

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

Determination Number: WA 121/07
File Number: 5052788

BETWEEN Upokoina Kinney
Applicant

AND Security First Holdings Limited
Respondent

Member of Authority: G J Wood

Representatives: John Gwilliam for Applicant
Wayne Gazley for Respondent

Investigation Meeting: 7 August 2007

Determination: 29 August 2007

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The applicant, Ms Upokoina Kinney, claims that she was unjustifiably constructively dismissed by the respondent (Security First). This followed her allegedly being subjected to a hostile and unsafe work environment and being suspended over a disciplinary issue, latterly without pay. Security First claims that Ms Kinney was treated fairly throughout the course of her employment.

The Facts

[2] Ms Kinney commenced employment as a security operator at Security First on 21 December 2005. Security First installs and monitors electronic security alarms. Around 3800 alarm systems are monitored at any given time. The system relies on a software system known as Patriot, which allows such a large number of systems to be monitored at the same time.

[3] Ms Kinney worked on shift, both during the day and at night, monitoring the alarms. For long periods at night she worked on her own. In fact her shifts were often for 12 hours and she averaged 43 hours per week, but she was quite content to work these shifts throughout her employment. I accept that while the hours on night shift were long and there was no other staff on duty, there were sufficient opportunities for workers to take breaks and the work itself was seldom demanding because it was night time.

[4] Like all new staff Ms Kinney worked alongside existing operators for her first three months. During that time she was shown how to operate the Patriot system, which was prone to breakdowns of varying levels of severity, sometimes involving the necessity to call in expert IT contractors. As part of her training Ms Kinney was made aware that there was a backup system to Patriot known as Telemate. That system was, however, far less user friendly and a lot more difficult to operate accordingly.

[5] From 1 February 2006 Mr Wayne Gazley took up a major shareholding in Security First and became its managing director.

[6] It was clear that Ms Kinney was finding work difficult, although she did not necessarily raise this with management at Security First. For instance, Ms Kinney was sent on a telephone skills course run by Kiwihost at her own suggestion. While Ms Kinney claims that Mr Gazley commented on her attendance in a negative light I conclude that this was not the case. I do so because of the evidence of Mr Gazley and others, which was supported by the staff meeting notes circulated at the time. All this evidence indicated that Mr Gazley congratulated Ms Kinney on having taken and passed the course.

[7] The issue of telephone skills training is one of many events where the recall of the witnesses differed. The Authority can have no certainty as to what occurred many months before. I must therefore determine the facts on the balance of probabilities i.e. what is more likely than not to have occurred. I have no doubt that Ms Kinney genuinely believes that Ms Gazley negatively criticised her on regular occasions, but the weight of the evidence did not support those claims, as can be highlighted by the above example and the independent assessment available from the videotape of the disciplinary meeting.

[8] It was following an incident in August 2006 when Ms Kinney had overlooked calling the Police after an “activation” on a client’s premises that she went to the Hutt Union and Community Health Services and was prescribed anti-depressants and three days off work. While Ms Kinney’s supervisor Ms Sharon “Lot” Webb did not take that issue up in a disciplinary sense, she did raise it

with Mr Gazley. I accept that Mr Gazley discussed the matter with Ms Kinney the next day and told her that it was vital that correct procedure be followed. I accept that Mr Gazley would have come across as stern and determined to have such issues dealt with properly in the future, but that he was not abusive of Ms Kinney. As noted above, despite such a serious allegation, there was no independent supporting evidence of this sort of behaviour in any of the material put before the Authority.

[9] On Ms Kinney's return from her three days sick leave she did not give any reason for her absence. In particular, I find that she did not inform Security First that she was under stress because of her conditions of work and of her treatment by Mr Gazley to a sufficient degree to alert it that further action was required in terms of its health and safety obligations.

