



Employment Court of New Zealand

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Ngawaka v Global Security Solutions Limited [2022] NZEmpC 40 (9 March 2022)

Last Updated: 15 March 2022

IN THE EMPLOYMENT COURT OF NEW ZEALAND AUCKLAND

I TE KŌTI TAKE MAHI O AOTEAROA TĀMAKI MAKĀURAU

[\[2022\] NZEmpC 40](#)

EMPC 343/2020

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	RIO NGAWAKA Plaintiff
AND	GLOBAL SECURITY SOLUTIONS LIMITED Defendant

Hearing: 15–17 February 2022
(Heard via Audio Visual Link)

Appearances: R Ngawaka, plaintiff in person
R Johnson, agent for
defendant

Judgment: 9 March 2022

JUDGMENT OF JUDGE K G SMITH

[1] Rio Ngawaka was employed as a security guard by Global Security Solutions Ltd. His employment ended with his resignation on 2 November 2018.

[2] Mr Ngawaka raised a personal grievance with the company claiming that he had been forced to resign because he was unfairly suspended, victimised and discriminated against. He also claimed that the employment agreement between him and the company was breached.

[3] Global Security Solutions Ltd did not accept that it had compelled Mr Ngawaka to resign or acted in any of the ways claimed by him.

RIO NGAWAKA v GLOBAL SECURITY SOLUTIONS LIMITED [\[2022\] NZEmpC 40](#) [9 March 2022]

[4] The Employment Relations Authority dismissed all of Mr Ngawaka’s claims.¹ In a separate decision he was ordered to pay costs of the investigation meeting to Global Security.²

The challenge

[5] Mr Ngawaka challenged both determinations. He challenged the whole of the Authority’s substantive determination and claimed lost earnings from the date of his resignation until he resumed full-time employment in September 2019. Compensation pursuant to [s 123\(1\)\(c\)\(i\)](#) of the [Employment Relations Act 2000](#) was sought.

[6] The challenge to the Authority’s costs determination sought to have the award in favour of Global Security set aside.

Constructive dismissal

[7] A resignation by an employee may be regarded as a dismissal where it was the result of some adverse action by the employer, commonly known as a constructive dismissal.³ In *Auckland Shop Employees Union v Woolworths (NZ) Ltd* the Court of Appeal listed three non-exhaustive situations where a constructive dismissal might occur:⁴

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

1 *Ngawaka v Global Security Solutions Ltd* [2020] NZERA 413 (Member Craig).

2 *Ngawaka v Global Security Solutions Ltd* [2020] NZERA 482 (Member Craig).

3. *Wellington, Taranaki and Marlborough Clerical Etc IUOW v Greenwich (T/A Greenwich and Associates Employment Agency and Complete Fitness Centre)* [1983] ACJ 965 (AC) at 101–113.

4 *Auckland Shop Employees Union v Woolworths (NZ) Ltd* [1985] 2 NZLR 372 (CA) at 374–375.

[8] In *Woolworths* the Court held that the conduct complained of by the employee, said to give rise to the constructive dismissal, must amount to a repudiation of the contract. Conduct that was just unreasonable is not enough.

[9] In the subsequent decision of *Auckland Electric Power Board v Auckland Provisional District Local Authorities Officers IUOW Inc* the Court of Appeal held that the approach to constructive dismissal involved two stages.⁵ The first stage is to determine whether the resignation was caused by a breach of duty on the part of the employer taking into account all the circumstances of the resignation. The second stage is to ask whether that breach was sufficiently serious that a substantial risk of resignation was reasonably foreseeable.

[10] The last point to mention is that in *Business Distributors Ltd v Patel* the Court of Appeal accepted that there may be a constructive dismissal even if the employer is not seeking the resignation of the employee and wants to retain that person in employment.⁶ The Court held that in such cases it may be difficult to establish a constructive dismissal occurred.

What happened?

[11] Mr Ngawaka's case rests on what happened after he was assigned to work as a security guard at a residential apartment building in central Auckland. His actions, and how Global Security investigated them, were the cornerstones of his case.

