

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

5074125
AA 133/08

BETWEEN SHARRYN Te ATAWHAI
 BARTON
 Applicant

AND WAIKATO SECURITY
 SERVICES LIMITED
 Respondent

Member of Authority: Dzintra King

Representatives: Tim Oldfield, Counsel for Applicant
 Cor Speksnijder, Advocate for Respondent

Investigation Meeting: 26 February 2008

Determination: 8 April 2008

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant, Ms Sharryn Barton, claims a personal grievance for unjustifiable disadvantage or, in the alternative, a claim for a breach of her employment agreement. There was a claim for reinstatement but that claim has now been dropped. Ms Barton claims compensation for lost wages and compensation for humiliation, loss of dignity and injury to feelings. In the alternative, she seeks damages for distress, for breach of contract and compensation for lost wages for breach of contract.

[2] Ms Marian Mangan is the executive manager and a director of the respondent, Waikato Security Services Limited (“WSSL” or “the company”). The company provides security services for a number of customers. In May 2006, the company was advised that it was the successful tenderer for the provision of security services at the Henry Rongamau Bennett Centre (“Henry Bennett Centre”) for the Waikato District

Health Board (“WDHB”). The company then set about recruiting staff to fulfil that contract. As part of that recruitment process, the CEO, Mr Chris Mangan, and the operations manager, Mr Mike Hastie, contacted the existing security personnel employed by the outgoing contractor, Chubb New Zealand Limited, with a view to offering them employment. A number of those staff, including Ms Barton, were members of the Service and Food Workers’ Union.

[3] The contract between the Waikato DHB and WSSF for the provision of security services at the Henry Bennett Centre dated 1 July 2006 provides at para.11.1:

Staff employed by Waikato Security deployed on Waikato HRBC will meet Waikato DHB’s reasonable expectations under this contract. The Waikato DHB manager has a right to refuse access by Waikato Security personnel not meeting Waikato DHB’s reasonable expectations.

[4] All of WSSL’s staff were employed on the basis of meeting the company’s performance criteria as well as that of their clients. Ms Barton signed an individual employment agreement with WSSL on that basis prior to her starting date on 1 July 2006.

Ms Barton’s Individual Employment Agreement

[5] Clause 4 headed **Company Policy** reads:

This agreement is deemed to include the appropriate policies and procedures contained in the Waikato Security Services company policy handbook (referred to as the policy handbook) and the employees should familiarise themselves with the contents of this handbook and comply with these policies at all time.

[6] Section 10 of the policy manual deals with termination of employment. It contains a section headed **Frustration of Contract**. This states that “*an individual unable to perform work due to their own actions (e.g. imprisonment, banned from any customer premises)*” would constitute frustration of contract. It goes on to say that the manager would discuss the situation with the business services manager and consider employee representation. The manager would then notify the employee of his or decision which could involve termination.

[7] Clause 6 of the employment agreement provides for the hours of work. This states:

- 6.1 *The ordinary hours of work for this position shall be worked on any of the seven days of the week, Monday to Sunday inclusive, including public holidays, and may involve duties at various sites. However, it is expected the employee will complete most of their duties at the Henry Bennett Centre.*
- 6.2 *In the case of the Henry Bennett Centre the current roster rotation of four on/four off will be retained. However, this will not prevent the employer and employee from mutually agreeing to an alternative roster option to meet the operational needs of the company and its clients.*
- 6.3 *For those employees not on a rolling roster, a roster shall be displayed on the Friday preceding the next week setting out employees' hours of work for the period. The employer reserves the right to alter the roster to meet the needs of the business.*
- 6.4 *All employees are required to be available to work a reasonable number of additional hours to meet operational requirements and may be required to work/change shifts at short notice. However, the maximum hours worked in one day should not exceed 12.5 hours. This will not prevent the employer and employee from mutually agreeing to additional hours beyond the specified 12.5 in the case of urgent company or client operational needs.*

[8] Section 5 of the policy manual, headed **Undertaking the Work**, under the subheading "Hours of work and rosters" states:

WSS reserves the right to alter rosters at any time to meet company/client requirements.

[9] The job description for Ms Barton's position is that of security officer. The purpose of the position is:

to perform the duties required for the provision of security services to the employer's contracted clients in an efficient, effective, customer focused manner.