[10] A few days later there was another incident involving Ms Webb, because Ms Webb required Ms Kinney to work through a problem rather than provide direct assistance, perhaps because the incident happened late at night. I accept that this led to a difference of opinion between the two women and that Mr Gazley came in later to take the matter up with Ms Kinney. Again I conclude that while he was direct and forceful he was not abusive of her.

[11] On the evening of 12 September 2006 Ms Kinney was on duty alone for several hours when the whole of the Patriot system went down and therefore no monitoring was being done of the 3,800 alarms Security First is responsible for. This breakdown continued even after Ms Kinney had rung Ms Webb for advice when the system first went down. When he attended work on 13 September Mr Gazley was advised by Ms Webb and the staff there that the system had never operated properly after the phone call to Ms Webb and that Ms Kinney was the only worker on duty at the time.

[12] Mr Gazley decided that a formal investigation into the matter was required. Accordingly he got written statements from Ms Kinney and Ms Webb.

[13] As Ms Kinney later accepted, this was a serious issue for Security First, as it simply could not allow the system to be down and have no monitoring of all the premises it was responsible for. As one example only, Security First could have been liable in negligence for any losses incurred while the monitoring system was down.

[14] Mr Gazley considered that Ms Kinney's actions could involve misconduct, or serious misconduct such as behaving in a manner likely to bring the employer into disrepute. The employment agreement provides for suspension while the company investigates the possibility of termination for serious misconduct. Suspension was to be on pay and under the agreement, could be for a period of up to one month at the discretion of Security First.

[15] In reliance on the parties' employment agreement Mr Gazley discussed suspension with Ms Kinney when she turned up for work on 13 September and indeed did suspend her on that date. Ms Kinney was given a letter that day which states:

This company views the 'incident' that occurred in the monitoring room this morning as extremely serious.

For a period of approximately three hours our computers were not displaying the important information that was necessary for us to monitor our customers' alarms, which could have led to disastrous consequences.

Accordingly, and in accordance with clause 11 of your employment contract, you are hereby given written notice that you are immediately suspended from this company pending a full investigation into the event surrounding the incident. It is hoped that this will be undertaken by Monday, at which time we can re-evaluate our position.

[16] Both Ms Kinney and Ms Webb provided one page reports to Mr Gazley. Without going into the details of what occurred it is sufficient to state that when she noticed that the Patriot system was down, at approximately 3.30am, Ms Kinney rang Ms Webb. Ms Webb thought that she had given Ms Kinney sufficient information and Ms Kinney had responded positively to her questions about whether certain information from the Patriot system was available on screen, to satisfy Ms Webb that the system was operational again. In fact Ms Kinney and Ms Webb were operating under different assumptions flowing from the questions asked and answers given by both women, which is not entirely surprising given the time of the day this discussion occurred. Ms Kinney thought that having satisfactorily answered the types of questions Ms Webb asked that Ms Webb had given her the go ahead to continue her monitoring as if the Patriot system was fully operational. Ms Webb and Ms Kinney were, however, at cross purposes about the state of the system at the end of their conversation. In fact the system was down for the next three hours until a relief operator arrived. What was clear was that had Ms Kinney been monitoring the back-up Telemate system during this period she could not have failed to notice that the system was not operating.

[17] Mr Gazley held a meeting with Ms Kinney, Ms Webb and her support people on 18 September. Ms Gazley had arranged for the meeting to be video taped and Ms Kinney was made aware of this soon into the meeting. Ms Kinney and her supporters claimed that video taping the meeting was unfair, but they did not raise the objection at the time.

[18] Having viewed the video on several occasions I conclude that Mr Gazley did not conduct the meeting in an intimidatory or rude or aggressive manner. Clearly tensions were high, because this was a very important meeting, but at no stage did Mr Gazley conduct himself in an unacceptable manner.

[19] At the commencement of the meeting, in reply to a question, Ms Kinney stated that she understood the purpose of the meeting to be whether or not she would keep her job. Mr Gazley replied that he did not think that it was that desperate but that there were a number of issues going beyond the most recent incident.

