

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2013] NZERA Wellington 49
5389270

BETWEEN

LANCE TERRY SMITH
Applicant

A N D

RECON PROFESSIONAL
SERVICES LIMITED
Respondent

Member of Authority: P R Stapp

Representatives: Stephen Taylor, Counsel for Applicant
Scott Murray and Blair Malcolm, Advocates for
Recon/Respondent

Investigation Meeting: 14 March 2013 at Wellington

Date of Determination: 3 May 2013

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] This employment relationship problem concerns a sexual harassment complaint made by another employee against Mr Smith. Mr Smith claims that he was unjustifiably dismissed from his employment based on the complaint, and he is seeking lost wages and compensation.

[2] In addition, he is seeking arrears of wages and holiday pay. The respondent denies all Mr Smith's claims.

The facts

[3] Recon Professional Services Limited (the respondent/Recon) is a limited liability company providing security and related services. Mr Smith was employed as a security guard by Recon. He has had various engagements over the years with

Recon on different occasions. His latest period of employment with Recon commenced in January 2012. He was employed as an on-site guard working at the Mount Crawford Miramar Film Set site. He was employed to work night shifts from 6pm to 6am for five or six nights per week subject to rosters. He was paid \$14 per hour plus a 50 cent site allowance per day.

[4] At the Miramar Film Set site there were two guard huts. Mr Smith initially worked out of one guard hut, but subsequently moved to work at guard hut 1. A guard working from guard hut 2 at the site made a complaint about Mr Smith's personal behaviour in March 2012.

[5] Mr Smith received a letter dated 14 March 2012 from Recon that outlined Recon's formal request to meet with him and the issues regarding the complaint. The letter contained four allegations:

1. *While working at MTC on Friday 2nd March 2012 you used your torch to touch the buttocks of [name withheld] while conducting a patrol of the site against her will.¹*
2. *Also the same night you made reference to your penis and asked if [name withheld] wanted to see it.*
3. *A few hours later you visited her guard hut and sat down. You then exposed your penis to [name withheld].*
4. *While working at MTC on Friday 9th March 2012 you sent a text to [name withheld] who was working at the other guard hut, it stated 'coming up for a patrol and to use the loo, do you want to have another look?'*

[6] In addition the letter also put Mr Smith on notice that a possible outcome of the meeting could be that no further action would be taken or that Mr Smith may receive a written warning. It also said that depending on Mr Smith's report it was also possible that he may have his employment terminated for serious misconduct.

[7] Mr Smith prepared a letter prior to the meeting and sent it to Mr Murray. The letter outlined his response to the allegations raised by the complainant. He asked to see a copy of the text referred to at paragraph 4 of the Recon letter dated 14 March 2012 (above). He denied the allegations, specifically denying that he touched the complainant's buttocks and denied exposing his penis. He denied making any reference to his penis in any discussions or texts with the complainant.

¹ The name of the complainant has been withheld by consent because the person concerned has not been involved in the Authority's investigation meeting.

[8] He acknowledged sending a text to the complainant to the effect that he would be coming up for a patrol and to use the toilet, and asking whether the complainant wanted to accompany him on the patrol. He denied the complainant's version of the text.

[9] On 15 March 2012 Mr Smith the owner of Recon, Blair Malcolm, and the operations manager, Scott Murray attended a meeting with Mr Smith. Prior to the meeting Mr Smith had the full knowledge that he was able to have a representative, but decided to proceed with the meeting without one. Mr Smith says that he provided a comment and explanation at the meeting. He recalled that during the meeting on 15 March 2012 that he was asked by Recon whether he had a tattoo on his penis. He says that he responded by suggesting that the complainant be asked to give a description of what she claimed to have seen. He says he said words to the effect that he was not denying or admitting that he had a tattoo. A record from Recon says that he said "no tattoo". He says he did not categorically deny that he had a tattoo on his penis and Messrs Murray and Malcolm say that Mr Smith confirmed he had "a distinctive mark" on his penis.

[10] Mr Smith denied that he had used his torch to touch the complainant's buttocks while conducting a patrol of the site. He acknowledged nudging the complainant's shoulder to show her a key that was found in a Suzuki vehicle and says there was nothing sexual or inappropriate intended by him doing so.

[11] Mr Smith agreed to get a doctor's certificate and did so, but the first medical certificate dated 21 March 2012 did not mention anything to help Recon. Messrs Murray and Malcolm repeatedly asked Mr Smith to produce a medical certificate.

[12] On 26 March 2012 Mr Smith's representative (Sarah le Page) wrote to Recon in regard to the employment issue and in particular about the allegations of serious misconduct and Mr Smith's hours of work during the employer's enquiries. The letter from Ms le Page asked if Recon had spoken to a senior guard referred to by Mr Smith for information. They dismissed the information in Ms le Page's letter because it added nothing more to the information they already had.

