

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI  
ŌTAUTAHI ROHE**

[2020] NZERA 502

3056912  
BETWEEN ALLIED INVESTMENTS LIMITED  
Applicant

AND JOSHUA LARKINS  
Respondent

3059613  
BETWEEN JOSHUA LARKINS  
Applicant

AND ALLIED INVESTMENTS LIMITED  
Respondent

Member of Authority: Philip Cheyne

Representatives: Damian Black, advocate for Allied Investments Limited  
Kevin Murray, advocate for Joshua Larkins

Submissions: 18 November 2020 for Joshua Larkins and 23 November  
2020 for Allied Investments Limited

Investigation Meeting: 17 November 2020

Date of Determination: 3 December 2020

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**DETERMINATION OF THE AUTHORITY**

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- A. Allied Investments Limited is to pay Joshua Larkins \$454.86, pursuant to section 131 of the Employment Relations Act 2000.**
- B. Allied Investments Limited is to pay Joshua Larkins interest of \$23.43, pursuant to clause 11 of Schedule 2 to the Employment Relations Act 2000.**

## **Employment relationship problems**

[1] Allied Investments Limited provides security services to clients. To fulfil its contractual obligations, it employs security officers. Allied employed Joshua Larkins from about July 2018 as a static guard. From January 2019 Mr Larkins transferred to work as a Mobile Patrol officer. The problems centre on this role.

[2] On 15 February 2019 Mr Larkins resigned. He refused to work further shifts, giving reasons in his email of that date. In March 2019, Allied filed a statement of problem (File Number 3056912) in the Authority claiming damages and a penalty for breach of contract. In April 2019, Mr Larkins filed a statement of problem (File Number 3059613) in the Authority. Mr Larkins' problem centres around personal grievances claims but includes an arrears claim and a penalty claim for breach of good faith.

[3] Problems were not resolved, despite mediation. I held a case management conference on 4 March 2020. Arrangements were confirmed for both problems to be investigated together. On 9 March Allied withdrew its application. That left Mr Larkins' claims to be investigated and determined. However, during that investigation meeting, Mr Larkins' representative referred to a claim for costs against Allied under File Number 3056912. Submissions were filed on 18 November 2020 on Mr Larkins' behalf. Allied then replied. As part of that submission, Allied seeks to reopen File Number 3056912.

[4] This determination resolves Mr Larkins claims (File Number 3059613), costs on Allied's claim (File Number 3056912) and the submission to reopen that claim. I first describe in more detail Mr Larkins' claims.

### **Mr Larkins' claims**

[5] Mr Larkins' account of events can be summarised as follows. He became aware in January 2019 that Allied was advertising for Mobil Security officers, a new role. Allied represented the work as being subject to a 4 on/4 off roster. Mr Larkins attended a 3 day training course. He was rostered to work 7pm to 7am, 5 nights on 2 nights off. However, he was paid 10 hours for each shift although he was unable to leave the premises and was required to be on duty for 2 hours in the middle of each shift. Mr Larkins finished work at 7am on Friday 8 February but was woken by a phone call from Allied at 8.31am. He did not

answer the call in time. There was a second call from Allied at 10.18am, which also woke him. Mr Larkins was required to attend the office as soon as practicable. He attended at 2.30pm and was required to work until 8.00am the following morning (Saturday 9 February). Allied only paid Mr Larkins 10 hours pay for the shift. On Thursday 14 February Mr Larkins was told of a shift change requiring him to work at Dunedin Airport on Saturday, Sunday and Monday. Mr Larkins resigned on Friday 15 February 2019 and the employment ended.

[6] Based on these events, Mr Larkins says that he was constructively dismissed. He says that Allied breached its obligation to provide him with a safe workplace. Statutory grievance remedies are claimed. He says that Allied breached its good faith obligations. A penalty is claimed. He also says that Allied did not pay his holiday pay in accordance with the Holidays Act 2003. Arrears are also claimed.

[7] After Mr Larkins resigned, he and an Allied manager (Simon) spoke. Mr Larkins says that there was an agreement reached which would have resulted in him rescinding his resignation. Mr Larkins says that Allied did not adhere to the agreement. However, events following the resignation make no difference to the resolution of Mr Larkins' employment relationship problem. It is not necessary to canvass matters which followed the resignation.

