



New Zealand Employment Relations Authority Decisions

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Shayler v Rush Security Services Limited [2011] NZERA 303; [2011] NZERA Auckland 211 (18 May 2011)

Last Updated: 26 May 2011

IN THE EMPLOYMENT RELATIONS AUTHORITY AUCKLAND

[2011] NZERA Auckland 211 5292214

BETWEEN RONNIE SHAYLER

Applicant

AND RUSH SECURITY SERVICES

LIMITED

Respondent

Member of Authority: Representatives:

Investigation Meeting: Submissions Received: Determination:

K J Anderson

D Feist, Advocate for Applicant Larissa Rush, Advocate for Respondent

9 February 2011 at Auckland

21 February 2011 for Respondent

18 May 2011

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The applicant, Mr Shayler, claims that he was unjustifiably dismissed on 13th November 2009, after little more than two months' of employment. He asks the Authority to find that he has a personal grievance and award him the remedies of reimbursement of wages for twelve weeks and compensation of \$10,000. The respondent, Rush Security Services Limited ("Rush") says that the dismissal of Mr Shayler was justified, due to serious misconduct.

Background Facts and Evidence

[2] Mr Shaylar commenced his employment on 7th September 2009, as a Control Room Operator; usually working the night shift from approximately 4:00p.m. to midnight. The role largely involves monitoring security cameras and noting "interesting" or important "events" that may require further attention by a security guard and/or the police. Mr Shaylar's terms and conditions of employment were provided by an employment agreement signed by both parties. Relevant to this dispute, the agreement included a trial period of 3 months (clause 5.0) and a term (at clause 6.0) that:

The Employee will be subject to and must observe and comply with all rules, policies and procedures in force from time to time as set out in the Employer's Policy and Procedure Manual/ House Rules/Company Standing Orders. The Employer is entitled from time to time to amend, cancel or introduce such rules, policies and procedures as it considers necessary. Any Employee who breaches any of the rules, policies or procedures in the Employer's Policy and Procedure Manual/House Rules/Standing Orders may be subject to disciplinary action, which may result in the termination of the Employee's employment.

[3] Around mid-September 2009, the company presented a restructuring proposal to Mr Shaylar. This indicated that his position could be affected. Not surprisingly, Mr Shaylar took issue with Ms Larissa Rush, the General Manager of the company, about the fact that he had only just started in his employment and was now going to be affected by a restructuring proposal. It subsequently transpired that Mr Shaylar retained his position. Mr Shaylar says that the attitude of Ms Rush changed towards him from that point but he has not provided any tangible evidence of this.

[4] On 10th October 2009, Mr Shaylar received a letter from Ms Rush. The letter recorded that a supervisor had reported that there had been instances where Mr Shaylar had been falling asleep on the job. Mr Shaylar was reminded that he was on a trial period in regard to his employment. His ability to remain in the role was questioned; if he was unable to remain awake whilst on duty. On 14th October 2009, Mr Shaylar had a performance update meeting with Ms Rush. A letter dated 27th October 2009, records that the matter of Mr Shaylar falling asleep on the job was discussed along with some other performance issues.

[5] On Friday, 6th November 2009, shortly after commencing his shift, Mr Shaylar went to the office of Ms Rush. Her evidence is that Mr Shaylar told her that his partner (Judy) had just called him informing that her aunty had just died. Mr Shaylar told Ms Rush that Judy required him to come home immediately, to drive her to Hastings. Mr Shaylar informed that he did not want to go to Hastings but Judy insisted that he take her there. The further evidence of Ms Rush is that she was led to believe:

- (a) That the situation was an emergency, due to a sudden death in the family and there was a requirement to leave immediately; and
- (b) That Mr Shaylar's partner appeared to be distressed and required his support to drive her to Hastings and that he was required to come home immediately.

Ms Rush says that due to the way the circumstances were presented to her, she felt that it would be "unreasonable if not inhumane" to refuse to allow Mr Shaylar to take leave to deal with the situation. Mr Shaylar left work after advising his supervisor that he had to leave due to a family emergency.

[6] On 10th November 2009, via an email from two company control room supervisors, Ms Rush was urged to listen to a voice recording of the conversation that took place between Mr Shaylar and his partner on 6th November. The evidence of Ms Rush is that after reviewing the recording, she formed the view that it appeared that Mr Shaylar had "grossly misrepresented" the situation leading to his departure from the workplace on 6th November; because:

- a. There was not an emergency.
- b. Mr Shaylar's partner stated that she was calling him urgently. However, when he asked her what had happened, she was unable to articulate that.
- c. There was no mention of a sudden death.
- d. Mr Shaylar's partner did not appear to be distressed. Rather, she sounded jovial and happy.
- e. Mr Shaylar's partner did not require him to come home, nor did she require him to drive her to Hastings.
- f. The brother of Mr Shaylar's partner (Tim) was in the house and Tim was supposed to drive to Hastings along with Mr Shaylar's partner. There was no mention of Mr Shaylar having to go Hastings.

