

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2012] NZERA Christchurch 105
5349508

BETWEEN ROBERT GOMEZ
 Applicant

A N D SUB 5 PRIVATE SECURITY
 LIMITED
 Respondent

Member of Authority: M B Loftus

Representatives: Georgina Burness, Advocate for the Applicant
 Barry Kay on behalf of the Respondent

Submissions received: At the investigation meeting

Investigation meeting: 27 March and 25 May 2012 at Christchurch

Date of Determination: 29 May 2012

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant, Mr Robert Gomez, claims to have been unjustifiably dismissed by the respondent, Sub 5 Private Security Limited (Sub 5), on 31 March 2011.

[2] Sub 5 denies it dismissed Mr Gomez and says he departed of his own volition.

Conduct of the investigation

[3] As can be seen from the intitulation the investigation meeting took place over two days. It was originally scheduled for one. On the first day Mr Gomez and Mr Kay (a Director and part owner of Sub 5) gave evidence. Their recollection of pertinent events differed considerably.

[4] As they proceeded it became apparent there had been another significant participant, Ms Kelly Ennis (Sub 5's Operations Manager). Neither party had called

her. Given the significant differences I concluded it was necessary for me to hear from her. She was therefore summonsed by the Authority, hence the second day.

Background

[5] Mr Gomez was employed by Sub 5 in July 2009. He occupied the position of Team Leader (Mobile Patrols). This meant that while he worked in the field as a Security Officer he also acted as a shift supervisor.

[6] Mr Gomez's tenure was not entirely blemish free. Sub 5 refers to disconcerting behaviours and attitudes, and the parties agree that Mr Gomez received two warnings. They do not agree on when. Mr Gomez says he received warnings in November 2009 and February 2010. Sub 5 agrees one was issued in February 2010 but denies giving a warning in November 2009; indeed they claim to have supported Mr Gomez over the incident which involved a complaint from a neighbouring business. Sub 5 says the other warning was issued in March 2010, but Mr Gomez denies any knowledge of it. This shall not be taken further as it does not affect the issues to be decided.

[7] Alarm activations or other requests for assistance by Sub 5's Security Officers are monitored by Code 9 Limited (Code 9). Code 9, having gathered relevant information, advise the Sub 5 Security Officer responsible for clients in the geographic area concerned. At the time Christchurch was suffering multiple earthquake aftershocks. These frequently caused electricity cuts and those, in turn, led to multiple security alarm activations. It would appear that Mr Gomez, acting under a mistaken belief that Sub 5 had decided not to respond to aftershock triggered alarms, reacted tersely when asked to attend an influx of aftershock activations one night in late March 2011. His reaction led to a complaint from Code 9.

[8] The complaint was received by Ms Ennis. She approached Mr Gomez about it as he was coming off shift at approximately 8am on 29 March 2011.

[9] Mr Gomez says Ms Ennis advised that she wanted to discuss an incident involving the despatch agent. Mr Gomez says he accepted he had acted inappropriately and apologised before going on to explain that Ms Ennis had to understand the pressures staff were working under as a result of the aftershocks. He goes on to say that Ms Ennis advised she had to stand him down as team leader and

that she would consult with Mr Barry Kay, a Director of Sub 5. Mr Gomez states that he responded to the advice of the stand down by saying *that's fine – I accept that*.

[10] Whilst Ms Ennis's recollection of that specific discussion is hazy, she denies removing Mr Gomez's supervisory responsibilities. She considers he continued to perform that function until he left but accepts she said she would speak to Mr Kay.

[11] Notwithstanding Ms Ennis' advice about speaking to Mr Kay, Mr Gomez says he thought the matter would end there with his alleged demotion resolving the issue. That was not to be (which is not surprising given Ms Ennis's view she never demoted Mr Gomez). The following morning she told Mr Gomez he would have to meet with Mr Kay and discuss the issues she had raised the previous day. Mr Gomez says he was told the meeting would occur the next morning (31 March) when Mr Kay arrived at work and toward the end of his (Gomez's) shift. Mr Gomez claims he replied by saying that he would have to have to think about it and obtain a support person. He says Ms Ennis responded by telling him he would have to be at the meeting.

[12] Ms Ennis denies the discussion was as described by Mr Gomez. She states it was a case of would that time suit and if not, can we arrange an alternate.

[13] Mr Gomez attributes his response, and the desire to have support, to the fact that he did not often meet with Mr Kay and that when he had the result *hadn't been the best* (a reference to the previous warnings). He adds that he had *an inkling*, given the previous day's discussion with Ms Ennis, that he was in trouble and the result could be disciplinary.

[14] Mr Gomez then went home and thought about the situation. At 10.50 am he sent Ms Ennis an email advising that he would not attend the meeting next morning due to insufficient notice leaving him unable to obtain support. It continues:

... I will have to arrange with my support person a suitable time for this meeting and I will inform you when I have arranged a time.

I would also like to know the nature and reason of this meeting also the points and allegations of which are going to be raised. I would also like to request a copy of the written complaint submitted to you by Code 9. I would also like to request copies of all other documents and notes pertaining to this complaint, and subsequent investigation of it.

