

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Andrew Asaua (Applicant)
AND Chubb New Zealand Limited (Respondent)
REPRESENTATIVES Paul Pa'u, Counsel for Applicant
Robyn Pope, Advocate for Respondent
MEMBER OF AUTHORITY Dzintra King
INVESTIGATION MEETING 6 July 2005
DATE OF DETERMINATION 15 July 2005

DETERMINATION OF THE AUTHORITY

The applicant, Mr Andrew Asaua, was employed by the respondent, Chubb NZ Limited, as a security guard. Mr Asaua claims he was unjustifiably dismissed.

The holding of a Certificate of Approval is necessary in order for a person to work in the security industry. The person seeking the certificate, either on initial application or annual renewal, must be approved by the Police and the Department of Courts as a person meeting the requirements of the Private Investigators and Security Guards Act 1974. The person must be a fit and proper person to act as a security guard.

Mr Asaua initially obtained such a certificate and was employed in March 2002. In January 2003 the certificate was due for renewal and Mr Asaua was asked to forward his certificate for renewal. He was reminded in February and again in March but did nothing. In May the company realised he still had not renewed the certificate and by that stage he had to make a new application.

Unbeknown to Mr Peter Martelleti, the Operations Manager, Guard Services, Mr Asaua had committed an offence and that was quite clearly the reason Mr Asaua had been delaying renewing his certificate. During the course of the Investigation it emerged that Mr Asaua had told his supervisor, Mr Tuala, about his arrest and that Mr Tuala had accompanied Mr Asaua to the police station and also gone to Court with him. Mr Tuala did not inform either Mr Martelleti or anyone else at Chubb about this. When asked, he had no explanation for this lapse. Furthermore, Mr Tuala had been interviewed by the respondent prior to the Investigation and had made no mention of his knowledge of Mr Asaua's offending. Mr Tuala attempted to explain this by saying he had not been specifically asked. Mr Tuala deliberately failed to advise his ex-employer (he now works elsewhere as a security guard and has employed Mr Asaua, who does not need a certificate for the work he is currently doing).

Mr Martelleti told me that the first that Chubb knew about there being a problem with Mr Asaua was when he received a letter from the Auckland District Court on 12 June 2003 stating that Mr

Asaua's application for a certificate of approval was being opposed by the Police. The letter also said:

Please advise this office in writing after discussing the contents of that letter with the abovenamed, whether or not you wish to proceed with the application.

If you wish to proceed with the application, a date of hearing will be allocated to hear and determine the application and objection thereto.

Mr Asaua had also received a letter, to which a police report was attached. The letter said:

If you wish to continue with this application, you will have to disclose this report to your prospective employer and your prospective employer will need to advise this office in writing that they wish to proceed with the application.

The police report, which I am satisfied was not made available to the employer until after Mr Asaua's employment had terminated, states that Mr Asaua had been charged with obtaining/using a document for pecuniary advantage and that he had admitted to the charges and had subsequently been granted diversion.

On 1 April 2003 Mr Asaua had received a letter from the Police stating that he had completed the conditions of the diversion agreement and:

You have successfully avoided a criminal conviction and have been given the opportunity of maintaining your otherwise good record.

Mr Asaua did not tell his employer about this or show his employer the letter.

He asked Mr Asaua to come into the office the following day to discuss the matter. On Friday 13 June Mr Asaua arrived, accompanied by Mr Tuala. Mr Martelleti asked if he knew the certificate had been declined. He said he did. Mr Asaua was then asked if he knew why the application might have been declined. At that stage Mr Asaua said he and others had been arrested for altering drivers' licences. Mr Martelleti told him he should have informed Chubb about the arrest when it happened. Neither Mr Asaua nor Mr Tuala said that Mr Tuala had been aware of it all along. Mr Asaua admitted he had had committed the offence.

Mr Martelleti told him he could not work as a security guard without the certificate and that as he had admitted the offence Mr Martelleti did not think he could challenge the decision of the police. Although Mr Tuala and Mr Asaua deposed to the contrary, I am sure that neither of them mentioned the fact of diversion at that meeting. Mr Martelleti said he would have to talk with the HR Manager and he then wanted to talk to Mr Asaua again on the Monday.

On the Monday Mr Asaua came into the office with his uniform and ID badge and handed in his resignation.

Dismissal Claim

The applicant contends that he was unjustifiably dismissed because the respondent failed to act reasonably and fairly towards him. The claim is based on the view that the employer had an obligation to consider whether or not it would support the application for the renewal of the certificate; and that, given that diversion had been granted, the application should have been supported.

This claim cannot stand for a number of reasons. Mr Asaua was not honest with his employer about his arrest or subsequent events. It was readily apparent to me that Mr Tuala and Mr Asaua had decided not to say anything in the hope that it would all go away. In those circumstances Mr Asaua's disclosure to Mr Tuala cannot count as a disclosure to his employer: the two men were clearly friends. Furthermore, there was no reference made to diversion at the meeting on 16 June so the employer could not take that into consideration. Even if it had, the fact of Mr Asaua's failure to disclose would in all likelihood have resulted in a decision not to support an application for the certificate. Mr Asaua made a decision to resign: there was no dismissal, actual or constructive.

Even had I found that there was an unjustified dismissal, Mr Asaua's behaviour was of such a nature that he would not have been entitled to any remedies.

Costs

Costs were reserved. Mr Asaua is legally aided. The parties should attempt to resolve the matter of costs. If that is not possible, the respondent should file a memorandum within 28 days of the date of this determination. The applicant should then file a memorandum in reply within 14 days of receipt of the respondent's memorandum.

Dzintra King
Member of Employment Relations Authority