

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Waisea Naivallivou (Applicant)
AND Armourguard Security Limited (Respondent)
REPRESENTATIVES Aseri Bale, for Applicant
David Barlow, for Respondent
MEMBER OF AUTHORITY Y S Oldfield
INVESTIGATION MEETING 27 May 2005
DATE OF DETERMINATION 28 July 2005

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

- [1] Mr Naivallivou was employed by the respondent (Armourguard) as a security guard for four years, and by its predecessor for a further six prior to that. Armourguard dismissed him for serious misconduct after it received an allegation that Mr Naivallivou had been found sleeping on duty. Mr Naivallivou now denies the allegation and says that Armourguard did not conduct a full and fair inquiry into it.
- [2] Armourguard says that it did conduct a proper inquiry during which Mr Naivallivou admitted that he had slept on the job. It was company policy that sleeping on duty amounted to serious misconduct. In this case it was particularly important that Mr Naivallivou remain awake and alert since he was responsible for guarding a potentially violent person. The company continue to believe that dismissal was justified.
- [3] I advised the parties that I accepted that sleeping on duty in these circumstances would, if established, amount to serious misconduct justifying dismissal. The key issue for determination therefore became whether, in the context of a fair process, Mr Naivallivou had indeed admitted that he had fallen asleep on the job.

Did a full and fair enquiry show that Mr Naivallivou was asleep on the job?

- [4] On 11 March 2004 Mr Naivallivou was on night duty at North Shore hospital. It was his third shift after a two month absence from work. His responsibility was to guard a patient at the hospital whose violent behaviour posed a risk to himself, staff and other patients. In the middle of the night the Night Operations Supervisor, David James, called at the site in order to lend Mr Naivallivou a tie, a part of the dress code that he had forgotten on this occasion.

- [5] Mr James says that as he approached Mr Naivallivou he realised that he was asleep but as he got closer Mr Naivallivou woke up. Mr James gave him the tie and (giving him the benefit of the doubt that he had only just closed his eyes) was about to leave the hospital without taking any further action. However the nurse on duty stopped him to voice concerns about Mr Naivallivou sleeping on this and the previous nights. She said that it was not a case of Mr Naivallivou briefly dozing off. During her rounds she had shone her torch right in his face with no response because he was sound asleep. She insisted that he be replaced for his and everyone else's safety.
- [6] Mr James immediately sent Mr Naivallivou home on the basis that he was suspended from work until further notice. He told Mr Naivallivou that he would report the matter to management and that they would get in touch with him.
- [7] Mr Naivallivou had been rostered to the hospital until the end of that week. He did not yet have the roster for the following week. Over the next few days Mr Pupulu (Operations Controller) tried unsuccessfully to contact him using the telephone number on Mr Naivallivou's file, but Mr Naivallivou was not at that address. Not realising there was a problem with his contact details, Mr Naivallivou at first waited for news but then took the initiative and contacted the call centre asking for work. The call centre was not aware that he had been stood down and gave him one duty to do on 17 March.
- [8] When Mr Pupulu heard about this he instructed the call centre that the next time Mr Naivallivou got in touch he was not to be given work and should be told to contact him immediately. On 30 March Mr Naivallivou rang in again and was put through to Mr Pupulu, who asked him to come in and see him, which he did on 7 April. Mr Pupulu then told Mr Naivallivou that he proposed to investigate the allegation that he had been sleeping on the job and advised him to come to a formal meeting about it on 13 April.
- [9] This meeting was attended by Mr Naivallivou, Mr Pupulu and Mr Tauti, another supervisor at the same level as Mr Pupulu. Mr Naivallivou was offered the opportunity to have a support person but declined the offer. Mr Pupulu put it to Mr Naivallivou that Mr James and the nurse had alleged that he had been sleeping on the job on the night of 10/11 March. He and Mr Naivallivou differ in their recollection of what was said after that.
- [10] Mr Pupulu's version is as follows. He says Mr Naivallivou admitted that he had slept on the job and apologised. In mitigation he said that he had been under a lot of pressure and was very tired on the night in question, and also did not consider the patient to pose a threat. Mr Pupulu did not accept this as Mr Naivallivou knew he was there because the patient's behaviour was considered a risk to the safety of others. He also asked Mr Naivallivou why, if he was too tired, he had not asked to be relieved, and Mr Naivallivou told him that he needed the money.
- [11] Mr Naivallivou denies all of this.
- [12] Mr Pupulu then adjourned the meeting while he conferred with the Auckland Branch Manager about what to do. At the time Armourguard had taken over Mr Naivallivou's employment, it had provided him with information about its policies and procedures, which identified sleeping on the job as serious misconduct. Mr Pupulu decided that Mr Naivallivou had been guilty of serious misconduct and that dismissal was appropriate. The Branch Manager agreed.
- [13] Mr Pupulu returned and asked Mr Naivallivou if there was anything else he wanted to say. Mr Naivallivou said there was not. He was then told that he was dismissed.

Determination

[14] I am satisfied that the respondent's process was full and fair. Mr Naivallivou was properly advised of the purpose of the meeting, offered an opportunity to have representation and given an opportunity to respond to the allegations. Much was made in submissions of the fact that he was not given the nurse's complaint in writing but I am satisfied that no prejudice arose from this since the allegation was simple and able to be put very clearly to him.

[15] The determination of this case comes down to credibility. Unfortunately, I did not find Mr Naivallivou a credible witness. During the investigation meeting he changed his evidence on several points, accepting the accounts given by respondent witnesses when the documentary record bore it out. His recall simply was not reliable. I accept that he admitted to Mr Pupulu that he had been sleeping on the job, consistent with what the charge nurse and the supervisor had alleged.

[16] The dismissal was therefore justified. I can do nothing more to assist Mr Naivallivou with his employment relationship problem.

Y S Oldfield
Member of Employment Relations Authority