[8] The following issues arise:

- (a) What were the terms of Mr Larkins' employment?
- (b) Did Allied constructively dismiss Mr Larkins?
- (c) Did Allied breach its obligation to provide him with a safe workplace?
- (d) Did Allied breach a duty of good faith owed to Mr Larkins?
- (e) If yes to any claim, what remedies follow?
- (f) Is Mr Larkins entitled to any arrears of holiday pay or wages?
- (g) Can the Authority reopen File Number 3056912?
- (h) What costs should be awarded?

**What were the terms of Mr Larkins' employment?**

[9] Mr Larkins saw an ad for the new Mobile Security Patrol positions for Allied in January 2019. His evidence is that he made inquiries about the position which was a 4 days on/4 days off roster. Mr Black is a director of Allied. It is common ground that Mr Black met Mr Larkins and they discussed the vacancy. I find that this was on January 12 while Mr Larkins was on duty as part of his original position.

[10] Mr Larkins says that he was required to be "on-call" for 2 hours in the middle of the shift running from 7pm to 7am. Allied produced a copy of the TradeMe ad listed on 7 January 2019. It says "The role is a split shift at night running from 7pm to 7am". Copies of other TradeMe ads for February and March were also produced. They each refer to the role as "split shift". Mr Black is unlikely to have said that the role did not involve a split shift in his discussion with Mr Larkins, given Allied advertised the shift arrangement.

[11] In evidence Mr Larkins told me that he could not recall the details of the 12 January meeting. Mr Black's evidence however is that he covered the 10 hour paid shift arrangement. He also says that he told Mr Larkins that it would be 4 or 5 shifts per week. There is no reason to doubt this evidence, which I accept.

[12] In general, the Mobile Patrol work involved locking and checking facilities towards the end of the day, following by opening facilities at the beginning of the next day. Mr Larkins says he was required to be on-call and was not allowed to leave the office during the 2 hour break between these tasks. Mr Larkins was unspecific about the source of this instruction and the circumstances under which it was given. There is no specific evidence about any tasks he was called on to perform during the 2 hour break. I prefer Mr Black's evidence that Mr Larkins was not required to perform any work and was not required to be on-call during the break between the first and second part of each shift. I find that it was a term of Mr Larkins' employment that the 12 hour span from starting to finishing time incorporated a 2 hour unpaid break.

[13] While Mr Larkins says that he was told that it was a 4 days on/4 days off position, there is an email dated 13 January from Mr Black to Mr Larkins suggesting a meeting on 14 January to:

review the... role, review the employment contract, and sign this job off ...My plan is to run the mobile patrols role 7 night shift and 2 day shifts (weekends) a week meaning 9 shifts initially. I also wish to include a new role... as the night officer at Dunedin airport. Across these roles you will be employed full time.

[14] This statement and the employment agreement signed by Mr Larkins on 18 January 2019 show what was agreed about the roster arrangements. The agreement set the hours of work between 20 and 60 per week at times to be mutually agreed between the employer and the employee. Mr Larkins' was not contracted to perform a 4 days on/4 days off roster position.

[15] Mr Larkins required a full driver's licence to start as a mobile patrol officer. Meantime, training for the Dunedin Airport role was arranged. There are emails between Mr Larkins and Mr Black dated 18 January about these points. Because of the Airport training, Mr Larkins rescheduled his licence test for 28 January, the day before mobile patrol training was set to start.

[16] Mr Black's evidence is that Mr Larkins attended training for the mobile patrol role between 27 and 31 January. Several emails describe the training arrangements. I accept Mr Black's evidence about the timing of the training. Following the training, Mr Larkins started the role.

[17] While Mr Larkins is critical about the training that was provided, it is not necessary to canvass the details. I accept Mr Black's evidence that the training covered the role and duties of a mobile patrol officer.

[18] On 27 January Mr Black sent Mr Larkins and the other mobile patrol staff an email with an attached roster for the first month. In the email exchanges Mr Larkins raised no objection. In evidence he says that as he was starting a "new job" he did not "feel" like he could "kick up a fuss". However, in his reply email on 27 January, Mr Larkins sought confirmation that he would receive a petrol allowance for Dunedin Airport work. I take from this that Mr Larkins would have raised any concern if the first month roster was not consistent with what he had been told about the work arrangements.