[10] It does not say that the position is specifically or solely to be carried out at the Henry Bennett Centre.

Complaint by Waikato District Health Board

[11] Six weeks into the contract, on 16 August 2006, Ms Mangan was informed by Mr Hastie that the client service manager, Ms Vicky Muir, had expressed concerns about Ms Barton following an incident at the Henry Bennett Centre on 11 August 2006. The client did not wish to see Ms Barton continue working in its environment. The letter sent by Ms Muir to Mr Hastie states:

I am writing to express my concern and dismay at the actions and behaviour of security guard Sharryn Barton in relation to a series of incident reports pertaining to a serious event which occurred on the above date [15 August 2006].

I have reviewed all of the incident forms and attach copies for your own investigation and follow up.

I wish to highlight the seriousness of this issue and advise you that there have been other instances of rude and unhelpful behaviour demonstrated by this guard. As a result I do not have any confidence that working in a mental health facility is the appropriate environment for this guard.

I would encourage your organisation to address these issues with Sharryn while also being clear that I do not wish to see her continue working in this environment.

Please do not hesitate to contact me if you have any queries.

[12] Ms Muir included several Waikato DHB internal incident forms together with this letter. The company also obtained an incident report from Ms Barton's shift co-worker, Mr David Heke, and Ms Barton's WSSL shift report for that day.

[13] Ms Muir met with Ms Mangan and Mr Hastie and they concluded that the basis of Ms Muir's request to have Ms Barton removed from the Centre was due to Ms Barton's conduct. It was noted that the client had made that decision based not only on the incident of 11 August 2006 but also on previous concerns while Ms Barton was employed by Chubb.

24 August 2006 Meeting

[14] On 20 August Ms Mangan wrote to Ms Barton asking her to attend a meeting and stated that the purpose of the meeting was to discuss a formal complaint made by Health Waikato regarding Ms Barton's performance. It stated:

The specific allegation is that on August 11 2006, in your capacity as security officer, you allegedly failed to perform to the required standards when dealing with an incident at the Henry Rongamau Bennett Centre.

As the outcome could result in disciplinary action being taken, you are entitled to have a support person present at the meeting. Should you choose to do so, could you please advise us not later than 24 hours prior to the meeting the name of the person attending with you.

[15] Ms Mangan said that as Ms Barton was on bereavement leave at the time, she waited until 20 August to inform her of the situation and asked her for a meeting.

Given that the request for Ms Barton's removal from the Henry Bennett Centre was also based on previous issues allegedly involving Ms Barton while working for Chubb and that WSSL had only just taken over the contract six weeks previously, they attempted to seek supporting information. As part of that, and because they regarded the WDHB's request for Ms Barton's removal as serious, she strongly recommended that Ms Barton ask her previous employer Chubb for her file information. However, Ms Barton did not produce anything. In the absence of any other information from Chubb to assist them in their investigation, Ms Mangan and Mr Hastie reviewed the shift reports and memoranda of the previous six weeks.

[16] On 24 August they met with Ms Barton and Mr Rupene Amato, a union delegate, to discuss the Waikato DHB letter and the allegations. Ms Mangan explained to Ms Barton that the purpose of the meeting was to investigate the client's allegations and discuss the request to have her removed from the site at the Henry Bennett Centre. She clarified the position of the company which was that it had a duty to ensure that WSSL met all its contractual obligations to its clients while also meeting its obligations to Ms Barton, and to act as a fair and reasonable employer.

[17] Ms Barton was given copies of the client letter and incident reports and asked to comment. The matter was then discussed. The meeting concluded with the understanding that a second meeting would take place after WSSL had spoken to the WDHB about the possibility of its attending mediation with Ms Barton.

[18] Ms Mangan said that after the first meeting with Ms Barton, they carefully considered all the information they had been able to obtain, including earlier shift reports that showed a number of unprofessional and belligerent remarks. Ms Barton was shown a copy of the relevant shift reports and the comments on them were brought to her attention.

[19] Following the 24 August meeting, Ms Mangan contacted Ms Muir. She asked Ms Muir to grant an interim stay of her request for Ms Barton's removal from the Centre in order to investigate the matter. Ms Muir agreed and Ms Barton was advised accordingly. Ms Mangan also raised the possibility of her attending mediation with Ms Barton. However, Ms Muir refused, reiterating her concerns about Ms Barton and that she had on more than one occasion complained to Chubb regarding Ms Barton's attitude and performance. Ms Muir said that to her knowledge Chubb had done nothing to address the concerns, or complied with her request for Ms Barton to do a

Kiwi Host course. Ms Muir agreed that if Ms Barton went on a Kiwi Host course or similar, she would be permitted to remain on site.

