

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE**

[2020] NZERA 413
3061292

BETWEEN

RIO NGAWAKA
Applicant

AND

GLOBAL SECURITY
SOLUTIONS LIMITED
Respondent

Member of Authority: Nicola Craig

Representatives: David Toopi for the applicant
James Sutherland for the respondent

Investigation Meeting: 26 September and 29 October 2019

Submissions and further information received: Submissions from both parties on 29 October 2019
Further information from the Respondent on 5 November 2019 and 10 February 2020

Date of determination: 12 October 2020

DETERMINATION OF THE AUTHORITY

- A. Rio Ngawaka was not suspended or constructively dismissed by Global Security Solutions Limited.**
- B. Mr Ngawaka has not established his claims regarding breaks or discrimination.**
- C. Costs are reserved with a timetable set if the parties are not able to resolve the matter.**

What is the Employment Relationship Problem?

[1] Rio Ngawaka worked as a security guard for Global Security Solutions Limited (Global or the company) for a little under six months before he resigned. Global is a family owned, New Zealand based, security business.

[2] Mr Ngawaka claims that he was constructively dismissed and that his dismissal was unjustified. Global denies there was a constructive dismissal.

[3] An investigation meeting was held in 26 September and 29 October 2019. I heard in person from Mr Ngawaka and from Global's Assistant Manager Manned Services Gavin Erasmus, Operations Manager Manned Services Ray Chisholm and Human Resources Manager Linda Johnson. I also heard evidence by telephone from Global's former Operations Co-ordinator Raewyn Brown.

[4] This determination has been issued more than three months after the day on which the last information was received. When I advised the Chief of the Authority that this would likely be the case, he decided that s 174C(4) of the Employment Relations Act (the Act) was applicable.

[5] This determination has not recorded everything received from the parties but has stated findings of fact and law, expressed conclusions and specified resulting orders.¹

What are the issues?

[6] The issues for investigation and determination are:

- (i) Was Mr Ngawaka given breaks as required?
- (ii) Was he unjustifiably suspended by Global, including in breach of his employment agreement?
- (iii) Was he constructively dismissed and if so, was that unjustified?
- (iv) Does he have a discrimination personal grievance against Global?

¹ The Act, s 174E.

- (v) If Mr Ngawaka establishes a personal grievance claim, what remedies (if any) should he receive?
- (vi) Should either party have to contribute to the other party's costs?

What did the work involve?

[7] At his request Mr Ngawaka was transferred from patrol duty to a static guard role at an apartment complex in Auckland city. The guard helped ensure that rough sleepers and other unauthorised people were not loitering at the site. Some patrolling of the site was required.

Did Mr Ngawaka receive breaks?

[8] Mr Ngawaka claims that he was not able to take breaks as legally required. Global responds that breaks could be taken and that all Mr Ngawaka's meal and rest breaks were paid. What has traditionally been known as crib time was paid, as Mr Ngawaka could not completely get away from the worksite during his breaks.

[9] There have been some changes over the years to Part 6D of the Act which covers rest and meal breaks. Although the current law requires breaks of particular lengths depending on the work period, that was not always the case. In 2018, s 69ZD more broadly provided that a reasonable opportunity for rest, refreshment and attention to personal matters was required.

[10] That entitlement could be subject to restrictions which were reasonable and necessary, having regard to the nature of the employee's work.² This included the employee continuing to be aware of his or her work duties or, if required, continuing to perform some duties during the breaks.³

[11] Mr Ngawaka was the only guard on this site during his shift. However, there were opportunities to sit down, eat a meal and go to the bathroom. Some routine patrolling was required but it was not extensive and prevent breaks occurring. Mr Ngawaka described it as a chill job. I conclude that Mr Ngawaka was able to take breaks as envisaged by the legislation in place at the time.

² The Act, s 69ZD(2)(a)(i) in force from 6 March 2015 to 5 May 2019.

³ The Act, s 69ZD(2)(b)(i) in force as above.

What happened during the 19 September shift?

[12] Mr Ngawaka started a night shift on 19 September 2018. During the shift he lost the site keys for the apartment building. He admits that he started “freaking out”.

