

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2017] NZERA Auckland 261  
3004791

BETWEEN                      ANDREW DONALD JAMES  
MacKENZIE  
Applicant

A N D                              INDEPENDENT SECURITY  
CONSULTANTS LIMITED  
Respondent

Member of Authority:        Anna Fitzgibbon

Representatives:             Applicant in person  
Erin Reilly, Counsel for Respondent

Investigation Meeting:      4 August 2017 at Rotorua

Submissions received        Orally by the parties on 4 August 2017

Date of Determination:      31 August 2017

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**DETERMINATION OF THE AUTHORITY**

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- A.        The suspension of Mr Andrew MacKenzie by Independent Security Consultants Limited (Independent Security), amounted to an unjustifiable disadvantage.**
- B.        Mr MacKenzie was subsequently unjustifiably dismissed by Independent Security.**
- C.        In order to settle Mr MacKenzie's personal grievance claims, Independent Security is to make payment of the following sums to him within 21 days of the date of this determination:**
- (a)      \$5,000 compensation under s.123(1)(c)(i) of the Employment Relations Act 2000 (the Act), for humiliation,**

**loss of dignity and injury to feelings in respect of his unjustifiable disadvantage;**

**(b) \$10,000 compensation under s.123(1)(c)(i) of the Act, for humiliation, loss of dignity and injury to feelings in respect of his unjustifiable dismissal;**

**(c) Pursuant to s.128(2) of the Act, reimbursement of lost salary in the sum of \$4,085 gross for the 5 week period from the date of his unjustifiable suspension on 30 September 2016 until he obtained further employment on 7 November 2016;**

**(d) The filing fee of \$71.56.**

**D. There is no order as to costs.**

### **Employment relationship problem**

[1] The applicant, Mr Andrew MacKenzie, was employed by the respondent, Independent Security Consultants Limited (Independent Security) as a communications operator on 2 May 2016.

[2] On 30 September 2016, Mr MacKenzie resigned giving 3 weeks' notice.

[3] Upon receipt of Mr MacKenzie's resignation, the Managing Director of Independent Security, Mr Derek Farrelly, sent him an email immediately suspending him from his employment without pay on the grounds that Mr MacKenzie had indicated "an intention to breach the terms of [his] Employment Agreement", specifically the restraint of trade clause.

[4] Mr Farrelly requested Mr MacKenzie to reply in writing by 4 October 2016 with his explanation as to whether he intended to be employed by another Security Company.

[5] On 21 October 2016, Mr MacKenzie was dismissed for serious misconduct.

## **Preliminary matters**

[6] Mr MacKenzie filed a statement of problem in the Authority alleging that he had been constructively dismissed, unjustifiably disadvantaged, unjustifiably dismissed, sexually harassed and bullied during his employment at Independent Security.

[7] At the Authority's investigation meeting, Mr MacKenzie confirmed not having raised the claims of constructive dismissal, sexual harassment or bullying as personal grievances with Mr Farrelly during the course of his employment or following its termination within the 90 day statutory timeframe specified in s.114 of the Employment Relations Act 2000 (the Act).

[8] The parties agreed at the Authority's investigation meeting that the Authority was to investigate Mr MacKenzie's claims that he was unjustifiably disadvantaged when suspended from his employment by Independent Security on 30 September 2016 and unjustifiably dismissed for serious misconduct on 21 October 2016.

## **Mr MacKenzie's claims**

[9] Mr MacKenzie says at the time of his resignation he did not have another job to go to and did not intend breaching his employment agreement. However, Mr MacKenzie says that his employment agreement was never signed by Mr Farrelly or anyone else on behalf of Independent Security and that even if it was signed the restraint of trade clause was not reasonable or enforceable.

[10] Independent Security did not file any proceedings in the Authority or the court to enforce the terms of the employment agreement.