5 September 2006 Meeting

[20] At this meeting the findings of the company were discussed and Ms Mangan invited Ms Barton to respond. Ms Barton did not accept that her acts or comments contributed to the situation and did not see that there was any need for her to change or improve. When asked whether she had ever attended a Kiwi Host course, Ms Barton said she was personally offended by the suggestion and was adamant that she would not participate in such a course. Mr Hastie supported Ms Mangan's suggestion and Ms Mangan attempted to persuade Ms Barton to take up the Kiwi Host offer, especially as the course was similar to unit standard on customer services in the National Certificate in Security which was a qualification that all WSSL staff would eventually obtain. Ms Barton remained adamant in her refusal.

[21] I note at this point that the parties differ about whether or not Ms Mangan told Ms Barton that Ms Muir was agreeable to having her back at the Henry Bennett Centre if she did such a course. Ms Barton and Mr Rupene are adamant that it was not couched in those terms. Ms Barton also said that even if it had been, she was so angry at the time that she probably may well not have taken up that offer.

[22] The notes of the meeting of 5 September clearly show that the issue of the Kiwi Host course for Ms Barton was raised, that she refused to do it and was offended. On 5 September, Ms Mangan wrote to Ms Barton saying:

We are therefore writing to confirm verbal advice given today in order to meet our contractual obligations to our client Health Waikato Limited, it is necessary to transfer you to an alternative work site(s). This is effective from 1500 hours 05 September 2006.

You will be aware the company provides security on numerous sites and as such we can provide many opportunities for a variety of duties. Therefore we would like to consult with you regarding your next work site. The shift/hours of work cannot be confirmed until we discuss options for sites.

[23] Ms Mangan said she supported Mr Hastie when he explained to Ms Barton that they were not treating the issue as a disciplinary matter at that stage. However, due to the WDHB's stance, Ms Barton was not able to return to the Henry Bennett

Centre and arrangements would have to be made for her to work on another site or sites.

Alternative Work Arrangements

[24] Ms Mangan did not endeavour to terminate Ms Barton's employment. Instead, there was considerable discussion and attempts were made by the company to accommodate Ms Barton in her preferences as to an alternative work site. Ms Mangan said the company had numerous contracted sites. However, all had different specific needs and none had identical hours and shifts so Ms Barton was given a list of options of available sites with similar hours and days of work. The company confirmed this in a letter to Ms Barton dated 5 September 2006.

[25] Further meetings and communications took place between 11 and 29 September to negotiate alternative sites for Ms Barton. The company continued to pay Ms Barton her Henry Bennett Centre wages in good faith during that time.

[26] On 11 September, a further meeting was held, attended by Ms Mangan, Ms Barton, Mr Amato and Mr Hastie. They discussed the alternative work site option. Ms Barton advised she would only be available for shifts that fell in the same pattern as what she was working at the Henry Bennett Centre, that is 12 hour shifts, four on/four off due to her commitments outside work. She explained that she was involved in various activities and only those hours of work suited her lifestyle.

[27] Ms Barton turned down a 12 day four day on/four day off role at AgResearch because it had different start and finish times. Eventually she identified three sites which were acceptable to her and agreed to lessen her working hours to that of part-time status.

[28] On 14 September, Ms Mangan emailed Mr Amato, saying:

Sharryn has today submitted a time sheet to WSS for wages this week. We need to be quite clear that there will be no further wages paid for time not worked. Ideally this would have been settled earlier this week and the days not worked would have been days off with other shifts making up her time. However the company has ample shifts and sites Sharryn can work in the interim and still retain an income while she makes a decision.

Mike has collated a list of sample sites and duties. However he is on a site and I will see him in the morning before getting it over to you.

[29] On 15 September, Ms Mangan wrote to Ms Barton a letter setting out examples of sites and shifts. The letter ended by stating:

Therefore and as we have mentioned in previous correspondence it is in everyone's best interest that this matter is finalised with some expediency. As such we do require your decision whether you do or do not wish to remain at Waikato Security at other sites by 21 September 2006.