[20] During the meeting there was discussion about what I have already concluded was a misunderstanding between Ms Kinney and Ms Webb, but also about the adequacy of Security First's training.

[21] Both Ms Webb and Mr Gazley wanted to know why Ms Kinney had not contacted them again during the three hours when the system was down. Ms Kinney's response was that she had received the all clear from Ms Webb and had not noticed any need for further action until near the end of her shift.

[22] Mr Gazley had researched Ms Kinney's application for her job before the meeting and had discovered that she had qualifications and experience in Microsoft packages. As the Patriot system utilises Microsoft technology exclusively, he requested Ms Kinney to undertake a test on her Microsoft skills, to be conducted by an independent agency, in order to satisfy Security First that she was competent in this area. Ms Kinney declined to do so, stating that she did not need to prove herself and because Mr Gazley declined to provide Ms Kinney with an assurance that if she passed the test she would keep her job.

[23] Mr Gazley made it clear that he needed confidence in Ms Kinney to do the job properly and that if she was not prepared to be tested then he could not take the matter much further. He then said that if she did the test then she was showing some good faith. He also stated that if she scored satisfactorily then Security First would re-evaluate her position, but that he could not promise that she would keep her job. Rather the test was an attempt to identify the issues arising from her employment. Mr Gazley suggested that Ms Kinney should meet with her family and then everyone would meet again by the end of the week.

[24] Mr Gazley also stated that Ms Kinney was hard working and honest but that he needed to build up his confidence in her again and that she needed to demonstrate willingness to take on board matters the company felt were important.

[25] I also accept that Mr Gazley was prepared to consider Ms Kinney's departure from Security First on agreed terms and that this was discussed with Ms Kinney's sister after the conclusion of the meeting. At that time Ms Kinney's sister advised Mr Gazley that he should discuss it with Ms Kinney directly and preferably put something in writing.

[26] Unfortunately matters deteriorated after the meeting. Ms Kinney remained adamant that she would not do the external test on Microsoft that Security First wanted her to undertake. On 21 September Mr Gazley rang Ms Kinney to find out what she had decided about taking the test. I conclude that there must have been some reference to the testing because otherwise there would be no point in the conversation. I find that Ms Kinney again stated that she was not taking the test.

[27] Ms Kinney then stated that she had sought legal counsel. At that point Mr Gazley concluded, although Ms Kinney did not explicitly say so, that Ms Kinney would not ever take the test. He therefore decided, as a result of both Ms Kinney declining the test and her seeking legal advice, to no longer pay her wages during the course of her suspension.

[28] Ms Kinney's pay in fact stopped on 2 October. That day Mr Gwilliam wrote to Security First raising a personal grievance on substantially the same terms as now before the Authority.

[29] Security First's lawyer wrote back, requiring Ms Kinney to attend work and undergo a performance assessment by an independent agency and that suspension without pay would be implemented unless Ms Kinney turned up for work immediately. In fact her pay had been stopped the day before. A meeting date, as requested, was suggested by Security First's lawyer for the next week, but the reply also noted that it may achieve little if Ms Kinney maintained her stance about the test.

[30] Mr Gwilliam replied on behalf of Ms Kinney a week later, noting that Ms Kinney's pay had stopped and that this was unjustifiable, as well as suggesting mediation. Security First's lawyer responded, following a telephone conversation between the representatives, noting that Ms Kinney had no justification for not returning to work to do the test. He noted that Ms Kinney had gone on to other income, which no doubt was the domestic purposes benefit.

[31] Mediation was unfortunately delayed. It was unsuccessful.

[32] On 17 January 2007 Ms Kinney accepted that her employment relationship with Security First was over and resigned accordingly. She stated that she was unable to consider further employment for many months because of the effect of the loss of her job at Security First on her and subsequently was unable to find work until very recently. I accept that she was paid all her leave entitlements after she left.