[19] In summary, Mr Larkins was engaged generally to work a split shift with 10 hours paid and a 2 hour unpaid break usually between 7pm and 7am. A shorter night shift of only 4½ hours was introduced. The role was permanent and full time with Mr Larkins to work up to 60 hours per week.

**Did Allied constructively dismiss Mr Larkins?**

[20] Constructive dismissal includes where a breach of duty by an employer causes the employee to resign. No other category of constructive dismissal has any application in this case.

[21] Mr Larkins set out various issues in his 15 February email by which he resigned immediately. I assess whether there is a breach of duty established by the evidence.

[22] The first issue is Mr Larkins says he was unaware of a forced 2 hour unpaid break in the middle of the shift. He also says that the roster does not record the break. Mr Larkins is correct that the roster did not show the 2 hour break. However, as explained above, I accept that the job was advertised then explained at the initial discussion with Mr Black and in the training as involving a split shift. Mr Larkins agreed to a role that involved split shifts. There was no breach of duty by Allied over the shift arrangements.

[23] Mr Larkins' second issue refers to rest and meal breaks as a mobile patrol officer and previously as a static guard. If there had been a previous issue regarding breaks as a static guard, it would not have caused Mr Larkins' resignation from his new role. In any event, I prefer the evidence of Mr Black that as a static guard Mr Larkins was entitled to take a half hour paid break during his rostered shift. The split shift arrangement for the mobile guard position covered the obligation to allow an unpaid meal break. I also accept the evidence that it was for Mr Larkins to arrange his rest break during each part of the split shift as a mobile patrol officer. There was no breach of duty by Allied over the breaks arrangements.

[24] Mr Larkins' third issue concerns Mr Black's departure from New Zealand, three days' training and then "You... just threw us under the bus... causing... mistakes... [and] adding extra stress". I accept the evidence that Mr Black departed New Zealand but was working from overseas. His email communications support that finding. Mr Black acknowledged that mistakes by the mobile patrol officers to that point indicated that training may have been

inadequate. Although experience indicated that the original training might have been insufficient, that does not mean that Allied breached a specific duty owed to Mr Larkins starting the new role.

[25] Mr Larkins' fourth issue is that insufficient staff were hired to complete the work in a safe manner, resulting in him working more than 60 hours and being deprived of rest to allow him to work safely. He says he worked more than 60 hours in each of the last two weeks but without mutual agreement being sought, despite the hours of work provision in the agreement. I accept the evidence that 3 full-time staff were hired and would have adequately covered the eight 12-hour shifts per week. Employees ceased unexpectedly. Allied added staff and introduced a shorter 4½ hour shift to assist. Mr Black's evidence is that Mr Larkin worked 50 hours in the week starting 4 February which included two days off. He was rostered to work 44 hours in the following week. Email exchanges show that Allied sought Mr Larkins' agreement to the roster arrangements. I accept that these arrangements were consistent with the employment agreement. There was no breach of duty by Allied over the work hours.

[26] Mr Larkins' fifth issue concerns his claim that the job was advertised and communicated as a 4 on/4 off roster arrangement but this was not included in the agreement. He says that working 5 days on/2 days off "consistently" and driving for more than 8 hours each night was unsafe and risked his life. As explained above, it was not advertised or part of the agreement that there had to be a 4 on/4 off roster pattern. Mr Larkins agreed to work split shifts which involved driving for approximately 5 hours, a break and driving again for up to 5 hours. There was no breach of duty by Allied over the roster pattern.

[27] Mr Larkins' next issue is the delay in advising the roster and the effect that caused for him in arrangements in his personal life such as adjusting between night shift work and personal life during the day. The evidence is that the unexpected staffing changes had affected the timing of the roster availability. Allied resolved that with new appointments. The employment agreement did not set a time by which the roster was required to be set before coming into effect, but required hours of work to be set by mutual agreement. There was no breach of duty by Allied over the roster advice.