[30] On 17 September, Ms Mangan emailed Mr Amato stating:

Attached is a letter to Sharryn regarding hours and sites. Whilst we appreciate her need to be sure of what she wants to do, I think it is time now for some decisions to be made. We have work for Sharryn. It is all security work. We believe it is time now for Sharryn to make a decision as there is no going back for her to return to HBC and it is time to move forward. Therefore as you will see I have put a timeframe on a decision to be made. It is a shame she did not choose to work with us on other sites in the past two weeks in the interim as it would have given her an insight in the other roles.

I won't post this out to Sharryn as I'm assuming she will get a copy off you.

[31] On 21 September, Ms Barton replied to Ms Mangan in a letter headed "Without prejudice". She said:

Thank you for your correspondence regarding alternative work sites for my consideration.

I can accept being relocated to another site with similar hours and roster as that of the Forensic In Patient Services (FIPS) at the Henry Bennett Centre without prejudice to my personal grievance for unjustifiable disadvantage arising out of my removal from the FIPS at the Henry Bennett Centre. This is a practical measure pending resolution of my grievance as I will be seeking reinstatement to the FIPS at the Henry Bennett Centre on my original hours of work and rate of pay.

I would request at this time a further meeting to negotiate as close as possible a work site that would meet my requirements of comparable hours and roster as that of the Forensic In Patient Services. Subject to this being mutually satisfactory, I would agree to relocation conditional on the resolution of my personal grievance.

[32] On 27 September, another meeting was held to discuss the details of alternate shifts and sites. Ms Barton agreed to work on other sites, reiterating she would not work anything other than four on/four off. Ms Barton commenced working at the transport centre by mutual agreement.

[33] Ms Mangan said the company was satisfied that the matter was resolved as it had had no communication from Ms Barton to the contrary until they received her personal grievance letter dated 31 October 2006. Ms Mangan said that although Ms Barton did not work the same number of hours as before, she refused to accept additional work when offered. Ms Barton said she had had to curb some of the community activities she undertook outside of work time because of the financial impact as her hours of work had been reduced. She said she really needed the four on/four off roster so she could have time on her four days off to undertake her community and cultural obligations. The situation had caused her a lot of anxiety because of the loss of income. She said she was disappointed that the respondent did not go into bat for her with the WDHB.

[34] This is not a complaint that can be substantiated. The company spoke with Ms Muir; it did try to arrange a mediation which Ms Muir resisted; there was nothing further the company could do in that regard. It arranged for Ms Barton to continue working there for an interim period. Although Mr Oldfield has argued that there was no agreement between Ms Mangan and Ms Muir about the return of Ms Barton to the site if she attended a Kiwi Host course, the evidence indicates that it was likely such an agreement was reached.

Contract Interpretation

[35] Mr Oldfield argued that the IEA did not permit the respondent to unilaterally adjust the applicant's hours and place of work and that under the IEA the respondent was required to offer work to the applicant at the Henry Bennett Centre on a four on/four off roster. The applicant says that clause 6 is the only provision dealing with her hours and place of work. Mr Oldfield said the plain words of 6.1 stipulated that Ms Barton would work most of her duties at the Henry Bennett Centre. The words "*and may involve duties at various sites*" are clearly qualified by the following sentence: "*However it is expected the employee will complete most of their duties at the Henry Bennett Centre*".

[36] Mr Oldfield said that clause 6.3 did not apply to the applicant and it was safe to assume it was a standard form employment agreement that had been modified to suit the applicant's requirements and that was why there was a reference to employees not on a rolling roster. Otherwise, its presence in the agreement did not make sense because Ms Barton was on a four on/four off roster rotation. However, it seems to me

that another explanation for its being there is that it did envisage that she would be on another type of roster and that meant that the work patterns could be altered.

[37] He said the agreement made it clear that Ms Barton was not precluded from agreeing to working on other sites and did contemplate that as a possibility, but that would only be in addition to work at the Henry Bennett Centre. He says the word “*expect*” was defined in the OED 11th edition as “*require as appropriate or rightfully due, someone to fulfil an obligation*”. That was the meaning in clause 6.1.