[13] It is common ground that following the meeting that Mr Murray would contact the complainant for any further details and response to Mr Smith's explanation. The complainant provided a written statement (dated 16 March 2012). Amongst a number

of allegations the complainant said that the tattoo she saw had two colours. Mr Smith says that he had never seen this until the papers were filed in the Employment Relations Authority. However, I hold that it is more likely than not that Mr Smith (or at the very least Ms le Page) did receive the complainant's statement dated 16 March 2012. This is because:

- The complainant's written statement was provided attached to the statement of problem filed by the applicant's representative in the Employment Relations Authority on 17 July 2012.
- That on Thursday 29 March 2012 by email the applicant's representative at the time asked Mr Murray to advise when the complainant's statement would be received "*as this [would be] continuing 'contingent on the advice we give our client about whether he should provide any further information to you'*".
- That on Friday 30 March 2012 Mr Murray sent an email that attached the statement. He also said that "*I am still working on putting the other documentation together and forwarding it to you via post.*" The documentation as requested (on 26 March 2012 by Mr Smith's representative) was sent by Mr Murray on 30 March 2011 when he "*enclosed copies of the documents regarding your client Lance Smith*".
- That Mr Smith's representative never raised this as an issue again.
- That Mr Smith obtained a medical report from his doctor and the medical report was shown to Messrs Malcolm and Blair at their meeting on 29 May.

[14] It is therefore more likely than not that at the next meeting held on 29 May 2012 that Mr Smith and his representative at the time had all the information available in regard to the complaint, including the complainant's written complaint. Messrs Malcolm and Murray discussed that they had reviewed what had happened to date and reviewed the complainant's statement. At least from this time Messrs Malcolm and Murray knew that Mr Smith had a tattoo because Mr Smith showed them a medical certificate (the second certificate) that said "*Lance has a single*

coloured tattoo on his penis"². Mr Smith's comments about the incidents and allegations were noted by them. The decision was subsequently made to dismiss Mr Smith because Messrs Malcolm and Murray decided that he had not been fully truthful about the existence of a tattoo until the meeting on 29 May 2012, when they were shown the medical certificate that confirmed that he had a tattoo. Up until that time Mr Smith says that he was trying to establish to Recon that the complainant had made up her complaints and that what the complainant says she saw was not accurate. He has explained that any knowledge she has about him having a tattoo can be explained by her being told by word of mouth by their mutual acquaintances.

[15] On 1 June 2012 Mr Murray says that he telephoned Mr Smith and advised him of the employer's findings, and the decision to dismiss Mr Smith, and that he had the opportunity to discuss the decision then. Mr Smith denies any such telephone call occurred. It is more likely than not that Mr Murray is mistaken about the telephone call because:

- The formal letter (1 June 2012) does not record it as having happened.
- The formal statements of evidence from Messrs Malcolm and Murray did not refer to such a telephone call.
- The statement in reply filed in the Authority did not refer to such a telephone call taking place.
- The letter dated 1 June 2012 formalising the dismissal gave Mr Smith the opportunity to respond to the dismissal decision in writing in five working days. The letter did not refer to any telephone call.

[16] The letter of 1 June 2012 for dismissal for serious misconduct reads as follows:

Dear Lance

This letter serves as formal confirmation of the particulars that occurred at a Performance Management Meeting.

The meeting date was Tuesday 29th May 2012 at 14.30 hours and the meeting was held at Recon Professional Services headquarters. You had Sarah le Page as your representation (sic).

² Medical certificate dated 28 April 2012 produced at the Authority's investigation meeting.

At the meeting concern was raised about the following:

1. *While working at MTC on Friday 9th March 2012 you used your torch to touch the buttocks of [complainant name withheld] while conducting a patrol of the site against her will.*
2. *Also the same night you made reference to your penis and asked if [complainant name withheld] wanted to see it.*
3. *A few hours later you visited her guard hut and sat down. You then exposed your penis to [complainant name withheld].*
4. *While working at MTC on Friday 9th March 2012 you sent a text to [complainant name withheld] who was working at the other guard hut, it stated "coming up for a patrol and to use the loo, do you want to have another look?".*

The correct and acceptable behaviour of a security officer employed by Recon Professional Services is extensively detailed in your employment agreement, company rules, initial training programme, site training programme and checklists.

Serious misconduct is clearly explained in the company rules. With the evidence we have obtained and the information you have provided, we are required to terminate your employment immediately for serious misconduct.

If there is any aspect of this letter you don't understand, disagree with or needs clarification, please submit that in writing within five working days.

[17] There was no response from Mr Smith and/or his representative until 17 July 2012 when Mr Smith's representative filed a statement of problem in the Employment Relations Authority. The letter purported to raise the personal grievance and seek arrears of wages and holiday pay.

[18] The parties have not been able to settle, and have attended mediation. It now falls to the Authority to make a determination.