The Law

[33] The law on constructive dismissal is clearly set out in *Auckland Shop Employees IUOW v. Woolworths (NZ) Limited* [1985] 2 NZLR 372 (CA), where it was held that a resignation can constitute a dismissal in different circumstances, including where an employer has followed a course of conduct with a deliberate and more dominant purpose of coercing an employee to resign or where a breach of duty by the employer causes an employee to resign.

[34] In respect of the latter the Court of Appeal found in *Auckland Electric Power Board v. Auckland Provincial District Local Authority Officers IUOW Inc* [1994] 1 ERNZ 168, at 172, that:

...the first relevant question is whether the resignation has been caused by a breach of duty on the part of the employer. To determine that question all the circumstances of the resignation have to be examined, not merely of course the terms of the notice or other communication whereby the employee has tendered the resignation. If that question of causation is answered in the affirmative, the next question is whether the breach of duty by the employer was of sufficient seriousness to make it reasonably foreseeable by the employer that the employee would not be prepared to work under the conditions prevailing: in other words, whether a substantial risk of resignation was reasonably foreseeable, having regard to the seriousness of the breach.

Determination

[35] I conclude that the reason Ms Kinney left was because she refused to do the independent assessment requested of her. Security First was seriously exposed in a commercial sense from Ms Kinney's failure to notice that the system was down for several hours on 12/13 September. Coupled with previous concerns about her performance, Security First was quite entitled to seek this independent assessment. It was not a breach of duty by Security First to suggest such an assessment, especially given the seriousness of the situation that occurred on the evening of 12/13 September. Unfortunately, Ms Kinney declined the assessment for her own reasons. While they might be understandable, given that I have concluded that this was the main reason she left her employment, her employment did not end by way of a constructive dismissal.

[36] Given my findings of fact above, I conclude that there was no unsafe work place because of long hours or a hostile and abusive environment. I also conclude that Ms Kinney was given sufficient information to do her job even in the absence of a formal job description and that the video taping of the meeting was not a substantial concern to her at the time and neither was it the reason for her leaving.

[37] I also accept that Ms Kinney was justifiably suspended in the first instance. This was an extremely serious matter for Security First. Its commercial reputation was severely jeopardised by

Ms Kinney's failure to notice that the system was non-operational for several hours. Therefore Security First was entitled to treat this matter as potentially constituting serious misconduct, as is clear in cases such as *Click Clack International Limited v. James* [1994] 1 ERNZ 15.

[38] While the stopping of Ms Kinney's pay whilst she was on suspension was not the reason she left and therefore cannot give rise to a personal grievance for unjustifiable dismissal, it was clearly unjustified. The contract provided for suspension for up to one month at the company's sole discretion, but that discretion must be exercised fairly. In this case it appeared to be as much in retaliation for Ms Kinney obtaining legal advice and assistance as anything else. This is contrary to the Employment Relations Act as under s.236 any person has the right to choose a representative to assist them.

[39] On the other hand it appeared that matters were reaching a stalemate. What must be considered is the fairness of the withdrawal of Ms Kinney's pay. It is possible that her suspension could have continued on pay for four and a half weeks (one month), but she was only allowed three weeks paid suspension by Security First.

[40] I conclude that the matter could have been resolved within the month, had Ms Kinney co-operated with the assessment issues as I found she should have. At the time her pay was stopped, however, both parties had engaged representatives and it could still have been possible to have resolved matters while Ms Kinney remained on paid suspension. Her pay should not have been stopped during this period. It is therefore clear that Ms Kinney was unjustifiably disadvantaged in her employment. She has lost \$910 gross (65 hours times \$14 per hour) and is to be reimbursed for that money by Security First. Given the paucity of evidence of the specific effect of this particular action on Ms Kinney, and my finding that she was unreasonable in her refusal to undertake the test, I decline to award any further compensation. All other claims are formally dismissed.

Costs

[41] Costs are reserved.

G J Wood
Member of the Employment Relations Authority