

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2015] NZERA Christchurch 18
5419931

BETWEEN EDDIE MARRIOTT
 Applicant

A N D ALLIED SECURITY LIMITED
 Respondent

Member of Authority: M B Loftus

Representatives: Rachele Boulton, Counsel for Applicant
 Chris McDowall, on behalf of Respondent

Investigation Meeting: 30 September 2014 at Christchurch

Submissions Received: 3 October and 21 October 2014 from Applicant
 15 October 2014 from Respondent

Date of Determination: 12 February 2015

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant, Eddie Marriott, claims he was unjustifiably dismissed by the respondent, Allied Security Limited (Allied) on 5 March 2013.

[2] Allied accepts it dismissed Mr Marriott but claims it was justified given serious breaches of its operating procedures and policies by Mr Marriott.

Background

[3] Mr Marriott was engaged by Allied as a security guard in 2011. He was normally employed in a guardhouse at the goods entrance of a site owned by Progressive Enterprises Limited (Progressive) in Christchurch.

[4] He says that on commencement he was given an employment agreement to which some policies were appended. He claims he did not get an opportunity to read them as he was required to return the signed agreement prior to the end of his first shift and has not seen any of the documents since.

[5] Allied disagrees and is of the view Mr Marriott should have been well aware of its standard operating procedures and their requirements. In particular, it claims he was given further copies of the relevant documentation on 11 December 2012. Mr Marriott denies that, though he accepts he was *au fait* with processes and protocols having learnt via on the job training and verbal instruction.

[6] Allied also claim the requirements were reiterated and further copies of the operating procedures distributed at a meeting conducted by Darren Johnston (a Progressive manager responsible for security). Again, Mr Marriott denies receiving any documents and says they were only told new versions were being prepared.

[7] The alleged breaches that led to Mr Marriott's dismissal occurred late February 2013. On the 26th Mr Marriott was working in the guardhouse when he received an email from a Matthew Williams. Mr Williams had, until approximately a month earlier, been Allied's site supervisor and Mr Marriott's immediate manager. Mr Williams initially transferred to another site where he continued to work for Allied but left after a couple of weeks. Mr Marriott claims to have been unaware of his departure.

[8] Mr Williams' email was sent to a generic email address to which all Allied security guards had access. It advised he was still receiving emails relating to the Progressive site and asked he be removed from the email list.

[9] Mr Marriott says he attempted to remove Mr Williams from the list but was unable to do so. He then sought advice from Mr Williams as to how to do it but still found himself unable to remove Mr Williams from the list. The exchange ended with Mr Williams advising, by text, *if you or Stevie are working tomorrow evening I can just pop in*. Stevie is another security guard and also a flatmate of Mr Williams.

[10] Mr Williams arrived at the Progressive Enterprises site at approximately 6pm the following evening (27 February 2013).

[11] Mr Marriott says Mr Williams came into the guardhouse and he (Marriott) showed how he had attempted to remove Mr Williams from the email list. He says he remained seated in front of the computer and Mr Williams, who was standing behind him, leaned over and rectified the problem by a single click of the computer mouse. Mr Marriott says Mr Williams stayed for another couple of minutes then departed.

[12] Mr Marriott approached the new site supervisor, Jim Wills, the following day and told him what had occurred. Mr Wills was unsure as to whether or not Mr Williams' retention on the email list raised an issue and therefore reported the incident to his manager. He also told Mr Johnston on 4 March 2013. Mr Johnston was displeased and sent an email to two Allied managers: Mr McDowall and Matthew Black. It reads:

Hi Chris / Matt,

I am not sure if you are aware but following a conversation with Jim this morning I understand that Friday, Matt Williams was allowed access to the premises and access to our computer systems to delete his name off mailing lists by Eddie Marriott.

I believe this is totally unacceptable, especially as Matt Williams is no longer an employee of Allied Security. I understand the request was made as Matt was receiving emails sent via security as his personal email had been loaded into the mailing list, this should have been removed by one of Allied's team upon Matt leaving the site to take up another position.

