal

was justified, and has raised a personal grievance on the ground of his unjustified dismissal.

Issues

[15] The test of justification for the dismissal is set out in s 103A of the Employment Relations Act 2000. It concerns 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. In applying the test the Authority must consider whether the employer: sufficiently investigated the allegations before dismissing the employee; raised its concerns with the employee before dismissing the employee; gave the employee a reasonable opportunity to respond; and genuinely considered the explanation before dismissing the employee.

[16] The issues are:

(a) did Armourguard conclude on reasonable grounds that Mr Hokianga breached the conflict of interest provisions in that,
   - there was a conflict of interest,
   - he failed to disclose the conflict, and
   - he proceeded without the express consent of his employer;

(b) did Armourguard reach this conclusion after following a fair and reasonable procedure; and

(c) was the decision to dismiss fair and reasonable.

Breach of the conflict of interest provisions

1.Was there a conflict of interest

[17] The Armourguard Security Limited Security Officers and Cash Processing Centres collective employment agreement (the cea) was the applicable agreement. It provided at clause 29:

> *An employee employed as a weekly employee shall not enter into any other employment agreement or business interests which may conflict with his/her employment obligations without the employer's express agreement.*[1]

[18] Armourguard also had a 'guide to ethical conduct policy'. Mr Hokianga signed a document certifying he had read and understood the contents, although he said in evidence that he did not believe he had seen it. The contents included a section on conflicts of interest which emphasised the importance of making decisions based on the needs of the company – not on personal interests or relationships. Outside employment with a competitor was prohibited if it interfered with an employee's responsibilities to the company. If such employment was being considered prior approval from the employee's manager was required. The human resources department was to be notified if the employee or a family member had a significant financial interest in a competitor.

[19] On its face the 1 August letter was an offer by an employee to provide, through an entity of his own, services in direct competition with those provided by his employer. Mr Hokianga was placing the interests of himself and his business ahead of those of his employer in circumstances where there was an overlap. His interests were plainly in conflict with those of his employer.

[20] If Mr Hokianga was purporting to offer the services as part of a business providing security training, rather than as part of a business providing security services, that difference is not material here. The material point is that, regardless of the context in which he planned to provide them, his provision of free security services could severely undermine Armourguard's business of providing paid security services.

[21] Mr Hokianga explained the purpose of the 1 August letter in the Authority - although not to Armourguard - as I have set out. Even that explanation, however, signalled a conflict of interest which should have been recognised and raised with Armourguard.

[22] I find Armourguard concluded on reasonable grounds that Mr Hokianga had a conflict of interest.

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[1] This provision was superseded by a cea which was renegotiated after Mr Hokianga's employment ended, but had retrospective effect. The material concerns are unaffected.

2. Did Mr Hokianga fail to disclose the conflict

[23] Even on Mr Hokianga's evidence to the Authority there was no disclosure. At best, in or about March or April 2011, he had a brief and generalised discussion with Mr Betham about his interest in security training. He told Mr Betham he was considering security training as a business. Mr Betham said: *'sounds interesting, let me know how you get on'*. There was no mention of an intention to register a company, Astra Group, or any indication that Mr Hokianga was pursuing any activity towards achieving its accreditation as a private training provider. At that point Mr Hokianga had not even considered the possibility of offering free security services as part of a work experience programme, let alone disclosed it to Mr Betham.

[24] Armourguard concluded on reasonable grounds that Mr Hokianga failed to disclose the conflict.

3. Did Mr Hokianga obtain consent

[25] Both Mr Betham and Mr Matata denied consenting to Mr Hokianga's intended course of action.

[26] Mr Hokianga's discussion with Mr Betham in March or April - which Mr Betham did not in any event recall - did not amount to a grant of consent to anything. It was merely a conversation. Further, Mr Betham said Armourguard had a consent procedure which included escalating such requests to the company's head office for approval, and requiring consent to be issued in writing. No such procedure was embarked on in respect of Mr Hokianga.

[27] Armourguard concluded on reasonable grounds that no consent had been given.

Fairness of the investigation procedure

[28] I find Mr Matata:

- sufficiently investigated the allegations about Mr Hokianga's conduct,
- put to Mr Hokianga his concerns about the 1 August letter and its implications for Armourguard's business,

- gave Mr Hokianga a reasonable opportunity to respond, and
- took the response into account before making the decision to dismiss.

[29] Unfortunately, during the meetings with Mr Matata Mr Hokianga refused to accept that Mr Matata had a valid concern about his actions, and failed to appreciate it was in his best interests to answer the concern. Despite being warned of the possibility of a disciplinary outcome, he believed that his business plans were confidential information belonging to his business and he was not obliged to disclose them. He did not consider it necessary to obtain assistance during the disciplinary process, although the opportunity was offered. He did not provide any explanation of his actions, and viewed with unwarranted suspicion the attempts to obtain an explanation. He did not appreciate Mr Matata's reasonable and constructive point that early engagement about his proposal with Armourguard could have led to an arrangement of benefit to him.

[30] Mr Hokianga accused Mr Matata of adopting a hectoring and bullying attitude during the disciplinary process, but I do not accept that. Mr Matata asked questions he was entitled and even obliged to ask. He was entitled to press for answers when Mr Hokianga attempted to deflect the questioning or was unresponsive.

[31] Mr Hokianga also said he expected Mr Matata to know he had obtained consent from Mr Betham. If Mr Matata did not know of that, any failure lay in Mr Betham's failure to brief him on the matter.

[32] However Mr Hokianga did not have consent from Mr Betham. Even if he genuinely thought he did, it was incumbent on him to offer that information to Mr Matata when an explanation was sought. He was not entitled to take the stance that Mr Matata had an obligation to be aware of it without it being raised.

[33] Finally, Mr Hokianga said in evidence that he responded to Mr Matata as he did because he wanted time to consider his answers. However he did not say so at the time, and when he could have. In any event I find it likely his overriding concern was his view that Mr Matata was not entitled to the information sought. I find it unlikely that further reflection would have led to any more fulsome response.

Fairness and reasonableness of decision to dismiss

[34] At the time the decision to dismiss was made Mr Matata had available to him the 1 August letter appearing to offer free security services to a group which included at least one of Armourguard's clients. Mr Hokianga was resisting his attempts to obtain an explanation, and had not provided an explanation. No evidence of appropriate disclosure to, or consent by, Armourguard had been offered.

[35] In the circumstances at the time a fair and reasonable employer could conclude there was a conflict of interest, and that Mr Hokianga was in breach of the employment agreement. The threat to its business, and the refusal to acknowledge the threat, aggravated the breach. Dismissal was an action a fair and reasonable employer could take.

[36] For these reasons I find the dismissal was justified.

[37] This is an unfortunate outcome for Mr Hokianga, particularly as he was highly regarded as a security officer. However his reaction to Armourguard's concerns was misconceived, and the misconception persisted during the Authority's investigation. He did not accept that his plans involved a conflict of interest, even when Mr Matata explained the nature of the conflict to him. He thought the requests for an explanation were unwarranted, but if he had been willing to listen and respond constructively to Mr Matata it is possible the parties could have resolved the matter.

Costs

[38] Costs are reserved.

[39] The parties are invited to resolve the matter. If they are unable to do so any party seeking an order for costs shall have 28 days from the date of this determination in which to file and serve a memorandum on the matter. The other party shall have a further 14 days in which to file and serve a memorandum in reply.

R A Monaghan
Member of the Employment Relations Authority