[38] The meaning of “*expected*” is more like “*to regard as probable*” or “*likely*”, “*hoped*” or “*anticipated*”. I agree that it does not create a legitimate expectation of indefinite work at that site. I agree that clauses 6.2 and 6.3 operate as contractual contingencies to provide for situations where it was no longer for the applicant to work at the Henry Bennett Centre.

[39] The employment agreement does not give Ms Barton an absolute right to work solely at the Henry Bennett Centre. It contemplates only that that is likelihood or an expectation.

Disadvantage

[40] I accept the respondent’s submission that the applicant’s disadvantage claim does not meet the required element of s.103 (1) (b) for a number of reasons. I agree that disadvantage grievances must depend upon disadvantageous consequences for the employee and not merely the employee’s subjective dissatisfaction at her circumstances: *Bilkey v. Imagepac Partners* (unreported, Colgan J, 7 October 2002, AC65/02) at para.33.

[41] The Court of Appeal has held that disadvantage in employment must relate to the on-the-job situation. In *Northern Clerical etc IUOW v. South Auckland Taxic Association* [1987] NZILR 342, 344 the taxi dispatcher had arranged his hours of work to accommodate his pursuits of other interests. The respondent changed the employee’s duties and shift hours and the Union brought a personal grievance on behalf of the employee, claiming that the action of the employer had affected the employee’s employment to his disadvantage. The Court held that there was no personal grievance because the change in duties had affected the worker’s private activities, not his employment.

[42] In this case, Ms Barton was offered several alternatives but she was only interested in working at another site if she could work the same roster, that is four days on/four days off, 12 hour shift patterns, to suit her lifestyle and private interests. Ms Barton agreed during the investigation that but for her private community involvement, she could have accepted a different roster and/or additional hours and that any disadvantage reflected on her private life only. Therefore, any disadvantage she may have suffered by the disruption of her private lifestyle was not an on-the-job disadvantage and therefore not disadvantage by the employer.

[43] Furthermore, if any disadvantage had occurred it was not in fact caused by any action on the part of the employer. It was caused by an action taken by the Waikato DHB in saying that it would not have her on site any longer.

[44] The applicant was not disadvantaged in a legal sense but was merely dissatisfied with her circumstances. The change of work site was not a disciplinary measure; she was not demoted; she suffered no loss of status or job security; no involuntary loss of income and there was no change in her terms or conditions of employment. The engagement at another work site is just part and parcel of being a security officer.

[45] Even if Ms Barton had been disadvantaged, any disadvantage must also be unjustifiable.

[46] Being faced with a situation in which the WDHB no longer wished Ms Barton to be engaged at its site, the respondent had few options. In *Charles v. Waitakere City Council* (unreported, R Arthur, 19 November 2007, AA362/07), at para.[63] the Authority considered that in triangular employment cases it was the employer's responsibility to properly investigate complaints before complying with the principal's demand for the removal of a worker. That case can be distinguished from the present on the facts, because in that case the employer did not investigate the complaints at all, nor inform the employee of the third party's complaints before removing the employee from the third party work site. In the present case, the respondent did investigate the matter, sought to obtain information about earlier complaints and sought interim reinstatement and mediation before agreeing to remove the applicant from the site. Further, it followed fair procedures and communicated fully with the applicant and her representative on alternative work prospects. The

respondent dealt with the situation in a manner in which a fair and reasonable employer would have done in the circumstances.

[47] The respondent observed the rules of natural justice and carried out the transfer of the applicant in a procedurally fair manner.

[48] The contractual arrangements between the WDHB and WSSL made it clear that the WDHB could refuse access to the site by WSSL personnel not meeting the WDHB's reasonable expectations. After the WDHB notified WSSL that it no longer wished to have Ms Barton on its site, Ms Mangan made several efforts to secure the return of the applicant. These efforts included the successful seeking of an interim return pending the finding of a solution; offering the applicant to go on a Kiwi Host course as suggested by the WDHB; and seeking mediation between the applicant and the WDHB.

[49] There was no unjustified disadvantage because once the DHB decided that it would no longer have Ms Barton back on the site, the employer had no option but to remove her. The respondent offered Ms Barton as much work as she wanted. Ms Barton refused that offer because it would not fit in with her private arrangements.

[50] Ms Barton does not have a personal grievance nor has her contract been breached.

Costs

[51] If the parties are unable to agree the matter of costs, leave is reserved for the respondent to 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 the Employment Relations Authority