

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Ron Schwagler (Applicant)
AND Summit Security Limited (Respondent)
REPRESENTATIVES Mike Davis for Applicant
Kathy Hughes for Respondent
MEMBER OF AUTHORITY Alastair Dumbleton
INVESTIGATION MEETING 29 November 2005
DATE OF DETERMINATION 12 December 2005

DETERMINATION OF THE AUTHORITY

[1] The respondent Summit Security Ltd (Summit) employed the applicant Mr Ron Schwagler as a Security Guard from 28 January 2005.

[2] There is no dispute that Mr Schwagler was instantly dismissed on Tuesday 12 April 2005 by Mr David Oswald, the managing director of Summit. Advice of the dismissal was conveyed during a heated exchange the pair were having over the telephone that day.

[3] Mr Schwagler has raised an employment relationship problem created by his dismissal. He complains that Mr Oswald acted unfairly and unreasonably in dismissing him, and he asks the Authority to resolve his personal grievance by ordering Summit to reimburse him for 8 months lost wages (about \$15,000), compensate him for hurt feelings and humiliation (\$1,000) and make a contribution to his advocacy costs (\$450).

[4] On its own the evidence taken by the Authority from Mr Oswald strongly supports the contention of Summit that Mr Schwagler seriously misconducted himself by using abusive and threatening language towards Mr Oswald while on the telephone to him. Further, his evidence is that he asked Mr Schwagler to cease using this language and had only resorted to dismissing him after he persisted with the abuse and threats. Mr Oswald also gave evidence that immediately after dismissing Mr Schwagler he had rung him back and asked to meet with him straight away so that they could review what had just taken place. He says that this conciliatory approach was immediately rejected by Mr Schwagler who said he would get money out of Mr Oswald.

[5] Mr Schwagler's evidence however almost completely contradicts that of Mr Oswald and strongly supports his contention that the dismissal was unjustified. The Authority must resolve this strong conflict of evidence between the parties. Although Mr Schwagler confirmed that he and Mr Oswald had been shouting at each other over the telephone and that there had been a dismissal, he denied that his language had been abusive or threatening. He said it was Mr Oswald who had

used “vulgar” language over the telephone and at other times throughout the employment, although he admitted he had used the words “fuck” or “fucking” when addressing Mr Oswald. Mr Schwagler denied that Mr Oswald had requested a meeting to sort out the row straight after he had been told he was dismissed. He says he was ordered to give back his uniform and keys to Summit.

[6] Both Mr Oswald and Mr Schwagler presented witnesses to corroborate their respective versions of the exchange that had taken place between them over the telephone. Another Summit employee had been in the room when Mr Oswald had taken the call and had heard Mr Schwagler’s voice clearly and was also able to hear some of what Mr Schwagler said to Mr Oswald. At his end of the telephone Mr Schwagler’s partner and a friend of the couple had been with him listening to the exchange over a speaker on the telephone.

[7] The telephone dismissal of 12 April was confirmed by letter to Mr Schwagler from Summit. It was written the next day and contained the following advice;

Your dismissal was in relation to your personal behaviour on the phone to David Oswald – where you stated that you would visit him to:

“deal to David Oswald by knocking his block off” and to “come down to deal to him properly” and “knock his fucking head off”

prior to stating that you would cause physical harm to the Director of the company you were swearing at him, you were cautioned not to speak to him in this manner, after which you proceeded to threaten to physically attack David.

[8] The letter was written by Mr Mark Raynes, as the Accountant and Manager of Summit. I accept that before writing the letter Mr Oswald told Mr Raynes about the row over the telephone and what had been said during it.

[9] I find that Summit did not get any response to this letter for two months, until Mr Schwagler and his advocate Mr Davis arranged to meet and discuss the dismissal. Summit submits that the lack of prompt reaction indicates an initial acceptance of responsibility by Mr Schwagler for his dismissal.

[10] If the Authority had been able to listen to a clear recording (if one had been made) of the several telephone calls made between Mr Oswald and Mr Schwagler on 12 April, what exchange would be heard between them? I consider their words are likely to have been similar to the ones Mr Oswald and his supporting witness Mr Nelson Bainerere described in evidence to the Authority.

[11] I consider it unlikely that Mr Oswald fabricated a story about being abused and threatened with violence during a telephone call Mr Schwagler had made to him. It is clear that what had upset Mr Schwagler enough for him to ring Mr Oswald was the discussion they had had a few hours earlier about Summit taking money from his pay to recover wages paid for periods when Mr Schwagler had not worked. Once Mr Oswald told him the pay deductions had already been actioned, their discussion quickly deteriorated into a loud exchange.

[12] I can see no reason why Mr Oswald should then and there have decided to invent a reason to dismiss Mr Schwagler, just because Mr Schwagler was unhappy after apparently taking advice about whether the deductions could be made. Notwithstanding Mr Schwagler’s denial that he threatened Mr Oswald, and notwithstanding the corroborative evidence of Ms Darnell Te Heu Heu his partner and Mr Joseph Mike their friend, I consider it likely from the evidence that the complained of abusive and threatening language was used and that it provoked the response of

dismissal when that language was not stopped as requested by Mr Oswald.

[13] There is a good reason why Mr Oswald dismissed Mr Schwagler but then asked him to meet and discuss the situation. Mr Oswald directed Summit operations from a room or office he occupied on the site of one of Summit's clients. The threat of Mr Schwagler having a physical altercation with Mr Oswald at that place naturally caused Mr Oswald to become concerned about Summit's reputation with the client being harmed and the ongoing employment of several other Summit Security Guards working on that site being jeopardised by the threatened behaviour.

[14] The uttering of abuse and threats by Mr Schwagler over the telephone that I find took place, constituted serious misconduct. In these and probably in any other circumstances there could be no reasonable excuse or explanation for threatening physical violence, whether to an employer or anyone else. I find that the instant dismissal was justified at the moment that decision was conveyed by Mr Oswald to Mr Schwagler. Further, I find that Mr Oswald acted reasonably in trying to get Mr Schwagler to come to him and talk about what had happened. The dismissal could have been undone in this way if Mr Schwagler had not rejected the initiative.

Determination

[15] For the above reasons the determination of the Authority is that the dismissal of Mr Schwagler was justified and that he does not have a sustainable personal grievance on account of Summit's action. No orders are therefore required to be made against the company to resolve the employment relationship problem.

Costs

[16] If costs are to be sought by Summit for Ms Hughes work, an application is to be made to the Authority in writing.

A Dumbleton

Member of Employment Relations Authority