[11] Mr MacKenzie says he was not given an opportunity to meet or discuss the allegations made by Mr Farrelly that he was intending to breach the restraint of trade provisions in his employment agreement before he was suspended without pay. Mr MacKenzie says he attempted on a number of occasions to meet with Mr Farrelly to discuss issues following his suspension, but Mr Farrelly refused to do so. Mr MacKenzie says he was summarily suspended without pay and then dismissed by Independent Security for serious misconduct without ever attending a meeting.

[12] Mr MacKenzie says his suspension was unjustified and amounted to an unjustified disadvantage under the Act. Mr MacKenzie says his dismissal was both substantively and procedurally unjustified. Mr MacKenzie seeks remedies under the Act in relation to both personal grievances accordingly.

### **Independent Security's response**

[13] Independent Security says that Mr MacKenzie's resignation clearly indicated he was resigning to work for a competitor, this would be in breach of his employment agreement and his immediate suspension without pay was justified in those circumstances.

[14] Mr MacKenzie was given an opportunity to explain his intended breach in writing but failed to do so. Therefore, Mr Farrelly concluded that Mr MacKenzie did intend to breach his employment agreement and work for a competitor, in deliberate breach of his employment agreement.

[15] Independent Security says it was justified in those circumstances to dismiss Mr MacKenzie on the grounds of serious misconduct and did so on 21 October 2016.

### **Investigation meeting**

[16] As permitted under s.174E of the Act, this determination has not set out all of the evidence required. The determination states findings, relevant facts, legal issues and makes conclusions in order to efficiently dispose of the matter.

[17] The investigation meeting took almost one full day in the Authority. Mr MacKenzie filed a witness statement in the Authority and his partner Ms Ella Matthews, attended the investigation meeting and answered questions from the Authority. Mr Hayden Pore, a former employee of Independent Security, who resides in Perth, filed a statement and phoned into the Authority's investigation meeting to answer questions.

[18] For Independent Security, Mr Farrelly filed a witness statement. Each witness confirmed by affirmation or on oath that their evidence was true and correct. Each witness had the opportunity to provide any additional comments and information and did so.

## **Issues**

[19] The issues for the Authority to determine are as follows:

- (a) Was Mr MacKenzie's suspension by Independent Security on 30 September 2016 justified?
- (b) If the suspension was not justified, are remedies available?
- (c) Was Mr MacKenzie's dismissal on 21 October 2016 justified?
- (d) If not, what remedies is Mr MacKenzie entitled to?
- (e) If Mr MacKenzie was unjustifiably disadvantaged or dismissed did he contribute and if so should any remedies awarded by the Authority be reduced?

## **Background**

[20] Independent Security is a security company offering clients in New Zealand various security services and products including alarm systems and CCTV, mobile guards, monitoring and similar services.

[21] Mr MacKenzie was employed by Independent Security on 2 May 2016, as a communications operator. As a communications operator, Mr MacKenzie's role was to answer phones, despatch cars and provide technical support.

## **Individual employment agreement**

[22] Mr MacKenzie was provided with an individual employment agreement (the employment agreement) which he signed on 10 May 2016. Mr MacKenzie says he did not read the employment agreement thoroughly. However, he was keen to secure the job and so signed and initialled it as requested.

[23] The employment agreement was not signed on behalf of Independent Security. However, Mr Farrelly and Mr MacKenzie have initialled each page. Mr Farrelly says not signing the execution page of the employment agreement was an oversight by him.

[24] At the time he received the employment agreement, Mr MacKenzie was given a letter of offer signed by Chris Tyler, Finance and Admin Manager. The letter states that Mr MacKenzie's employment is in the position of Communications Operator and summarises Mr MacKenzie's terms of employment. There is no mention in the letter of any applicable restraint of trade provisions.

[25] The role was described in the offer letter to, among other things, monitor various types of alarm via the alarm monitoring software, mobile phone text and email alert, dispatching key holders, patrols, emergency services for clients and monitoring centres, maintaining client records and so forth. It was not a sales position and not one in which Mr MacKenzie required access to all Independent Security's clients to do his job.