[12] Mr Ngawaka came to be working at the apartment building because he was reassigned from other duties. When he began working for Global Security his first placement was as part of a team of security guards at a construction site.

[13] Some difficulties emerged on the construction site that led Mr Ngawaka to request his manager, Carl Watson, allocate him work elsewhere. The request to move followed Mr Watson's attention being drawn to several issues he discussed with Mr Ngawaka. They included allegations of lateness, not having a clean uniform, not

5. *Auckland Electric Power Board v Auckland Provisional District Local Authorities Officers IUOW Inc* [1994] NZCA 250; [1994] 2 NZLR 415, [1994] 1 ERNZ 168 (CA) at 172–173.

6 *Business Distributors Ltd v Patel* [2001] NZCA 301; [2001] ERNZ 124 (CA) at 131.

attending work, taking longer breaks than other security staff and not being diligent. While Mr Watson discussed these allegations with Mr Ngawaka they did not result in any disciplinary action.

[14] Mr Ngawaka requested and was granted a transfer to security patrol work. He undertook some training for the patrol work and a uniform was issued to him (there are differences between the uniforms of patrol guards and other guards).

[15] After Mr Ngawaka completed the training he advised Mr Watson of his preference not to be allocated patrol work. The upshot was an agreement for him to transfer to work as a guard at the apartment building in central Auckland where he was employed at the time his employment ended.

[16] This second transfer meant a change of line manager. Mr Ngawaka's new manager became Gavin Erasmus, who at the time was Global Security's Assistant Manager Manned Services.

[17] Three incidents prompted Global Security to investigate alleged problems with Mr Ngawaka's work while he was stationed at the apartment building. They were that:

- (a) On the evening of 19 September 2018, he lost the only keys to the apartment building allocated to Global Security.

(b) At the end of the night shift that began on 19 September 2018, he was asleep on duty and had to be woken by the guard who relieved him.

(c) On 25 September 2018 he arrived to begin work at the apartment building but was not in his uniform.

[18] The company's intention to investigate the first two of those allegations was communicated to Mr Ngawaka in a letter of 20 September 2018. He was invited to a meeting to be held on 28 September 2018, at 4 pm. As well as stating the allegations to be investigated at that meeting this letter referred him to four separate clauses in the employment agreement considered to be relevant to this inquiry. An opportunity was provided to inform the company if the nominated meeting time was unacceptable and

Mr Ngawaka was invited to bring a support person, or representative, to the meeting if he wanted to. The letter encouraged him to be supported at the meeting.

[19] The third allegation, about arriving at work out of uniform, was raised with Mr Ngawaka in a separate letter. There was some confusion over whether the letter provided to him was dated on 20 September 2018 or 26 September 2018 because the company possessed two versions of that letter with those dates. In the end that confusion was resolved because Mr Ngawaka accepted that he received at least the letter dated 26 September. As with the other matters to be investigated, the letter stated the purpose of the investigation, referred to clauses in the agreement that might be relevant and nominated a meeting date of 5 October 2018. Again, he was provided with an opportunity to advise the company if that meeting time was unacceptable and was encouraged to have a support person or representative at the meeting.

[20] Both meetings were held on the nominated dates and Mr Ngawaka attended them without support or representation.

[21] The meeting on 28 September 2018 was conducted for Global Security by Mr Erasmus and the company's Operational Co-ordinator, Raewyn Brown. Mr Erasmus said that at the meeting the subjects for discussion evolved somewhat from the letters sent to Mr Ngawaka. In addition to the matters raised in the letter the meeting discussed his failure to arrive at work on 24 September without notifying anyone that he was unavailable to work that day and then could not be contacted.

[22] Mr Erasmus' evidence was that the meeting ended with an agreement to meet on 5 October 2018 and went no further than an inquiry. It could not have gone any further because, he said, he lacked authority to take any disciplinary action. That meant before any disciplinary steps could be taken the matter would need to be dealt with by his manager, Ray Chisholm.