...

[15] The e-mail ends with a request that all questions be put in writing and asks that his employer act fairly. Mr Gomez states Ms Ennis did not respond. Ms Ennis denies that. She says she sent a text (though it may have been an e-mail), but accepts she did not explain the accusations in great detail. She is of the view Mr Gomez was well aware of the issues given the discussion between the two the previous day.

[16] She also discussed Mr Gomez's email with Mr Kay and both say her advice was simply – the meeting would not proceed as Mr Gomez did not have an advocate. Mr Kay says he readily agreed there would be no disciplinary meeting the following day but advised Ms Ennis that he still wanted to talk to Mr Gomez. He wanted to outline his expectations regarding Mr Gomez's behaviour as he considered it to pose a risk to the business.

[17] The following morning Mr Gomez returned to Sub 5's premises around 7.30am. There is considerable disagreement as to what occurred next.

[18] Mr Gomez says that Ms Ennis arrived soon thereafter and went into the office. He goes on to say that she then re-emerged and *...informed me that we were going to have the meeting. I asked her if she got my email regarding the meeting, and her reply was that she did not care about it, that the company director was waiting upstairs to have this meeting. Ms Ennis then told me to go upstairs or to hand my two weeks notice in to her now.*

[19] Mr Kay's view is that upon his return Mr Gomez simply sat in his vehicle and did not perform any of the tasks normally expected towards the end of a shift. Having seen this from his office window, he asked Mr Gomez's immediate manager, Mr Rob Story, to fetch Mr Gomez. Mr Story states he approached Mr Gomez and asked that he meet with Mr Kay in the latter's office. He states Mr Gomez refused – twice.

[20] Mr Gomez has no recollection of Mr Story's approach but does not deny it may have occurred.

[21] Mr Story reported his lack of success to Mr Kay who then told Ms Ennis to get Mr Gomez. This she did, returning with Mr Gomez who, as noted earlier, felt he had no choice but to comply or face dismissal. Ms Ennis denies threatening Mr Gomez with dismissal but accepts she was forthright. She says she initially told him they wanted a chat and that as he was still on pay he had to accede. She says that when he refused she told him that the discussion was not disciplinary and they simply wanted a chat. That led to a second refusal and she then responded by stating *If you don't want*

to talk to a director of the company when you're being paid you can get your arse upstairs and tell him yourself (or something very similar).

[22] A meeting proceeded but, again, recollections differ significantly. Mr Kay states he opened by advising, more than once, that the meeting was not disciplinary but he wished to address a couple of operational expectations. The first was Mr Gomez give an undertaking to attend all despatches forwarded by Code 9 and the second was a guarantee not to swear on the RT. Mr Kay states he mentioned attendance at call-outs first, but the only response he got from Mr Gomez was *no comment*. He says he received a similar response when he raised the issue of swearing and that it was not until late in the meeting that a phrase other than *no comment* or *don't put words in my mouth* was uttered by Mr Gomez.

[23] Mr Kay accepts he felt increasingly frustrated and says he reacted positively to a suggestion tendered by Mr Gomez towards the end of the meeting that they involve a mediator. Mr Kay says he accepted the suggestion as a circuit breaker that might allow them to find a way through what was becoming an increasingly difficult and unproductive situation. He says that was the end of the meeting.

[24] As said earlier, Mr Gomez has a different view of the meeting. He is adamant that Mr Kay never advised the meeting was operational as opposed to disciplinary. He also rejects the claim that swearing over the RT was raised. Mr Gomez claims Mr Kay only raised his alleged non-response to a specific call-out. He says that having ascertained the call in question, he advised he had attended and therefore could not comment further on the assertion he had not. Mr Gomez states his repeated denial of the claim he had not attended the call-out aggravated Mr Kay who started swearing before stating *as you're not going to talk to me you're fired. Pack your things and go*.

[25] Mr Gomez says Mr Kay and Ms Ennis then escorted him down the stairs and through an office space occupied by others, with Mr Kay continuing to swear and advise Mr Gomez of his dismissal. Mr Gomez claims they entered a garage in which his vehicle was parked and Mr Kay demanded the return of company property. Mr Gomez says Mr Kay again reiterated the fact of dismissal before telling him to take his rather negatively described vehicle from the premises and *f... off*.

[26] Ms Ennis's recital of events was very similar to that of Mr Kay until differences arise in respect to the meetings end. She is adamant that mediation was

not mentioned. She says Mr Gomez advised that he was resigning and that Mr Kay could deal with his lawyer. Mr Kay responded *that's fine* and Mr Gomez then stormed from the room. She says she sat there staring at Mr Kay – she considered the way events had unfolded unbelievable.