Is someone able to call me to discuss what actions are taken regarding this situation as Eddie has no authority to allow Matt to have access to our computer systems nor should he have allowed Matt to enter the site without approval.

My expectation is that Eddie is stood down (as far as working from this site) until a decision can be made.

Regards,

[13] Mr McDowall then telephoned Mr Marriott to advise he was suspended and should not go to work that day. Mr Marriott says Mr McDowall advised it was because he had let Matt into the guardhouse and they would discuss it the next day.

[14] Mr McDowall then sent Mr Marriott a letter confirming the suspension and the fact a disciplinary meeting would be held the next day. It advises the reason is:

... an employment problem ... has arisen. Specifically the following complaints have been raised by our client

- *Allowing an external party onto site against all SOPs [Standard Operating Procedures]*
- *Breaching site Health and Safety Policy*
- *Allowing an external party access to our clients IT systems.*

[15] The two met as arranged. Neither was accompanied but Mr Marriott accepts Mr McDowall advised he could have someone with him. He chose not to. There is disagreement over exactly what was said though it is accepted Mr McDowall put Allied's concerns and Mr Marriott was given an opportunity to respond.

[16] Following the meeting Mr McDowall consulted with both Mr Johnston and Mr Black. He understood from the conversation with Mr Johnston that it would be unacceptable for Mr Marriott to return. He also decided that as the cause of the client's dissatisfaction was misconduct, it would be inappropriate to consider transferring Mr Marriott to another site. Dismissal therefore became the only option and Mr Marriott was advised accordingly by letter later that day (5 March 2013).

Determination

[17] As already said Allied accepts it dismissed Mr Marriott. In doing so it also accepts it is required to justify the dismissal.

[18] Section 103A of the Act, states the question of whether a dismissal is justifiable:

... must be determined, on an objective basis, [by considering] whether the employer's actions, and how the employer acted were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal ... occurred.

[19] In applying the test the Authority must consider whether, having regard to the resources available to the employer, it sufficiently investigated the allegations. A sufficient investigation requires, as a bare minimum, that the employer put its concerns, allow an opportunity to respond and consider the response with an open mind.

[20] Traditionally the objective review has been performed by considering the employer's actions from both a substantive and procedural perspective. While issues of substance and process overlap and there is no firm delineation separation provides

a useful means of analysis especially as some of the requirements of s.103A have a procedural focus.

[21] Allied's resources and knowledge are not, in my view, an issue. This is a substantial employer with Mr McDowall exhibiting a good knowledge of what is required when addressing concerns with an employee's performance or conduct.

[22] According to the letter of 5 March 2013 Mr Marriott was dismissed for serious misconduct as he breached both Allied's and Progressives' SOPs and policies. This resulted in Progressive having *a complete loss in faith and trust in your ability to perform the role to expected standards.*

[23] Three particular breaches were alleged and, according to Allied, admitted by Mr Marriott. Each is characterised as gross misconduct and is said to have occurred despite Mr Marriott having demonstrated a comprehensive knowledge of the requirements. The breaches are:

- a. Allowing Mr Williams to access the site without authorisation;
- b. Failing to ensure all persons entering the *restricted workplace* comply with minimum PPE (personal protective equipment) standards; and
- c. Allowing an external party access to the client's IT system.

[24] Mr Marriott accepts he was unwise in letting Mr Williams access the IT system but considers weight should have been placed on the fact he was trying to rectify a security breach which should never have occurred and for which he was not responsible. He denies wrongdoing in respect to the other allegations. He responds to the alleged breach of health and safety requirements by noting no-one is required to don PPE when entering the guard hut with the requirement only being enforced should the visitor proceed further into the site. Similarly, he says allowing Mr Williams into the guard hut was not a breach as visitors are frequently allowed to enter to that extent.

[25] Mr Marriott accepts Mr McDowall explained Allied's concerns and allowed a response. There is, however, doubt about whether his responses were considered with an open mind. For a number of reasons I conclude they weren't.

[26] It is hard to see how Allied could have concluded Mr Marriott's purported breaches were misconduct, let alone gross misconduct justifying dismissal had they properly investigated his responses.