[23] There were no minutes kept of this meeting. However, Mr Erasmus and Ms Brown made a brief file note about it which they signed. It did not deal with issues that led to the meeting but concentrated on new issues of not being at work on Monday 24 September, lateness the next day and not being in uniform. The notes recorded

Mr Erasmus stating that unsuccessful efforts were made to contact Mr Ngawaka and summarised the answers given. The answers were that he had difficulties over his phone account explaining why he was hard to contact and had called to advise of his unavailability but could not recollect who he spoke to.

[24] Mr Ngawaka disputed being late to work, attributing lateness to the staff member who relieved him. The last matter covered in the note was Mr Ngawaka's response to the complaint that he was not wearing his uniform. It was that he was wearing it, but that he had a hoodie underneath his company shirt.

[25] The second meeting, on 5 October 2018, was attended by Mr Erasmus, Mr Watson and Mr Ngawaka. This meeting discussed the loss of the apartment building keys and returned to the subject of Mr Ngawaka's uniform. There was no dispute that Mr Ngawaka misplaced the keys. He told Mr Erasmus they were missing during his shift. They were found by someone else and returned to the apartment building's property manager.

[26] Mr Erasmus described Mr Ngawaka's responses during this meeting as blasé, as if there was nothing to be concerned about because the keys were retrieved without any adverse security outcomes.

[27] As with the previous meeting a file note of what was discussed was kept by Mr Erasmus. It recorded Mr Ngawaka's admission about the keys and a comment about his attitude and contained a follow-up comment about Mr Ngawaka's uniform.

[28] What followed the conclusion of these meetings was a further letter from the company to Mr Ngawaka, dated 12 October 2018, recording the outcomes of them. This letter repeated the matters that were investigated. It contained the company's conclusion that in answering the allegations Mr Ngawaka offered no explanation, that he had refused to work on a shift on 8 October 2018 and was late for two shifts on 10 and 12 October respectively.

[29] This letter was critical of Mr Ngawaka not correctly wearing the company's uniform before commenting that he did not

follow simple instructions, had a tendency

to sleep on the job, had “no respect for attendance” at the site, colleagues there, or the client’s property.

[30] Mr Ngawaka was informed that the company intended to have a final meeting with him about these issues at 8 am on Friday 19 October 2018.

[31] Mr Ngawaka’s claims lie in what he said happened in the third meeting, which he said took place on 19 October 2018. It was at this meeting he claimed to have been suspended, victimised and discriminated against. The company said the third meeting was scheduled but never took place because Mr Ngawaka did not turn up for it.

[32] In presenting his case Mr Ngawaka accepted he misplaced the building’s keys. He did not accept that there was any foundation for the other matters investigated at the meetings in September and October. In particular, he disputed allegations that his uniform was not adequately clean and that he was asleep at work.

Was there a 19 October 2018 meeting?

[33] Mr Ngawaka said he attended the 19 October 2018 meeting as scheduled. His recollection was that the meeting was conducted by Mr Erasmus and Mr Watson. He said that at this meeting Mr Erasmus bullied and castigated him over the incidents investigated in the previous meetings. Mr Erasmus was said to be trying to get rid of him, and to make him “feel like rubbish”, by wrongly accusing him of turning up on site dressed in civilian clothes and being late for work.

[34] Mr Ngawaka said he was distressed because he considered that the allegations being made about him were unsubstantiated.

[35] It is this alleged behaviour that supports Mr Ngawaka’s claims of being victimised and discriminated against. It may be intended to support the claim about being suspended, although that probably arises from Mr Ngawaka subsequently not working shifts, which is discussed later.

[36] To explain why the meeting of 19 October must have taken place, Mr Ngawaka said that he was doing everything he could to keep his job. He said he would not have

deliberately missed a meeting which, if it did not go as well as he wanted, may have placed his employment in jeopardy.

[37] In contrast, Mr Erasmus and Mr Watson said that there was no meeting on 19 October 2018 because Mr Ngawaka did not come to the company’s office at the planned meeting time. Further, they both said Mr Watson would not have been at the meeting had it taken place, because he no longer had managerial responsibility for Mr Ngawaka. After the transfer from the patrol work to the apartment building that responsibility passed to Mr Erasmus. They said Mr Watson only attended the 5 October 2018 meeting because the investigation touched on issues that arose when he had managed Mr Ngawaka.