[28] Mr Larkins is critical of the company culture and how Mr Black had dealt with him about a route he had driven while on duty. To some extent, the complaint concerns interactions between Mr Black and other staff, based on what others have apparently told Mr

Larkins. There is no reason to place any reliance on the hearsay assertions and I put them to one side. Mr Larkins characterises Mr Black's phone and email communications as "unprofessional, patronizing and overly aggressive". None of the email communications from Mr Black in evidence can be accurately described that way. That leads me to not accept Mr Larkins' similar description of the tone and manner of the phone exchanges between him and Mr Black. There was no breach of duty owed to Mr Larkins by Allied over company culture or the tone and manner of Mr Black's communications.

[29] Mr Larkins is very critical about an attempt to roster him for 36 hours within a 48 hour period on 16 and 17 February. This is the roster arrangement which was subject to emails between Mr Larkins and Mr Black on 11 February, with Mr Black saying that it had been changed and Mr Larkins responding "Okay sweet thanks!" There was no breach of duty by Allied over this roster.

[30] Mr Larkins is critical of having his sleep interrupted by phone calls on 8 February. He says that Mr Black asked him to go to the office, he attended at 2.30pm but had not been paid for the time from then to the start of his rostered shift that evening. I accept the evidence that Mr Larkins did not work on 7 February. Allied in calling in the morning on 8 February would not necessarily know that it would interrupt Mr Larkins's sleep ahead of a 7pm shift later that day. Mr Larkins had not put his phone on silent to prevent being disturbed. I accept the evidence that Mr Black asked Mr Larkins to go into the office to check keys, a task he expected to take an hour. Mr Larkins was paid for the week ending 10 February on Wednesday 13 February. Mr Larkins first raised his claim for arrears on 15 February when he resigned. In response, Mr Black asked Mr Larkins to speak to the manager (Simon) who he assumed had asked Mr Larkins to continue working after the keys had been checked. If there was a default in payment for some of the week's work, Allied would breach a duty owed to Mr Larkins. However, the breach on its own was not sufficiently serious for it to be reasonably foreseeable that Mr Larkins would resign.

[31] Mrs Larkins is critical of working with only a 30 minute break on the 4<sup>th</sup>, 5<sup>th</sup> 9<sup>th</sup> and 10<sup>th</sup> of February, taking issue with the unpaid break in the 12 hour rostered shift each day. As above, Mr Larkins was engaged to work a split shift and this was clearly explained to him. Mr Larkins was not required by Allied to work through the 2 hour break in the shifts on these days. There was no breach of duty by Allied concerning this matter.

[32] Mr Larkins is critical of not being paid correctly for working on Waitangi Day. A shift started on 7.00pm Tuesday 5 February and finished at 7.00am on Wednesday 6 February. Payment should have been included with the wages paid on Wednesday 13 February. Assuming there was a default in correct payment for work on 6 February, Allied would breach a duty owed to Mr Larkins. However, the breach on its own was not sufficiently serious for it to be reasonably foreseeable that Mr Larkins would resign.

[33] To summarise, assessing the reasons given by Mr Larkins in his email, mostly they do not involve a breach of duty by Allied. The arrears issues for work on 8 February prior to the start of the rostered shift and for work on Waitangi Day were first raised by Mr Larkins in his 15 February email announcing his resignation. Any breach by Allied in respect of these issues was not sufficiently serious to make it reasonably foreseeable that Mr Larkins would resign.

[34] Mr Larkins might have been disgruntled about his working conditions, but he took on that job with the conditions clearly described. Mr Larkins was entitled to resign, but I find he was not constructively dismissed.

**Did Allied breach its obligation to provide him with a safe workplace?**

[35] None of the issues relied on by Mr Larkins are made out, as explained above.

[36] There was no breach by Allied of its duty to provide Mr Larkins with a safe workplace.

**Did Allied breach a duty of good faith owed to Mr Larkins?**

[37] None of the issues relied on by Mr Larkins are made out, as explained above.

[38] Allied did not breach its duty of good faith owed to Mr Larkins.

**Damages**

[39] In making submissions about the claims in the statement of problem, Mr Larkins' representative characterised them in the alternative as claims for damages for breach of agreement. No claim for damages was set out in the statement of problem. Regardless, for

the reasons given above, Mr Larkins has not shown a breach of contract or any loss which was caused by any breach.

**Is Mr Larkins entitled to any arrears of holiday pay or wages?**

[40] Mr Black acknowledged that there was a default in payment of Mr Larkins' final pay, a total of \$171.36. Allied did not pay the final pay because it considered it was entitled to withhold the payment as Mr Larkins did not work out his notice of resignation. However, Allied withdrew its claim, leaving an obligation to pay the final pay. There will be an order to cover this amount.