[13] Mr Ngawaka phoned Mr Erasmus to ask him for a spare set of site keys for the apartments as he had lost his set. Mr Erasmus expressed concern and said that Global did not hold a second set of keys due to the uniqueness of the building. He said he would follow up with the key holder and in the meantime Mr Ngawaka should carry on with the site checks and be more vigilant.

[14] On thinking further, Mr Ngawaka recalled the only person around when he may have put the keys down was a bartender from the bar in front of the apartments. He hoped the bartender had picked up the keys.

[15] Mr Ngawaka asked the security guard who relieved him at the end of his shift to check with the bar when it opened later that morning. The guard who relieved Mr Ngawaka was employed by another security firm. He reported to his employer about the keys and also that he found Mr Ngawaka asleep on a bench with his headphones on. He took a photo. Mr Ngawaka accepts that he had been sitting down with headphones on but denies he was asleep. He questions the photo.

[16] Later that day the keys were handed over by a person from the bar.

[17] Both Global Security’s client and the security company the relieving guard worked for, complained to Global. The client’s property manager was very irate about the security breach, indicating that it may pull out of the contract with Global as a result.

How to Global begin its investigation?

[18] On 20 September 2018 Global wrote to Mr Ngawaka identifying alleged unsatisfactory performance and serious misconduct. The concerns noted were the loss of the site keys and Mr Ngawaka reportedly being found asleep by the relieving guard. Parts of the employment agreement were identified as possibly being breached. Global asked Mr Ngawaka to come to a meeting to have his say. He was welcome to have a support person or representative present. Two versions of this letter appear to have been sent. It was not clear whether Mr Ngawaka has received the first one so a second one was hand delivered.

[19] Before that meeting occurred, Global sent Mr Ngawaka another letter dated 26 September 2018 noting that the day before he had arrived at work in civilian attire and not in full uniform to perform his duties. This was as a result of the apartment's property manager meeting with Mr Chisholm about the keys issue and mentioning the uniform. Mr Chisholm thought that the uniform issue could have a different outcome from the keys and sleeping allegations and should therefore be treated separately. So two streams of investigation were to be run.

What happened at the 28 September meeting?

[20] Global's meeting notes refer to Mr Ngawaka, Mr Erasmus and Ms Brown being involved.

[21] Although it appears from Global's letters that this meeting was originally set up to discuss the keys and sleeping issues, those matters were still being investigated and so were not focused on at this meeting. The subjects discussed were Mr Ngawaka's uniform and more recent problems of him not turning up for a shift on Monday that week or reporting his absence, along with alleged lateness on Tuesday.

[22] Mr Ngawaka reported phone problems which meant he could not accept or make calls or open emails. He said he had phoned in about being sick on Monday but did not know who he had spoken to. He denied being late on Tuesday.

[23] Mr Erasmus reported that a complaint had been received that the Global uniform was not worn. Mr Ngawaka replied that he had been wearing his uniform but was wearing a hoodie underneath. He was asked to wear his Global jacket rather than wearing the hoodie. Mr Ngawaka responded that he had the jacket but preferred wearing the hoodie.

[24] Ms Brown's impression was that Mr Ngawaka was disengaged and did not care about the issues.

[25] Mr Ngawaka did not have very clear recall of this and the following meeting and seemed to be basing his evidence on the letters setting up the meetings rather than actually recalling the meetings themselves. This caused some confusion as Global had decided to use the first meeting to discuss the issues described in the second letter.

What was the 5 October meeting about?

[26] Mr Erasmus and another Global representative met with Mr Ngawaka on 5 October about the keys and sleeping allegations.

[27] Mr Ngawaka could not see what the problem was with the keys as they had eventually been recovered. A similar attitude was expressed at the Authority's investigation meeting when he acknowledged when questioned that Global thought the keys going missing was serious, but did not seem to have a sense of why that was.

[28] Mr Ngawaka denied that he had been sleeping during his shift, although he accepted that he was sitting down with his head phones on.

[29] Mr Erasmus was concerned from the two meetings that Mr Ngawaka seemed to have a blasé attitude to the difficulties which had occurred.