[26] Mr Farrelly explained to the Authority that he was the only person who could access the entire Independent Security database as the database was extremely valuable and required protection.

[27] Mr MacKenzie says he was subsequently promoted to the position of Compliance Manager. Mr Farrelly disputes this saying a change in Mr MacKenzie's role was discussed but never occurred.

### **Restraint of trade**

[28] There is a restraint of trade clause contained in clause 25.1 of the employment agreement. If an employee's employment is terminated, clause 25 prohibits any competition by that employee for 6 months after termination of his/her employment, within a 25 km radius of Independent Security's business. The clause also prohibits the enticement of any of Independent Security's clients or employees within the 6 month timeframe<sup>1</sup>.

### **Mr MacKenzie's employment**

[29] Mr MacKenzie described his employment at Independent Security as challenging and Mr Farrelly as being very difficult to work for. Mr MacKenzie says Mr Farrelly was rude and demanding, did not pay him what was due under his employment agreement and by mid-September 2016, he had had enough. Mr MacKenzie began looking for a new job.

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<sup>1</sup> Full restraint clause contained in Appendix 1 to this determination

## **Events leading to Mr MacKenzie's resignation**

[30] On Monday, 26 September 2016, Mr MacKenzie says he went to work and saw he had been rostered to work over the weekend when he was only employed to work Monday to Friday. Mr MacKenzie says he had already organised a weekend away with friends and was extremely upset when he saw that he was rostered for the weekend. Mr MacKenzie says this was the final straw, he was extremely stressed and left work to go to the doctor.

[31] Mr MacKenzie informed Mr Farrelly by text later that morning that he had visited his doctor and had been placed on stress leave and that he would send him a medical certificate.

[32] Mr Farrelly responded later in the day asking for a medical certificate detailing the period of time he would need to be away for stress. Mr Farrelly also stated: "If the certification is for stress as you have indicated- then you will also be required to provide a certificate that you are fit to return to work before you do so, Derek". A medical certificate was provided on 27 September 2016.

## **Resignation – 30 September 2016**

[33] On 30 September 2016, Mr MacKenzie decided to resign. At 1.27pm he sent an email resigning. The email was sent to his colleague Mr Hayden Pore because his relationship with Mr Farrelly had deteriorated. The email stated:

Hi Hayden,

Thanks for your support and guidance working with you at ISCL.

I have been offered an opportunity with a local security company that is to[sic] good to pass up. Please accept this as my 3 weeks' notice. 21/10/16 will be my last day of work with ISCL.

Kind regards,  
Andrew MacKenzie

...

[34] Mr MacKenzie says he had not in fact obtained another job at the date of his resignation but felt he could not stay on. Mr MacKenzie says by telling Mr Farrelly he had another job, he would not have to get into a discussion with Mr Farrelly about staying and could move on.

[35] Mr Pore forwarded Mr MacKenzie's resignation to Mr Farrelly.

[36] Mr Farrelly sent an email to Mr MacKenzie by email on 30 September 2016 at 2:12:01pm. The email stated:

Hi Andrew,

I have received your resignation letter dated 30 September. You have indicated you have “been offered an opportunity with a local security company”. This may be in breach of clause 25.1 of your Employment Agreement dated 10 May 2016. You are specifically restrained from being employed by another Security business within a 25km radius of ISCL’s business – which as you are aware covers a large area including Waikato, South Waikato, BOP, WBOP and beyond. The restraint remains in place for a period of 6 months. If you have not brought this matter to your prospective employers attention you should do so immediately. There are consequences also for any potential employer in interfering with an existing Employment Agreement.

For the avoidance of any doubt you are on notice that should you undertake employment in the manner you indicate within the restraint area while the term is in force ISCL will take all necessary steps to enforce the Employment Agreement against you and any prospective employer.