[38] I think it is more likely than not that there were only two meetings. In reaching that conclusion I prefer what was said by Mr Erasmus and Mr Watson. First, their evidence was consistent; they both said that the meeting scheduled for 19 October was for Mr Chisholm to consider if disciplinary steps might be taken because they lacked authority to take the inquiry beyond investigating the allegations. That is consistent with the meeting file notes containing no reference to Mr Ngawaka being suspended or disciplined. Second, had the meeting taken place there was no reason for Mr Watson to be present.

[39] Third, Mr Ngawaka’s version of events is inconsistent with the available Global Security records showing him as being allocated work after 19 October 2018. A brief explanation is required. Global Security allocates work by a roster prepared about two weeks in advance. Mr Ngawaka was rostered to work in the week of 22 October 2018. If his version of events is correct, it might be reasonable to expect the roster to have been changed to reflect the suspension he said occurred on the previous Friday. That is not what it shows. For the following week he was shown in the roster as working, but on each day it contained the comment “No Contact”. The company said that “No Contact” meant Mr Ngawaka had not communicated with it.

[40] Mr Ngawaka took issue with the “No Contact” comment and the company’s evidence to the effect that the responsibility fell on him to communicate with it. He

said the roster was inaccurate, there was no evidence of an attempt to contact him by telephone at his residence and that no other method of communication had been tried.

[41] However, inquiries made by Global Security showed that three phone calls were made to Mr Ngawaka’s residence on

25, 26 and 29 October. There was no evidence that they were answered by him and it is, perhaps, not surprising that he was unaware they were made.

[42] There is no reason to conclude that the roster was inaccurate. The roster and attempts to contact Mr Ngawaka are consistent with an expectation that he was to work not that he was suspended.

[43] It follows from these conclusions that Mr Ngawaka was not suspended on 19 October 2018. His remaining claims of victimisation and discrimination cannot succeed because they were said to have arisen from events on 19 October 2018. For completeness, and despite Mr Ngawaka concentrating on what he said occurred on that day, I have considered if it is possible that some or all of the behaviour he sought to rely on may have taken place at one of the earlier meetings. There is, however, no evidence that might support such a conclusion and it was not an outcome argued for by Mr Ngawaka in his submissions.

Subsequent conduct

[44] Finally, Mr Ngawaka's subsequent conduct is inconsistent with having been dismissed. On 2 November 2018 he went to Global Security's premises and requested a pen and paper. Without reference to anyone he wrote out his resignation and handed it to the company. His letter was brief. It stated that he was resigning with effect from 2 November 2018 and made no other comment.

[45] On 6 November 2018 Mr Ngawaka sent an email to the company which began by repeating that he had resigned on 2 November 2018 before inquiring about his holiday pay. It was not until several weeks later, on 19 December 2018, that the first steps were taken to raise a personal grievance.

[46] That sequence of events supports a conclusion that Mr Ngawaka knew what he was doing when he resigned and that his action was deliberate without any form of compulsion.

Conclusion

[47] Mr Ngawaka found himself under pressure because he was being investigated. The allegations were serious and he knew and understood that his employment was in jeopardy. Being under that pressure without more does not, however, equate to suspension, victimization or discrimination.

[48] The circumstances in which Mr Ngawaka resigned from Global Security did not involve a breach of contract by the company, a course of conduct by it to compel him to leave, or a breach of duty that repudiated the employment agreement.

[49] Mr Ngawaka's challenge to the Authority's substantive determination is unsuccessful and it is dismissed. His challenge to the costs order made by the Authority is also unsuccessful.

[50] Costs are reserved. Both parties represented themselves and it may be that there is no issue of costs to address. I am aware that Global Security was represented by a lawyer at the beginning of this proceeding who filed a statement of defence on its behalf. If Global Security considers it is entitled to claim costs, it is to make submissions within 15 working days. Mr Ngawaka has a further 15 working days to respond. All submissions are to be no more than ten pages.

K G Smith Judge

Judgment signed at 2.45 pm on 9 March 2022