[27] As already said he denies having the opportunity to properly read the SOP and policies though he accepts he had a working knowledge there-of gained from on the job experience. Allied has a different view but is unable to produce documentary confirmation Mr Marriott acknowledged receipt of the relevant documents.

[28] In deciding this issue I am cognizant of the evidence of Mr Wills. He worked for Allied as both a guard and supervisor and was at the time of these events Mr Marriott's supervisor. I put some weight on his evidence given his admission, elicited by Allied, he had difficulty working with Mr Marriott and had attempted to procure Mr Marriott's removal (though not over this).

[29] Mr Wills says learning was by verbal instruction and *immersion*. He is adamant there was no copy of the SOP in the guard hut as alleged by Allied. His evidence leads me to conclude that irrespective of what the policies may have said *on the job* training and practice dictated what would be considered acceptable procedure. That raises issues about whether the allegations, even if proven, would truly justify dismissal.

[30] Again Mr Wills' evidence was telling. The guard hut is within the sites perimeter fence though only just and well away from the other buildings. Access is gained via a gate and a short walkway.

[31] Mr Wills' evidence, which remained undisturbed by questioning, is consistent with Mr Marriott's. Visitors would frequently enter as far as the guard hut and he was unaware of anything that precluded this or instructed guards to prevent such entry by meeting visitors at the gate. He was also adamant such visitors would rarely wear the required PPE and it was his understanding that was perfectly acceptable. PPE need only be worn if the visitor proceeded past the guard hut.

[32] Mr Wills' evidence confirms that notwithstanding the content of written documentation Mr Marriott's conduct in respect of two of the three allegations conformed with normal practice and were condoned by his supervisor. Mr Wills also noted the acceptability of these practices was reinforced by the behaviour of Allied

managers, including Mr McDowall and Mr Black, who when visiting the site would often proceed to the guard hut without PPE.

[33] This evidence raises serious doubts that Mr Marriott's behaviour, at least in respect to two of the three accusations, was misconduct let alone gross misconduct warranting dismissal.

[34] There is then the issue of Mr Williams accessing the computer. Again little weight appears to have been put on the fact he and Mr Marriott were trying to correct a potential security breach that should never have arisen. It is at least a strong mitigating factor yet there is no evidence it was considered. Similarly there appears to be no recognition of Mr Marriott's assertion Mr Williams did nothing other than remove himself from the e-mail list and no evidence of any checks to ascertain whether or not something more nefarious had occurred.

[35] Finally there is no recognition of the fact that this only came to either Allied's or Progressive's attention because Mr Marriott reported it to Mr Wills.

[36] These factors and other evidence seriously undermine the substantive justification for this dismissal. That raises the question of how or why this occurred.

[37] The answer, I conclude, is Mr McDowall decided to comply with Progressives demand Mr Marriott be removed from the site and, as a result, he closed his mind to the explanations offered. In other words Allied failed to genuinely consider Mr Marriott's explanation as required by s.103A(3)(d) of the Act.

[38] I reach this conclusion as:

- a. Mr McDowall accepts he made no attempt to explain how this issue arose or otherwise defend Mr Marriott when he discussed it with Mr Johnson. Mr Johnson says Mr McDowall simply asked *what is your expectation*;
- b. Mr Johnson confirmed he told Mr McDowall his expectation was that Mr Marriott be removed;
- c. Mr McDowall says he made the decision to dismiss in consultation with Mr Matthew Black and Allied's sole director, Mr Damian Black. He says the key consideration before making the decision, which was

made by all as a committee, was Progressives' (read Mr Johnston's) feedback.

[39] This last point illustrates another procedural deficiency in that an accused employee is entitled to address all decision makers. Mr McDowall's admission shows that did not occur here.

[40] For the above reasons I conclude the dismissal was unjustified. There are clear procedural deficiencies with a failure to adhere to statutory obligations in this respect. There are also serious questions about the dismissal's substantive justification which were not properly investigated or considered. This was because the evidence confirms the outcome, dismissal, was preordained by Mr Johnston's expectations and that is confirmed in the dismissal letter which gives, as an overarching reason, Progressives loss of faith and confidence in Mr Marriott.