As you have indicated an intention to breach the terms of your Employment Agreement ISCL gives notice that you are hereby suspended without pay from your employment as at 1400 hours 30 September 2016 pending the outcome of an investigation into your statement that you intend to be employed by another Security Company and that intention may be a deliberate breach of clause 25.1 of your Employment Agreement.

1. The allegation is that you intend to or have breached your Employment Agreement with ISCL and in particular clause 25.1. Would you please now provide ISCL with an explanation as to your stated intention. On considering your explanation ISCL may require you to attend a disciplinary meeting at a time suitable to both parties.

You may bring a support person with you to this meeting. ISCL advises you that depending on your explanation one of the outcomes may be that you are dismissed from your Employment.

ISCL considers that you will have sufficient opportunity to consider your explanation and provide a written response to the allegation on or before Tuesday 4 October 2016.

Kind regards,  
Derek Farrelly  
Director

## First Issue

### **Was Mr MacKenzie's suspension by Independent Security on 30 September 2016 justified?**

[37] Following receipt of the letter of 30 September 2016 from Mr Farrelly, Mr MacKenzie says he became more stressed. Mr MacKenzie contacted his lawyer who wrote to Mr Farrelly on 4 October 2016 stating that it was his view that Mr MacKenzie had an unjustifiable disadvantage as a result of his suspension without pay by Independent Security. Mr MacKenzie's lawyer questioned the legality of the restraint of trade clause. The letter concluded as follows:

We would be happy to meet with you at any suitable time to discuss these matters.

[38] Mr Farrelly responded later on the evening of 4 October 2016 refuting Mr MacKenzie's claims made through his lawyer and stating that as Mr MacKenzie did not have any entitlements owing, was not due any payment for the period of his stress leave and therefore:

... it must follow there can be no disadvantage to Andrew in being suspended without pay. He wasn't due any payment for this period nor was he (in the alternative) attending at work. On receipt of Andrew's resignation ISCL suspended Andrew as it is properly empowered to do so. This was in response to Andrew advising ISCL that he intended to breach his IEA.

[39] Mr Farrelly ended the letter claiming that Mr MacKenzie had been requested to provide an explanation regarding his "stated intention to breach his IEA. To date that has not been received".

[40] There was no response by Mr Farrelly in his letter to the suggestion of a meeting to discuss matters.

[41] The Courts recognise that suspension "is a drastic measure which if more than momentary must have a devastating effect on the officer concerned. The prejudice occasioned the officer by a suspension can never be assuaged even if he is ultimately vindicated"<sup>2</sup>.

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<sup>2</sup> Richardson J in *Birss v Secretary of Justice* [1984] 1 NZLR 513 at 521

[42] Section 103A of the Act states:

**103A Test of justification**

- (1) For the purposes of section 103 (1)(a) and (b), the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by applying the test in subsection (2).
- (2) The test is 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 or action occurred.
- (3) In applying the test in subsection (2), the Authority or the court must consider-
  - (a) Whether, having regard to the resources available to the employer, the employer sufficiently investigated the allegations against the employee before dismissing or taking action against the employee; and
  - (b) Whether the employer raised the concerns that the employer had with the employee before dismissing or taking action against the employee; and
  - (c) Whether the employer gave the employee a reasonable opportunity to respond to the employer's concerns before dismissing or taking action against the employee; and
  - (d) Whether the employer genuinely considered the employee's explanation (if any) in relation to the allegations against the employee before dismissing or taking action against the employee.

...

[43] Mr MacKenzie was on sick leave for stress on the date of his suspension. Mr Farrelly made no attempt to contact him personally and made no attempt to set up a meeting with him to discuss potential suspension before he took that step. On the date of his resignation, Mr MacKenzie had not obtained employment with a competitor and if Mr Farrelly had met or discussed this issue with Mr MacKenzie, that would have become apparent. Mr Farrelly chose not to.