[30] Had Global made a decision about disciplinary action on the basis of the information it had after the 5 October 2018 meeting, I would have had to consider the reasonableness of the process and decision. However, that did not happen.

[31] Up until this point, the more senior manager Mr Chisholm had not met with Mr Ngawaka and felt he needed to find out what Mr Ngawaka's responses were. So another meeting was arranged for 19 October.

[32] In the meantime Global thought it might be better for Mr Ngawaka to move to a different site, rather than remain working at the apartments. The plan was to talk to Mr Ngawaka about the possible change at the next meeting.

Was Mr Ngawaka suspended?

[33] Mr Ngawaka claims that Global suspended him. Given the difficulties with identifying particular meetings, it is not entirely clear when Mr Ngawaka believes this happened. He says that he was told at the meeting with Gavin and the other man that he was suspended. The only meeting where the other man was present was 5 October 2018. His belief about being suspended was also based on a lack of payment from Global.

[34] Both Mr Erasmus and Mr Chisholm deny that Mr Ngawaka was ever suspended. Mr Erasmus was the person dealing with Mr Ngawaka at the earlier meetings but he

did not have the authority to suspend employees so that would have had to been permitted by a senior manager. I found Mr Erasmus' evidence that he did not tell Mr Ngawaka he was suspended to be credible.

[35] Pay records show that Mr Ngawaka was paid for 15.5 hours of work in the pay period ending 14 October 2018 and 36 hours of work in the pay period ending 21 October 2018. The pay for that last period was Mr Ngawaka's final pay until his termination pay was received later in November.

[36] On the basis of the roster and pay records and Mr Erasmus's evidence, I find that Mr Ngawaka was not suspended, at least until 18 October 2018.

[37] During the investigation meeting I explored whether Mr Ngawaka could have taken himself to be suspended due to not getting any shifts from around 19 October 2019 onwards. The rosters showed that Mr Ngawaka had been allocated to work Monday to Friday in the week starting 22 October but the entries were crossed out electronically with the reference "No Contact" noted on them.

[38] Ms Brown tried to get hold of Mr Ngawaka both by his phone, leaving messages at the hostel where he lived and by email. It seems most likely that this was during the week starting 22 October when ultimately Global noted there being no contact as Mr Ngawaka had not confirmed his availability and could not be contacted. According to Mr Erasmus, if contact had been able to be made with Mr Ngawaka he would have been offered shifts.

[39] I am reinforced in my finding that Mr Ngawaka was not suspended by the absence of any documentation to that effect. Global clearly committed to paper the fact that it was investigating and the issue being investigated. The letters are slightly over a page and set out quite a lot of information. This includes the issue being investigated, the relevant clauses of the employment agreement, a time for the meeting, a time to advise by if the meeting time offered was not suitable, the opportunity to have a support person or representative present and the possible outcome if the allegations are established.

[40] It seems unlikely that an employer as focused on meeting their procedural obligations would completely omit to mention the possibility of suspension in advance and then not document a suspension itself in any way.

[41] In addition the meeting notes also make no mention of suspension and the roster refers to “No Contact” (from Mr Ngawaka) rather than suspension.

[42] I am not satisfied that Mr Ngawaka was suspended. He may have thought that he had been suspended by the lack of any pay after the 24 October pay, but that was due to the company’s inability to contact him to confirm his availability to work and his lack of communication to Global.

[43] The breach of employment agreement claim appears to be based on the criteria for suspension in the agreement not being satisfied.⁴ However, as I have found there to be no suspension there was no non-compliance with the agreement.

Why did the 19 October meeting not occur?

[44] At an operational meeting a day or so before the 19 October 2018 meeting there was discussion about transferring Mr Ngawaka to another site. A site had been identified where he had worked previously so would not need a full length induction. Mr Chisholm said no decision had been made as he wanted to hear what Mr Ngawaka had to say on 19 October.

[45] On 19 October Mr Ngawaka did not arrive at the 8am scheduled meeting time. He arrived between about 12 and 12.30pm. Mr Chisholm was leaving the office to go to another meeting. He explained to Mr Ngawaka that he could not meet with him now as he was heading out the door. He asked Mr Ngawaka to make contact to reschedule. Mr Ngawaka did not respond so Mr Chisholm said he had to go and for Mr Ngawaka to call to reschedule.