[7] Ms Rush attests that the conversation did not appear to be bona fide due to the tone of the conversation midway, whispering and the lack of surprise displayed by Mr Shaylar.

[8] Ms Rush met with Mr Shaylar on 12th November 2009. The outcome was that he was suspended from his employment on pay, pending a disciplinary investigation. Ms Rush wrote to Mr Shaylar the same day inviting him to a disciplinary meeting on 13th November. He was encouraged to bring a support person and was informed that:

The following issues will have to be addressed:

1. On Friday 06 of November 2009, you have walked into my office and advised that you have to leave immediately due to a family emergency (sudden death in the family) and your partner had to immediately leave to Hastings and she required you to come home. You have then left your shift at the time, which was operationally extremely demanding for the company across all Control Room aspects. At the time, due to you presenting the situation to me in such a way, I was left with no choice but to allow you to leave.
2. Subsequently, during the routine sweep of the voice recording system, I have reviewed the call that was made by your partner to you on that date. The details of the conversation present an utterly different picture to the one you presented to me.
3. As I could hear jovial and playful laughter of your wife when talking to you, it appeared as nothing more than a set up for an excuse of not having to work on that day and using the "death" circumstances to back up your story.

Based on the above I allege that such behaviour is an abuse of leave, which constitutes serious misconduct as per Company's House Rules clause 25.5 e. In addition, I find such behaviour is a serious abuse of my trust not to mention the utter disregard

of other Control Room staff and our obligations to our Customers.

Mr Shaylar was also informed that:

As a result of your actions, my trust and confidence in you as a responsible employee has been severely damaged. I am looking forward to hearing your explanation as to why the company should continue to put its trust and confidence in you and why your employment with the company should continue. You should understand that we are treating this matter seriously and that if your explanation is not accepted a Summary Dismissal without Notice is a possibility.

[9] A disciplinary meeting was held on 13th November 2009. Mr Shaylar provided a response to the matters set out above. The general tenor of the meeting (and its outcome) is set out with reasonable accuracy in the dismissal letter from Ms Rush to Mr Shaylar; dated the same day.

You provided a response to the allegations raised. You advised that you wanted to see your partner before she left for Hastings on that night. I asked you why your partner was laughing and that there was no sign of distress and/or emergency in her voice. You advised that your partner's brother, who was at your house at the time, has said something amusing to her at the time. In addition, you acknowledged that your partner did not request you to come home. You have offered her to come home and before even seeking permission to leave you advised her that you could leave work. You advised that upon your arrival home on 06th November 2009, you immediately felt guilty by leaving work and hoped that "this situation would go away," using your words. You acknowledged the wrongdoing and that your behaviour on the day was unwarranted and unjustified.

We have considered in full your response. We remain of the view that your conduct in abusing emergency leave and misleading the manager constitutes serious misconduct. Your behaviour is totally unacceptable to the company. As a result of your misconduct, the company's trust and confidence in you as an employee has been irreparably damaged. In addition, the details of the conversation that took place between your partner and you prior to your departure, were picked up by two Control Room Supervisors on duty while conducting a routine sweep of the phone system.

There is now significant mistrust between myself as your manager and you, but also with your immediate supervisors which makes the continuation of your employment untenable.

Mr Shaylar was advised that his employment was terminated with immediate effect. **Analysis and Conclusions**

[10] [Section 103A](#) of the [Employment Relations Act 2000](#) (the Act) provides the test to be applied to a dismissal. In determining whether a dismissal or an action was justifiable, the Authority is required to consider on an objective basis, whether the employer's actions, and how the employer acted, were what a fair and reasonable employer would have done in all the circumstances at the time the dismissal or action occurred. The first issue that arises for consideration is:

Was Rush entitled to treat the actions of Mr Shaylar as being serious misconduct warranting dismissal?

[11] There appears to have been two grounds for the dismissal, albeit only one of these is relied on in the dismissal letter. The first ground is that the actions of Mr Shaylar constituted serious misconduct under the company's house rules. Subclause 25.5 refers to a number of actions (not exclusive) that constitute serious misconduct. One of these, at (e), is:

Abuse of leave, including sick or bereavement leave.