[44] Even if Mr MacKenzie had accepted employment with a competitor on the date of his resignation, Mr Farrelly could have taken steps to enforce the restraint of trade provisions when Mr MacKenzie resigned, instead he suspended Mr MacKenzie without pay while he "investigated" the matter.

[45] There was no investigation, in my view. Mr Farrelly refused to meet with Mr MacKenzie and his lawyer. Independent Security's suspension of Mr MacKenzie was in breach of the requirements of s.103A (3) of the Act. Mr Farrelly's concerns about Mr MacKenzie's resignation and possible employment by a competitor, were

not raised with him before his suspension and no reasonable opportunity was given to Mr MacKenzie to respond to the concerns before the suspension took place.

[46] I do not consider the suspension by Independent Security of Mr MacKenzie from his employment without pay, was the action of a fair and reasonable employer.

[47] Independent Security's suspension of Mr MacKenzie without pay, was an unjustifiable action which affected Mr MacKenzie's employment to his disadvantage.

[48] I find the suspension amounted to an unjustified disadvantage under s.103(1)(b) of the Act.

## **Second Issue**

### **If the suspension was not justified, are remedies available?**

[49] Mr MacKenzie spoke of his stress and worry following his suspension without pay. Mr MacKenzie's partner, Ms Ella Matthews says she was at home when the email suspending Mr MacKenzie was received. She says Mr MacKenzie was already stressed and the email exacerbated his stress. Ms Matthews says Mr MacKenzie became very low and could not sleep in the days after the suspension. Ms Matthews says the suspension without pay put them under increased financial pressure as she was unable to support them both.

[50] I consider compensation in the sum of \$5,000 under s.123(1)(c)(i) of the Act for the humiliation, loss of dignity and injury to feelings suffered by Mr MacKenzie appropriate in all the circumstances. Payment is to be made by Independent Security to Mr MacKenzie within 21 days of the date of this determination.

[51] Mr MacKenzie was suspended without pay from 30 September 2016 until his dismissal on 21 October 2016. Mr MacKenzie has a personal grievance, being his unjustified disadvantage as a result of his suspension, and has lost remuneration as a result.

[52] I order Independent Security to reimburse Mr MacKenzie lost remuneration for the period from 30 September 2016 until his dismissal on 21 October 2016 pursuant to s.128(2) of the Act. Payment is to be made by Independent Security to Mr MacKenzie within 21 days of the date of this determination.

### **Third Issue**

#### **Was Mr MacKenzie's dismissal on 21 October 2016 justified?**

[53] On 5 October 2016, Mr MacKenzie's lawyer reiterated his view that the restraint of trade clause was not a lawful term and condition of Mr MacKenzie's employment agreement. A further request was made to meet as follows:

We are seeking your agreement to attend a mediation conference in Rotorua run by MBIE in an attempt to resolve the impasse.

[54] Mr Farrelly responded on the same day, acknowledging receipt of the email only. The request to attend mediation was not responded to by Mr Farrelly.

[55] On 11 October 2016, a further request was made by Mr MacKenzie's lawyer to Mr Farrelly asking whether he would be prepared to attend:

... a voluntary mediation conference and/or attend a meeting with Andrew and myself and with you and your representative to see if this dispute can be resolved to the satisfaction of the parties.

[56] Mr Farrelly replied on the same day referring Mr MacKenzie's lawyer to his previous emails.

[57] A final request was made by Mr MacKenzie's lawyer on 12 October 2016 in which he accepted that Mr Farrelly disagreed that Mr MacKenzie had a valid claim but stated:

**Would you agree to voluntarily attend a mediation conference run by MBIE in an attempt to resolve the dispute to the satisfaction of all parties?**

[58] Mr Farrelly would not meet and he told the Authority at the investigation meeting that this was because no personal grievance claim had been lodged and he was not prepared to attend a mediation in those circumstances.

[59] In mid-October 2016, Mr MacKenzie says he was offered a job with Nutech Security Limited at its Tauranga office, starting in early November 2016, which he accepted.

