

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 520/10
5279156

BETWEEN DON MURRAY
 Applicant

AND SKY SERVICES LIMITED
 Respondent

Member of Authority: Robin Arthur

Representatives: Sharon Harris-Scoble for Applicant
 Christopher Eggleston for Respondent

Investigation Meeting: 23 November 2010

Determination: 20 December 2010

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Don Murray worked as a security guard for Sky Services Limited (SSL) from July 2008. He did the Saturday night shift (from 6pm to 6am) at the Pernod Ricard's site in Pilkington Road, Point England where SSL has a contract to provide security services. From November 2008 he also worked the Sunday night shift there.

[2] There were usually two guards on the weekend night shift. In April 2009 one of those guards resigned and, after doing so, wrote a letter addressed to SSL owner and director Paul Whitford complaining about Mr Murray.

[3] Mr Whitford arranged a meeting with Mr Murray to discuss the letter. There is strongly disputed evidence from both parties about how the meeting – which took place on 16 April 2009 – was arranged and what happened at it. According to Mr Murray, he was dismissed at the meeting. According to Mr Whitford, Mr Murray resigned and never returned to work.

[4] Either way Mr Murray spoke by telephone with Mr Whitford five days later on 21 April to ask for his final pay and the two men met briefly on 22 April. At that time Mr Murray returned his uniform and Mr Whitford gave Mr Murray a final pay slip.

[5] Along with his personal grievance application, Mr Murray sought holiday pay entitlements which he said had not been paid in full.

[6] The issues for investigation and determination were:

- a. Whether Mr Murray resigned or was dismissed on 16 April 2009?
- b. If Mr Murray did resign, was his resignation voluntary or a result of the employer not treating him fairly (a constructive dismissal)?
- c. If he was unjustifiably dismissed, what remedies are due (considering lost wages and compensation for hurt and humiliation), subject to mitigation (in respect of lost wages claimed) and contribution (in respect of all remedies)?
- d. Was Mr Murray's holiday pay fully and properly paid?
- e. Costs?

The investigation

[7] Written witness statements were provided by Mr Murray, Mr Whitford and SSL supervisor Shayle Johnston. At the investigation meeting each witness, under oath or affirmation, confirmed their statement and answered questions from the Authority member. The parties' representatives had an opportunity to ask additional questions and provided oral closing submissions.

[8] In preparing this determination I reviewed the witnesses' written and oral evidence, the parties' closing submissions, and the relevant background documents provided. As allowed for under s174 of the Employment Relations Act 2000 (the Act), I have not recorded here all evidence and submissions received but state findings of facts and law and express conclusions on the issues for determination.

[9] There can be no certainty about the events in dispute that occurred some 18 months ago. The Authority must determine the matter on the balance of probabilities, that is what is more likely than not to have happened. In doing so in this case I must

make some findings regarding the credibility of each witness because there is little evidence that independently corroborates their testimony. It is to some extent a “*he said, he said*” case.

[10] Generally I have preferred the evidence of Mr Whitford over Mr Murray where there are conflicts in their recall of what happened. This is for two reasons.

[11] Firstly, I found some of what Mr Murray recalled Mr Whitford saying at the 16 April meeting was unlikely.

[12] Mr Murray insisted he was told the letter of complaint was addressed to the general manager of the Pernod Ricard site but the letter was actually addressed to Mr Whitford. Mr Whitford knew that so he was unlikely to have said any differently. Further, Mr Murray insisted Mr Whitford said the complaint included an allegation that Mr Murray had been involved in drug dealing. The letter made no such reference and I consider it unlikely that Mr Whitford would have said so when he must have known Mr Murray could both demand and be entitled to see the letter at some point.

[13] Secondly, to prefer Mr Murray’s evidence, I would have to take the view that Mr Whitford had lied in his evidence about sending Mr Murray a letter on 17 April and giving him a further letter on 22 April and had fraudulently created those letters some time after Mr Murray raised his grievance in late May 2009. I do not. A copy of each letter was provided in SSL’s evidence. The text of both letters, in my assessment, has an air of authenticity and informality which accords with Mr Whitford’s account of events at the time they are said to have been written. If written as a deceptive afterthought, such letters would have been more formal and complete.

[14] The importance of accepting the letters as genuine is that they refer to Mr Murray saying he was not coming back, which differs from his account that he was told Mr Whitford had “*no option but to let me go*”.

The letter of complaint

[15] The letter of complaint was written by departing employee Ric Delmundo, who worked weekend night shifts with Mr Murray. He gave the letter to Mr Johnston who passed it on to Mr Whitford.

[16] Mr Delmundo's letter alleged Mr Murray did not do job properly, had told stories about acting dishonestly in previous jobs, and had once drawn an unemployment benefit while also working in a full-time job in Australia. Mr Murray insisted he did do his job properly for SSL and says the other incidents he had mentioned to Mr Delmundo happened more than 30 years ago and were simply among "*stories about the past*" that the two men had swapped while working together. I accept Mr Murray's evidence on this point and note that Mr Whitford's evidence was that he regarded Mr Murray as a good employee who worked two weekend night shifts which were otherwise hard to staff.