[46] Mr Chisholm thought that Mr Ngawaka was still rostered to work at this time. He understood Ms Brown was trying to make contact with Mr Ngawaka to get confirmation of his availability for shifts.

What occurred in the lead up to Mr Ngawaka’s resignation?

[47] Global’s next operations group meeting was on 25 October 2018. Mr Chisholm raised whether Mr Ngawaka had been in touch. When it was established that he had not, Mr Chisholm tried to phone Mr Ngawaka at the hostel. Mr Chisholm thought that Mr Ngawaka’s cell phone was still not working so does not recall trying to phone him

⁴ Clause 24 of the employment agreement.

that way. On being told Mr Ngawaka was not present at the hostel, Mr Chisholm left a message asking Mr Ngawaka to call. He tried phoning again the following day and left a message on the hostel's answerphone asking Mr Ngawaka to contact him to reschedule their meeting. Mr Chisholm did not hear anything back.

[48] Global could possibly have attempted to contact Mr Ngawaka in other ways but it did not take any action against Mr Ngawaka during this period. Rather after its attempts to contact him, it was waiting for him to re-engage.

[49] Mr Ngawaka initially said at the investigation meeting that he had flicked Mr Chisholm two emails after his suspension. He indicated that the emails were asking what was happening about his employment, showing that he knew he had been suspended and wanting to know where he stood and what was going on.

[50] I asked Mr Ngawaka to try to find these emails. Despite searching electronically, he was unable to find any emails of this nature. He did locate one email from after 6.30pm on 1 November 2018, to Mr Chisolm requesting a copy of his employment contract. This was the day before he resigned. Mr Ngawaka accepted that was his only email. In it there is no mention of suspension or what was happening about his shifts or employment.

[51] I conclude that Mr Ngawaka did not approach Mr Chisholm by email to question what was happening about his employment.

[52] Mr Ngawaka also says that he phoned Mr Chisholm and Mr Erasmus during this period but could not provide details about when this was. He was unable to provide any phone records of this and Mr Chisolm and Mr Erasmus deny getting any missed calls or phone messages from Mr Ngawaka. Global accepts that Mr Ngawaka may have phoned its communications section but not that any messages went to the two managers.

[53] In conclusion I accept that Global attempted to make contact with Mr Ngawaka in the period when he was supposed to be setting up another meeting but Mr Ngawaka did not leave any phone or email messages with Global. It was not apparent to the company that its employee was dissatisfied with the way the company was operating.

How did Mr Ngawaka resign?

[54] On 2 November 2018 Mr Ngawaka went into the Global office and spoke to Ms Brown. Ms Johnson was also present. Ms Brown had dealt with him numerous times before on rostering issues, both in person and on the phone. Her impression was that he seemed quite happy and looking smoothly dressed. He asked for a pen and a piece of paper to put in his resignation.

[55] Mr Ngawaka says that he told Ms Brown that he had no work and no one will answer his calls. Both Ms Brown and Ms Johnson deny this, saying he did not indicate any unhappiness or that he was resigning because he was suspended. I find Ms Brown and Ms Johnson to have better recall and be more credible.

[56] The resignation note was brief and simply referred to Mr Ngawaka resigning. There was no indication of Mr Ngawaka's dissatisfaction with Global being the cause of his action. Similarly, Mr Ngawaka emailed Ms Johnson on 6 November 2018 without suggesting any concerns about the company's investigation or process. He simply noted that he had resigned on 2 November and wanted to know what was happening with his pay.

Was there a constructive dismissal?

[57] Mr Ngawaka claims that he was constructively dismissed. The three categories of constructive dismissal set out by the Court of Appeal in *Auckland Shop Employees Union v Woolworths (NZ) Limited* are:

- (a) Where the employee is given a choice of resignation or dismissal;
- (b) Where the employer has followed a course of conduct with a deliberate and dominant purpose of coercing an employee to resign; and
- (c) Where a breach of duty by the employer leads an employee to resign.⁵

[58] The first category is not applicable.