[60] On 17 October 2016, a letter was sent by Mr Farrelly's lawyers to the Managing Director of Nutech Security regarding Mr MacKenzie. The letter referred to clause 25 of Mr MacKenzie's employment agreement and stated that

Mr MacKenzie was in breach of that clause and if Mr MacKenzie continued to breach his ongoing obligations to Independent Security:

... it will be forced to take steps to enforce the terms of his IEA against him as an individual and you as a party. This is likely to include injunctive relief.

[61] Mr MacKenzie's employment was terminated for serious misconduct by letter from Independent Security on 21 October 2016. The letter referred to Mr MacKenzie's employment with another "local security company" and noted that Independent Security had concluded that Mr MacKenzie had been acting in breach of the restraint of trade clause in his IEA:

... in light of the seriousness of the breach, ISCL has reached a finding that your conduct amounts to serious misconduct, pursuant to clause 19 of your IEA with ISCL, we now give you notice that your employment with ISCL has been terminated with effect on 21 October 2016.

[62] Mr Farrelly never issued proceedings in the Authority seeking to enforce clause 25 of the employment agreement. Mr Farrelly told the Authority this was for "commercial reasons".

[63] The employment agreement between the parties was signed by Mr MacKenzie but was not signed by Mr Farrelly. Schedule B of the employment agreement refers to duties of an "on call" guard and the obligations required in respect of such a position. Mr MacKenzie was not employed as an on call guard, he was employed as a communications operator. Mr MacKenzie's employment was to answer phone calls into the centre and to respond to callouts. Mr MacKenzie's role was not one in which he was in close communication with clients nor was it a position in which he had access to a database. As Mr MacKenzie says, it is evident to members of the public whose Independent Security's clients are because it has stickers on the windows of those premises stating that security is being provided by Independent Security.

[64] Ms Reilly helpfully provided the Authority with some authorities regarding the enforceability of employment agreements which are not signed.

[65] In this instance, Mr MacKenzie says he did not read the employment agreement thoroughly, he was excited by the prospect of employment by Independent Security and signed the document. Mr MacKenzie did sign a declaration to the effect that he understood its contents and agreed to them.

[66] I refer to the decision of Judge Inglis (now Chief Judge) in *Pottinger v Nine Dot Consulting Ltd & Ors*<sup>3</sup>. Judge Inglis stated:

[16] Contractual provisions restricting the activities of employees after termination of their employment are, as a matter of legal policy, regarded as unenforceable unless they can be justified as reasonably necessary to protect proprietary interests of the employer in the public interest: see *Gallagher Group Ltd v Woolley* [fn5 [1999] 1 ERNZ 490 (CA) at [20]] citing *Mason v Provident Clothing & Supply Co Ltd* [fn6 [1913] AC 724 (HL) at 733].

[17] The onus of establishing that a restrictive provision is reasonable is on the employer [fn7 *Gallagher* at [28]]. Such a provision should be no wider than is required to protect the party in whose favour it is given [fn8 *Fletcher Aluminium Ltd v O'Sullivan* [2001] 2 NZLR 731].

[18] Restraints are enforced only to the extent required to protect a proprietary interest of the employer. The nature of the employee's role in the employer's business, the geographical scope of the restraint, and its nature and duration are relevant factors in assessing whether a restraint is reasonably necessary.

[67] The restraint of trade clause does not appear to be reasonable and enforceable. However, the Authority's investigation was not into the enforceability of the restraint clause. Such a claim was not before it and its validity was not investigated by it. The Authority's investigation was into Mr MacKenzie's claims that he had been unjustifiably suspended from his employment and unjustifiably dismissed by Independent Security.

[68] I do not consider that at the date of terminating Mr MacKenzie's employment on 21 October 2016, Independent Security was in a position to conclude that Mr MacKenzie had breached the restraint clause and was therefore entitled to terminate his employment for serious misconduct.