[12] The position of the company is that Mr Shaylar asked for, and was granted, emergency leave, based on what he told Ms Rush on the evening of 6th November 2009. Ms Rush subsequently discovered that she had been misled by Mr Shaylar and now says that the misrepresentation that led to her allowing Mr Shaylar to take emergency leave to assist his partner, due to a purported death in her family, was an abuse of leave pursuant to clause 25.5(e) of the employment agreement; and that this abuse constitutes serious misconduct under the provisions of the clause.

[13] It is arguable whether Mr Shaylar actually breached clause 25.5(e) of the employment agreement as it seems unlikely that his spontaneous departure, on purported compassionate grounds, could be classified as an abuse of any leave provisions that are generally recognised. But in any event, further analysis of whether there was breach of clause 25.5(e) and hence serious misconduct, is not required as the second and primary reason, for the dismissal of Mr Shaylar, is more sustainable.

[14] The second and primary reason for the dismissal of Mr Shaylar is set out in the dismissal letter (13th November 2009) as: ["... misleading the manager regarding the circumstances for your need to leave work on an emergency basis." The letter also informs that:

We remain of the view that your conduct in abusing emergency leave and misleading the manager constitutes serious misconduct. Your behaviour is totally unacceptable to the company. As a result of your misconduct, the company's trust and confidence in you as an employee has been irreparably damaged. In addition, the details of the conversation that took place between your partner and you prior to your departure, were picked up by two Control Room Supervisors on duty while conducting a routine sweep of the phone system. There is now significant mistrust between myself as your manager and you,

but also with your immediate supervisors which makes the continuation of your employment untenable.

[15] Having read the transcript and listened to the tape of the conversation, between Mr Shaylar and his partner on 6th November 2009, I conclude that Mr Shaylar did deliberately misled Ms Rush. I also find that Ms Rush was entitled to treat the behaviour of Mr Shaylar as serious misconduct. This is because his actions led to a substantial breach of trust and confidence; and dismissal was an option that was fairly and reasonably available to the employer.

Is there anything that made the dismissal unjustified?

[16] It has been submitted for Mr Shaylar that his dismissal was predetermined. It is posited that the process culminating in the dismissal, was rushed and that had Mr Shaylar's partner been given the opportunity to explain that she had misled Mr Shaylar in regard to the reason why he had to go home, the outcome may have been different. I cannot accept that proposition. While Mr Shaylar has attempted to portray that he misled Ms Rush and went home early because he in turn, was misled by his partner, I do not accept that. The reality of the situation is that there was not a funeral; in fact his partner's aunty died about a year before and what was going to occur was an unveiling ceremony. Indeed, the recording of the conversation leads to a fair conclusion that Mr Shaylar and his partner most probably colluded in regard to ensuring that he went home early on the day in question.

[17] It is further submitted for Mr Shaylar that Ms Rush had prepared the dismissal letter prior to meeting with him on 13th November 2009. But there is no evidence to support that proposition and I accept the evidence of Ms Rush that she typed the letter after hearing from Mr Shaylar and considering what he had to say. In summary, I find that there is nothing to suggest that there was any deficiency in the process and procedure that led to the dismissal of Mr Shaylar.

Was the dismissal of Mr Shaylar the action of a fair and reasonable employer in the all the circumstances?

[18] Taking into account all of the circumstances, I find that the dismissal of Mr Shaylar was the action of a fair and reasonable employer in all the circumstances. This is particularly so given that Mr Shaylar was employed in an industry where trust and confidence in the employee is a key component of the employment relationship. The evidence is that that not only did Mr Shaylar deliberately mislead his employer; his supervisors had lost faith in his honesty and reliability. And his early departure left his colleagues stretched to cover the surveillance duties that are essential to the effective operation of the business and its credibility with outside agencies, such as the police.

Determination

[19] For the reasons set out above, I find that the deliberate actions of Mr Shaylar on 6th November 2009, constituted conduct that was destructive of the basic trust and confidence that is essential to the employment relationship.^[1] It follows that I also find that the dismissal of Mr Shaylar was the action of a fair and reasonable employer in all the circumstances. Mr Shaylar does not have a personal grievance and his claims are dismissed.

Costs: The respondent was represented by Ms Rush, the General Manager (and a Director) of the company. Therefore, any consideration of the issue of costs is not required.

K J Anderson

Member of the Employment Relations Authority

^[1] *Northern Distribution Union v BP Oil NZ Ltd* [1992] NZCA 228; [1992] 3 ERNZ 483, 487.