Determination

[19] Mr Smith has a personal grievance. His personal grievance relates to the failure of the employer to discuss with him the findings and decision for dismissal and any other options before giving him the letter of dismissal. I have reached this finding because:

- a. The allegations are serious allegations because serious misconduct has been alleged. The allegations require evidence that is compelling as the allegations are grave. The complainant's statement is contradicted

by the second medical certificate about the colours involved on the tattoo. Mr Smith's denial was to try and establish the truth of the matter by asking that the complainant tell the details of the tattoo before he disclosed that he had a tattoo.

- b. The explanation provided by Mr Smith that he nudged the complainant has not been challenged in the absence of any evidence from the complainant.
- c. That Mr Murray did not convince me that a telephone call was part of the disciplinary process because it had never been referred to before he was interviewed during the Authority's investigation.
- d. That there are differences in the information about the allegations from the complainant that seem to have changed from the complainant's written statement dated 16 March 2012 where there was no mention of any torch and that Mr Smith used his hand to touch the complainant.
- e. That there was no evidence of any findings of what was in various texts and that they are reliable given the conflicts between Mr Smith and the complainant about what the texts said and their meaning. No explanation was provided about this.
- f. That Mr Smith and the complainant have mutual acquaintances, who he says knew about his tattoo; and that this might explain how the complainant knew had he had a tattoo and that the information has been used against him. At the time there were no enquiries made in regard to this information, and no witnesses called during the Authority's investigation.
- g. That the new reason relied upon by Messrs Murray and Malcolm came about on 29 May and was referred to later in the reasoning for the dismissal.

[20] As such, a fair and reasonable employer could not have dismissed Mr Smith in the circumstances. The failure is not merely minor and or technical, I hold. I am left to conclude that Messrs Murray and Malcolm have made their decision intuitively, based on their conclusion that Mr Smith had not disclosed the information in regard to

his tattoo when they asked him and then relied on his response being untrue, which was a new reason not previously, put to Mr Smith. If this was the reason underpinning the findings Mr Smith was entitled to know of the allegation before the decision and be able to reply. There was no meeting after 29 May for this to happen and before the 1 June 2012 letter. Moreover their information has not been conveyed correctly between the original complaints and the decision recorded in the letter of dismissal. This therefore does not represent a full and fair enquiry of the complainant's allegations and Mr Smith's response to the complaints, I hold.

[21] On the matter of arrears and holiday pay the records produced support that Mr Smith has been paid. He did not challenge the detail of the records. He has been paid holiday pay, and whilst he claims that his hours had been reduced that has to be seen in the context of his employment agreement that provides for flexible hours. The records show that the hours worked by Mr Smith varied from pay period to pay period depending on the work that was required and to be performed. The claim was not pursued.

Remedies for personal grievance

[22] Mr Smith is entitled to his lost wages. He was paid \$14 per hour. His wages ceased on 1 June 2012 when he was dismissed. His weekly hours were variable. His average hours from the schedule of earnings over his employment are 46 hours per week. I have to assess his contributory fault. He cannot be blamed for the employer's failure, but he was not as openly communicative as he should have been, for example producing his second medical certificate late and taking his own initiative to decide on his own way to get to the truth of the matter that avoided answering Messrs Murray's and Malcolm's question as to whether or not he had a tattoo. This accounts for a twenty per cent reduction for contribution, I hold. I cannot determine from the evidence that his alleged personal behaviour was offensive as the information made available to me has not been tested given his denials. The complainant was not called to give evidence. There was not enough evidence for me to take into account the complaints and to make a finding about Mr Smith's alleged behaviour.

[23] Therefore I hold that Mr Smith's lost wages amount to \$648.42 per week. He has lost three months (13 weeks wages) wages (a quarter of a year's wages) due to his dismissal. This amounts to \$8,429.47 to be deducted by 20%.

[24] I am not prepared to award more than this as Mr Smith did not do enough to mitigate his lost wages, although I accept he did attempt to get another job, albeit without much success. He stopped after applying for 6 or 7 positions and not getting interviews. He did explain that he tried to get work “on line” and had gone to Work and Income and an agency for help. He has not adequately explained any other earnings from casual stores work that he had prior to November. Also, he has not adequately answered Recon’s opinion that he would have been made redundant when filming ceased on the site in the period of his claim. His availability for other work has been restricted because of medical circumstances that cannot be linked to the loss of his job with Recon. I conclude that Mr Smith had no certainty of continued employment having regard to the nature of the industry, the terms of the employment agreement and the varied hours of work.

[25] Mr Smith is also entitled to compensation for hurt and humiliation as he discussed the impact on him about the loss of the job and his dismissal based on the unproven allegations. However he has only relied on what he says the impact was on him and he had no supporting evidence. I must therefore set the sum at the lower end of the scale and I award him \$2,000 under s 123 (1) (c) (i) of the Act, to be deducted by 20%.

[26] Recon Professional Services Limited is required to pay Mr Smith:

- i. \$6,743.57 lost wages
- ii. \$1,600 compensation.

Costs

[27] Costs are reserved.