[69] Mr MacKenzie resigned as he was entitled to do. He indicated that he was leaving to pursue employment with a local security company. I accept Mr MacKenzie's evidence that at the time of his resignation on 30 September 2016 he was looking for other employment opportunities but had not obtained employment. It was not until mid-October 2016 that Mr MacKenzie discussed possible employment with Nutech Security Limited (Nutech). Mr MacKenzie did not commence employment with Nutech until 7 November 2016 and provided the Authority with his

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<sup>3</sup> [2012] NZEmpC 101

employment agreement dated 1 November 2016. Mr MacKenzie signed the employment agreement on 2 November 2016 and it was signed on behalf of Nutech on 7 November 2016.

[70] I do not consider Mr MacKenzie's dismissal justified, substantively or procedurally. At the time of his dismissal Mr MacKenzie was not employed by another company. Mr Farrelly assumed that Mr MacKenzie was going to deliberately breach his employment agreement by taking up employment with a competitor company.

[71] Mr Farrelly was requested on four separate occasions by Mr MacKenzie's lawyer to meet to discuss matters, including the restraint clause. Mr Farrelly repeatedly refused to do so because no personal grievance claim had been filed.

[72] Mr Farrelly's stance, in my view contravened the overall objectives of the Act which requires employment relationships to be "productive"<sup>4</sup>. It also breached the requirements on parties to an employment relationship to be "active and constructive" and "responsive and communicative"<sup>5</sup>.

[73] Mr Farrelly undertook an investigation into "an intended breach" of an employment agreement without ever meeting Mr MacKenzie to discuss that matter. There was no actual breach of the employment agreement by Mr MacKenzie.

[74] Mr MacKenzie was suspended for intending to breach his employment agreement, without any input prior to the decision being made. Mr Farrelly refused to meet with him and then sent a letter dismissing him, again without meeting or discussing that possible outcome with him.

[75] I consider these to be fundamental breaches of Independent Security's obligations to act fairly towards Mr MacKenzie.

[76] Mr MacKenzie was dismissed for serious misconduct. As the Court of Appeal stated in *Northern Distribution Union v BP Oil New Zealand*<sup>6</sup> a definition of serious misconduct is not possible as it is always a matter of fact and degree. The Court concluded that "usually what is needed is conduct that deeply impairs or is destructive of that basic confidence or trust that is an essential element of the employment relationship".

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<sup>4</sup> Section 3, Employment Relations Act 2000

<sup>5</sup> Ibid s.4(1A)(b)

<sup>6</sup> [1992] 3 ERNZ 483(CA) at 487

[77] At the time of both Mr MacKenzie's suspension and dismissal, he was not employed by another company in competition with Independent Security. Mr MacKenzie was firstly suspended and then dismissed by Independent Security because Mr Farrelly assumed he intended breaching his employment agreement.

[78] There was no proper investigation by Independent Security into this allegation. Independent Security was not able to reach such a conclusion. In any event, Clause 25 of the employment agreement allows, with the written consent of Independent Security, (which is not to be unreasonably withheld), for an employee to take up employment with another company within the period of restraint<sup>7</sup>. This was an option that could have been discussed during the course of the investigation, and implemented but was not.

[79] Mr MacKenzie commenced employment with Nutech on 7 November 2016, after he had been dismissed and was no longer Independent Security's employee. It is not clear whether Mr MacKenzie's employment by Nutech breached the restraint clause.

[80] The evidence in the Authority was that Mr MacKenzie's role with Independent Security was not one in which he had access to confidential client information, including in relation to their contact details, the nature of their work and their specific needs. Mr MacKenzie was not in a position to develop strong client relationships with Independent Security's clients. The type of work that Mr MacKenzie undertook did not put him in a strong position to harm Independent Security by unfair competition. The role at Nutech is in sales support based in Tauranga.

[81] In any event, Mr Farrelly decided for commercial reasons not to enforce the restraint clause.