Course of conduct

[59] Under this head I consider:

⁵ *Auckland Shop Employees Union v Woolworths (NZ) Limited* [1985] 2 NZLR 372 (CA) at 374-375,

- (a) Did Global carry out a course of conduct with a deliberate and dominant purpose of coercing Mr Ngawaka into resigning; and
- (b) If so, did Mr Ngawaka resign in response to that course of conduct?

[60] Having considered all the evidence, I am not convinced that Global had any deliberate and dominant purpose to coerce the resignation. The company had a legitimate basis on which to begin an investigation. Keys to a property it was required to guard, including the only master key, had gone missing.

[61] The company was pursuing an investigation. Mr Chisholm sensibly felt he should not make a decision without meeting Mr Ngawaka. But Mr Ngawaka had not arrived on time for the 19 October meeting. Global had attempted to follow up with him on several occasions but had not received any response. No action had been taken in his absence. There was no intent to encourage a resignation.

Breach of duty

[62] In *Wellington etc Clerical Workers etc IUOW v Greenwich* the Court noted that it was not sufficient if the employer's conduct was inconsiderate and caused some unhappiness to the employee. What is required is dismissive or repudiatory conduct. I then examine:

- (a) Did the conduct cause the resignation?
- (b) Was the breach of duty sufficiently serious to make it reasonably foreseeable by the employer that the employee would not be prepared to work under the conditions prevailing? Was there a substantial risk of resignation?

[63] Was there dismissive or repudiatory conduct by Global? The company initiated investigative action about its concerns. This was an acceptable employer response in the circumstances. Mr Ngawaka himself accepted that most of the actions being investigated had occurred. These included the keys going missing and not arriving at work in his uniform.

[64] The confusion around the different subjects for discussion and meetings could be seen as a breach of the duty of good faith in that, albeit not intentionally, the company did not act in an open and communicative matter.

[65] I have considered whether any confusion around the letters may have been the cause of Mr Ngawaka's views around what was happening. However, his evidence did not reflect that. He felt he was being hounded about issues which he did not see as serious at all. My impression was that it was the fact that his actions were being questioned which he regarded as harassment. He was offended that an investigation was occurring and did not like the possibility of a dismissal outcome being mentioned in a letter. Warning an employee of possible outcomes is part of a good process. I do not consider that any repudiatory conduct by Global was the cause of Mr Ngawaka's resignation.

[66] If I am wrong about the conduct causing the resignation, there remains the question of whether the conduct would have made it reasonably foreseeable that Mr Ngawaka was not prepared to work under the prevailing conditions. I do not accept that it was. Prior to and at the time of resignation, Mr Ngawaka provided no indication of concerns about Global's process.

[67] Mr Ngawaka was not constructively dismissed.

What about the discrimination claim?

[68] Mr Ngawaka claims that he was discriminated against by Global. This relates to Global's actions which are part of the suspension and dismissal claims. When asked what type of discrimination or on what grounds, Mr Ngawaka said that he was not really sure what type. At the investigation meeting Mr Ngawaka mentioned a secret agenda but was not more explicit. I took Mr Ngawaka's position to be that there must have been reasons behind Global's actions which were not obvious to him.

[69] The onus of proof in discrimination personal grievance claims is on the applicant.

[70] Other than Mr Ngawaka's suspicion, there was no evidence of any discriminatory actions or motivations by anyone at Global. The company provided material supporting its employment of a diverse range of employees from multiple ethnic, cultural and religious backgrounds. It also has a regular lunch where such backgrounds, beliefs and religions are discussed. I was unable to identify any secret agenda on Global's part.

Costs

[71] Costs are reserved. The parties are invited to resolve the matter. Global were represented by staff members in the lead up to and at the investigation meeting and so may not have incurred any costs which are claimable. If the company wishes to apply for costs it shall have 21 days from the date of this determination in which to file and serve a memorandum. Mr Ngawaka shall have a further 14 days in which to file and serve a memorandum in reply. Submissions claiming costs must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

[72] The parties can expect the Authority to use the notional daily tariff as the starting point, with possible adjustments upwards or downwards.

Nicola Craig

Member of the Employment Relations Authority