The 16 April meeting

[17] When Mr Whitford saw the letter he decided Mr Murray should see it and arranged a meeting for the purpose. Mr Whitford says he suggested meeting at a coffee shop in the Sylvia Park mall because Mr Murray wanted to meet somewhere more convenient than the SSL offices. Mr Murray disputes that he made that request.

[18] Mr Johnstone went to the coffee shop with Mr Whitford but sat at a neighbouring table when Mr Murray and Mr Whitford began their conversation. When Mr Whitford referred to a complaint from another employee Mr Murray initially assumed it was a different employee about whom he had complained some months earlier and whom Mr Whitford had subsequently transferred to the day shift.

[19] Mr Whitford explained that the complaint was actually from Mr Delmundo and tried to show his letter to Mr Murray. Mr Murray refused to take the letter and told Mr Whitford: "*You can stick your job. I don't need this crap in my life anymore*". Mr Murray stood up and, as he walked away, said: "*I'll just add this one to the Don Murray comic book of life*".

Further contact

[20] Mr Whitford wrote a letter to Mr Murray, addressed to his home address, on 17 April 2009. It referred to Mr Murray “*losing your cool*” and walking out of the meeting. It stated an assumption that Mr Murray was “*not coming back*” but asked him to contact Mr Whitford if that was not the case. Mr Murray said he did not get that letter. He did not work on his rostered Saturday and Sunday shifts but rang Mr Whitford on the following Tuesday to ask about his final pay. Mr Whitford had rung Mr Murray’s home telephone number on the Monday and left a message on his answer phone. Mr Murray said he did not get any message from Mr Whitford.

[21] Mr Whitford arranged to meet Mr Murray on 22 April to get his uniform back and to hand over a final pay slip. Mr Whitford also handed over a letter saying he was sorry Mr Murray had decided to leave SSL.

A dismissal or a resignation

[22] I find that Mr Murray resigned from his job on 16 April. In doing so I decline to accept his evidence that Mr Whitford dismissed him at the coffee shop meeting supposedly on the orders of Pernod Ricard’s general manager. There is no evidence that the general manager was even aware at that time of the circumstances or Mr Delmundo’s complaint addressed to Mr Whitford.

[23] I accept Mr Whitford’s evidence that he had no intention of dismissing Mr Murray on the basis of Mr Delmundo’s complaint or pursuing it further. Mr Whitford deposed that it was not unusual for employees to have a “*passing shot*” when leaving, and that such comments seldom impressed him. He also noted that Mr Delmundo’s letter acknowledged that his allegations about the stories he was told by Mr Murray “*may or may not be true*” and that if Mr Delmundo had genuine concerns he would have raised them earlier.

[24] Mr Murray’s conduct following 16 April is also more consistent with a resignation. If it were a dismissal, he might have been expected to express some words of protest or disagreement to Mr Whitford when they spoke by telephone on 21 April and met briefly on 22 April. Mr Murray accepted that he did not.

[25] Mr Whitford's letter of 17 April and his telephone message of 20 April also show SSL did not seize upon words of resignation uttered by Mr Murray in the heat of the moment but, properly, attempted twice to check with him whether that was his true intention. Nothing Mr Murray did between 16 and 22 April contradicted what Mr Whitford understood to be his intention to resign.

No constructive dismissal

[26] Mr Murray's written and oral evidence consistently maintained he was subject to an express act of dismissal by Mr Whitford. However, having found he resigned, I have also considered whether his resignation was not truly voluntary but resulted from a breach of his terms of employment by SSL – specifically not dealing with him fairly over Mr Delmundo's complaint.

[27] If the coffee shop meeting on 16 April were intended to have any disciplinary consequences, it would have been unfair. There was no notice of any such purpose or the opportunity to attend with a representative or advice about the content of allegations to be discussed. However I accept Mr Whitford's evidence that the purpose of the meeting was to provide Mr Murray with the information about Mr Delmundo's complaint, not require explanations in response to its allegations. Accordingly I find no breach of Mr Murray's terms of employment and no constructive dismissal. He chose to resign.

Determination

[28] For the reasons given I find Mr Murray does not have a personal grievance and no remedies may be awarded to him.

[29] I encouraged the parties to resolve the holiday pay issue themselves and set a timetable for their representatives to revert to the Authority if any aspect remained for determination. Nothing further has been lodged within that timetable.

Costs

[30] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves for what was less than a half-day investigation meeting. If they are not able to do so, SSL may lodge and serve a memorandum as to costs within 28 days of the date of this determination. Mr Murray will then have 14 days to lodge a reply before the Authority determines costs. No application will be considered outside this timetable without prior leave.

Robin Arthur
Member of the Employment Relations Authority