[41] Mr Black acknowledged arrears for Waitangi Day, which he calculated at \$189.00. The employment agreement includes a transfer provision. The effect is that the whole shift which commenced before Waitangi Day and ended on that day must be treated as having been worked on Waitangi Day. Mr Larkins is entitled to half time extra for the time he worked plus an alternative holiday. The payment calculated by Mr Black covers the alternative holiday but not the half time extra. Mr Larkins is entitled to an additional \$94.50. There will be an order to cover these two amounts.

[42] Mr Larkins' claim is for arrears for work on 8 February and for working during the break in shifts on 4<sup>th</sup>, 5<sup>th</sup>, 9<sup>th</sup> and 10<sup>th</sup>. Mr Larkins has not established that he worked and is entitled to be paid any wages, apart from what was paid to him before his resignation for these shifts.

[43] The total in arrears of wages and holiday pay is \$454.86.

[44] There is a claim for interest. The arrears of wages and holiday pay should have been paid on 20 February 2019. I calculate interest on the arrears from that date to the date of this determination at \$23.43. There will be an order for that amount.

**Summary of File Number 3059613**

[45] The personal grievances, damages (in the alternative) and penalties claims all fail.

[46] Mr Larkins is entitled to arrears of wages and holiday pay totalling \$454.86 and interest of \$23.43.

**Can the Authority reopen File Number 3056912?**

[47] Clause 14 of Schedule 2 to the Act permits an applicant to withdraw a matter at any time where it is before the Authority. As noted, Allied expressly withdrew its claim under file number 3056912. In response to Mr Larkins' claim for costs, Allied submits that the matter should be reopened.

[48] Clause 4 of the Schedule permits the Authority to order an investigation to be reopened. Applications for the Authority to exercise power under this clause must be lodged in form 6 and be accompanied by the prescribed fee. Allied has not lodged an application in that form or paid the fee.

[49] No order to reopen file number 3056912 can be made.

**Costs**

[50] Although unable to reopen file number 3056912, the Authority has power to order costs despite the withdrawal by the applicant.

[51] Mr Larkins was required to lodge any statements of evidence in support of his claim (3059613) and in reply to Allied's claim (3056912) no later than 15 May 2020. The Authority's file shows a statement from Mr Larkins was lodged on 15 May. Mr Black withdrew Allied's claim in an email to the Authority on the evening of 9 March 2020. The Authority copied the withdrawal advice to Mr Larkins' representative on 10 March 2020. Mr Larkins was required to do nothing further on file number 3056912 after the case management conference. I do not accept the submission that costs had to be incurred in preparation for an investigation meeting before the claim was withdrawn.

[52] The only steps required by Mr Larkins before the withdrawal of the claim were lodging a statement in reply, attending mediation on both matters and attending the case management conference on both matters. Mediation costs fall outside the current assessment. The case management costs attributable to the withdrawn matter cannot sensibly be separated from the costs attributable to Mr Larkins' claim. That leaves the cost of preparing and lodging a statement in reply in circumstances where the applicant later withdraws the claim. In this case however, the statement in reply set out matters that then formed the basis of Mr Larkins' subsequent statement of problem, lodged a short while later. Again, the costs cannot

be separated. That leads me to the view that there should not be an order for costs in favour of Mr Larkin.

[53] That leaves cost on file number 3059613, the claim by Mr Larkins. A principle is that costs should follow the event. Here, Allied was the successful party but Mr Larkins' achieved a small measure of success with recovery of arrears. That success itself in part came from Allied's concession, in part from a statutory holiday point addressed by me and only partly from Mr Larkins' claim. Mr Larkins also failed on part of his claim for arrears.

[54] Allied instructed counsel at an early stage and principally in respect of its own claim. Mr Black dealt with the Authority for the case management conference and thereafter. He is a principal of the company so legal costs do not arise from his work.

[55] Given that Mr Larkins was in large measure unsuccessful, he is not entitled to an order for costs on file number 3059613. Allied, although substantially successful, is not entitled to an order for costs.

Philip Cheyne  
Member of the Employment Relations Authority