[41] The conclusion Mr Marriott's dismissal was unjustified raises the question of remedies. He seeks wages lost as a result of the dismissal and compensation for hurt and humiliation. He also seeks the imposition of a penalty for an alleged breach of good faith with payment to be to him rather than the crown.

[42] Section 128(2) of the Act provides the Authority must order the payment of a sum equal to the lesser of the sum actually lost or 3 months ordinary time remuneration. Additional amounts may be awarded on a discretionary basis and Mr Marriott asks that I exercise this discretion and reimburse his loss in full.

[43] Mr Marriott took immediate steps to mitigate his loss and acquired casual work five days after his dismissal. During the following 3 months (which is 13 weeks and not the 12 upon which he based his calculations) he earned \$3,434.86 less than he would have received had he remained with Allied. That is payable given the provisions of s.128(2) of the Act.

[44] I turn now to the request I award the shortfall between his actual earnings and what he would have received had he remained with Allied beyond the three months. The argument is his ability to extend his hours was curtailed by the stress of the dismissal and this was supported by a medical certificate which in part reads:

... Eddie has presented frequently to the surgery with a variety of symptoms. We have concluded many of these symptoms are physical manifestations of stress.

[45] Therein lies the problem with this request. Mr Marriott has some serious pre-existing medical conditions. The evidence is he was faring well in respect to those while employed at Allied and his condition worsened after his dismissal. The evidence is also that stress was a contributing factor and some of that stress was attributable to the dismissal. What is unknown is the extent to which stress attributable to the dismissal affected his ability to mitigate his loss and how much is attributable to other factors. Nor do I know if his other conditions would have worsened in any event and affected his ability to remain at Allied. I therefore decline to exercise the discretion and choose instead to address the issue of stress via s.123(1)(c)(i) of the Act.

[46] Mr Marriott seeks an unspecified amount as compensation under s.123(1)(c)(i). The application is supported by his own evidence, that of his partner and the medical evidence already referred to. It is clear from the evidence his health deteriorated after the dismissal and stressors attributable to the dismissal and its consequences were a contributing factor. These stressors were primarily financial but also included a loss of confidence and feeling of self-worth.

[47] Having considered the evidence I conclude the award under s.123(1)(c)(i) should be significant and consider \$10,000 appropriate.

[48] The conclusion remedies accrue means I must, in accordance with the provisions of s.124 of the Act, address whether or not Mr Marriott contributed to his dismissal in a significant way. While Allied undoubtedly have a different view my conclusions regarding the weakness of the dismissals substantive justification must lead to a finding the answer is no, at least in the way envisaged by the Act. Similarly the procedural failures mean there is no evidence upon which a finding of contribution may safely be based.

[49] The penalty application was not pursued with vigour. In essence the argument is Allied failed to act in good faith by not seeking input from Mr Marriott prior to the suspension and by requiring him to attend the disciplinary meeting at short notice.

[50] A penalty for a breach of good faith requires deliberate, serious and sustained behaviour intended to undermine the employment relationship (s.4A of the Act).

[51] If Mr Marriott considered he was given insufficient notice of the disciplinary meeting he could have queried or challenged it. There is no evidence he did and that undermines a claim this was a serious breach.

[52] The alleged breach pertaining to the suspension was a one off and Mr Marriott produced no evidence it seriously undermined the employment relationship. That occurred when he was dismissed and that has been addressed through the personal grievance application.

[53] The threshold required for the imposition of a penalty has not been met and I take this claim no further.

Conclusion and orders

[54] For the above reasons I conclude Mr Marriott has a personal grievance as he was unjustifiably dismissed.

[55] As a result the respondent, Allied Security Limited, is to pay the applicant, Eddie Marriott, the following:

- i. \$3,434.86 (three thousand, four hundred and thirty four dollars and eighty six cents) gross as recompense for wages lost as a result of the dismissal; and
- ii. A further \$10,000.00 (ten thousand dollars) as compensation for humiliation, loss of dignity and injury to feelings pursuant to section 123(1)(c)(i) of the Act.

[56] Costs are reserved.

M B Loftus
Member of the Employment Relations Authority