[82] The dismissal was not the action of a fair and reasonable employer in the circumstances. The dismissal was unjustified both substantively and procedurally.

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<sup>7</sup> See appendix 1 to this determination

## **Fourth Issue**

### **What remedies is Mr MacKenzie entitled to?**

[83] Mr Farrelly acted in a highhanded and unreasonable manner when suspending and dismissing Mr MacKenzie. Mr MacKenzie suffered a great deal of stress as a result of his dismissal and the manner in which he was dismissed. Mr MacKenzie was unable to sleep, felt unmotivated and was stressed financially.

[84] Mr MacKenzie took steps to mitigate his losses and began employment at Nutech on 7 November 2016.

[85] I consider compensation in the sum of \$10,000 under s123(1)(c)(i) of the Act to be appropriate for the humiliation, loss of dignity, and injury to feelings suffered by Mr MacKenzie. I order Independent Security to pay Mr MacKenzie \$10,000 within 21 days of the date of this determination.

[86] I order Independent Security to reimburse Mr MacKenzie lost remuneration for the period from 21 October 2016 to 7 November 2016 pursuant to s.128(2) of the Act.

[87] I make an order that lost remuneration, from 30 September 2016 to 7 November 2016, in respect of both personal grievances (unjustified suspension on 30 September 2016 and unjustified dismissal on 21 October 2016) be paid by Independent Security to Mr MacKenzie in one lump sum totalling \$4,085 gross for the 5 week period. This amount is to be paid within 21 days of the date of this determination.

[88] Mr Farrelly deducted the sum of \$545 being the licence and certificate of approval (COA) for private security and investigation work from Mr MacKenzie's final pay. The offer of employment from Independent Security signed by Mr MacKenzie on 10 May 2016 stated:

ISCL will pay for your licence application. Should you leave ISCL's employ within 12 months you may be required to repay ISCL. You give ISCL permission to deduct the cost from any final wages and entitlements owing.

[89] Mr MacKenzie was never asked to repay ISCL nor was he informed this amount was required to be repaid by ISCL. Mr MacKenzie first knew about the

deduction when he received his final pay slip. I consider the way in which Independent Security dealt with this issue to have been unfortunate. However, by signing the letter of offer containing the above clause, Mr MacKenzie agreed that Independent Security could deduct the cost of the fee from his final pay.

#### **Fifth Issue**

#### **If Mr MacKenzie was unjustifiably disadvantaged or dismissed did he contribute and if so should any remedies awarded by the Authority be reduced?**

[90] I am required under s124 of the Act to consider the extent to which Mr MacKenzie's actions contributed towards the situation that gave rise to his suspension and dismissal.

[91] I do not consider Mr MacKenzie contributed to the circumstances leading to his suspension or dismissal. Accordingly, there will be no reduction in the remedies awarded to him.

#### **Costs**

[92] There will be no order as to costs as Mr MacKenzie was not represented, but Independent Security is ordered to pay him the filing fee of \$71.56 within 21 days of the date of this determination.

**Anna Fitzgibbon**  
**Member of the Employment Relations Authority**

## **APPENDIX 1**

### **CLAUSE 25**

#### **NON-COMPETE ON TERMINATION OF EMPLOYMENT**

##### **25.1 Restraint of trade**

In consideration of entering into this agreement, including the resultant benefits, the Employee agrees that for a period of six months after termination of this agreement for any reason, he or she will not do any of the following without the express written consent of ISCL provided that such consent shall not be unreasonably withheld:

- (a) Carry on or be connected, engaged, or interested either directly or indirectly or alone with any other person or persons and whether as principal, partner, agent, director, shareholder, or otherwise in any business, which is carried out within a 25km radius of any of the ISCL business which in any way competes for the Employer's clients;
- (b) Attempt to entice away from ISCL any client of ISCL;
- (c) Employ or attempt to entice away from any Employee or contractor of ISCL;
- (d) Assist anyone to do any of the acts in (b) or (c).