[27] Mr Kay also said Mr Gomez stormed from his office and that he and Ms Ennis followed. Again he denies swearing and/or advising Mr Gomez of a dismissal. He does accept that once in the garage he asked Mr Gomez for his security access card and a jacket which would identify him as a member of Sub 5's duty staff. He says he did this as Mr Gomez's attitude gave him reason to have significant concerns about the security and safety of his premises and he wished to ensure that whilst the matter was progressed. He denies asking for other company property, but accepts he probably made a negative observation about Mr Gomez's car. He puts this down to being angry about the fact the car was parked in a place Mr Gomez had repeatedly been told not to use.

[28] Ms Ennis agrees that she and Mr Kay followed Mr Gomez from the room and down a flight of stairs. She says that at the bottom Messrs Kay and Gomez turned into a garage whilst she briefly went to speak to Mr Story and advise him that Mr Gomez had resigned and to alter the rosters accordingly. She does not believe Mr Kay either swore or mentioned dismissal. She says she then went into the garage where she saw Mr Gomez handing an RT to Mr Kay and that Mr Kay then said *no, I want your jacket and all your Sub 5 gear as well* (or something similar).

[29] On 5 April Mr Gomez returned to Sub 5's premises and handed a number of uniform items to the receptionist. He also handed her a letter addressed to Ms Ennis. The letter requests payment of any unpaid wages and holiday entitlement that may have accrued between 20 July 2009 (Mr Gomez's date of commencement) and 31 March 2011. That letter was followed by another dated 11 April 2011 which advised *I hereby notify you that I am logging a personal grievance for unjustified dismissal, regarding termination of my employment on the 31 March 2011.*

[30] Sub 5 responded by letter dated 20 April 2011. It reads:

Please accept this letter as a written confirmation of receipt of your correspondence dated the 11th of April 2011 advising me you wished to log a personal grievance for unjustified dismissal.

[31] The letter then goes on to refer to Mr Gomez's individual employment contract and the provision relating to the resolution of employment relationship problems before stating:

It was correct for you to advise me directly of the nature of your grievance and you have done so within the 90-day period following the alleged incident.

You will however be aware that your written statement should include:

- ii) the facts relied upon, and*
- iii) the remedy you seek to achieve.*

As you have failed to provide this information to me it is very difficult, if not impossible, to include any further information within this reply at this time.

[32] Mr Gomez replied with a letter dated 30 June 2011 which sets out his view of what occurred and commenced the process that led to this investigation meeting.

Issues for determination

[33] There are two issues that require determination. They are:

- a. Was Mr Gomez dismissed or did he, as Sub 5 contend, leave of his own volition; and
- b
 - i) If a dismissal occurred, can Sub 5 justify it; or
 - ii) If a resignation, did it occur in circumstances that mean it amounts to an unjustified dismissal?

Determination

[34] As has already been said, Messrs Gomez and Kay had significantly different recollections about key events and that led to Ms Ennis being called.

[35] Ms Ennis's presentation was extremely credible, especially as it became clear that neither party had briefed her prior to her giving evidence. Whilst that created some issues about evidence previously given by Messrs Gomez and Kay, her answers were clear and concise once she grasped what was being discussed and gathered her thoughts about events which were now well in the past. She displayed no favouritism and while her participation in these events was as a senior company representative she

is no longer beholden to Sub 5, having left both its employ and Christchurch. I also note that while her evidence generally supported Sub 5's position, it also differed in respect to some crucial points (see 26 and 28 above). I accept her evidence as an accurate reflection of what actually occurred.

[36] The conclusion I accept Ms Ennis's evidence means I accept, as alleged by Sub 5, that Mr Gomez resigned.

[37] The fact I accept Ms Ennis's evidence also means that notwithstanding Mr Kay's contrary contention, I accept he specifically gave advice that he accepted Mr Gomez's resignation and that he reinforced that acceptance by demanding the return of Sub 5's property.

[38] That raises the issue of whether or not Mr Gomez's resignation took place in circumstances whereby it still amounts to an unjustified dismissal (33(b)(ii) above). The question arises given case law such as *Kostic v Dodd EMC Christchurch* CC14/07, 11 July 2007 Judge Couch. In that case the Judge, when addressing a 'heat of the moment resignation', observed that in the absence of an express resignation:

A fair and reasonable employer would not take at face value what was said in such circumstances. Rather, such an employer would allow a cooling down period and then discuss with the employee what had occurred.

[39] The Court concluded that in such circumstances a resignation becomes a dismissal.

[40] Here, there was no cooling down period and no subsequent discussion. The resignation was accepted, with alacrity, in heated circumstances. A fair and reasonable employer would not act that way especially where that employer accepts, as Sub 5 does, that such occasions, whilst not common, have occurred before and that it is their practice to reconsider a resignation tendered in anger. This last point arose in Ms Ennis's evidence and Mr Kay made supportive comments. There was no reconsideration here and Sub 5 did not query whether or not Mr Gomez really intended resigning. Nor did Mr Gomez raise the possibility of returning – he took Mr Kay's acceptance as bringing his employment to an end and acted accordingly.

[41] I am also concerned that Sub 5 did nothing to rectify the situation when it became aware that Mr Gomez thought he had been dismissed. I can only conclude that by then they were happy to see the end of him. Given the evidence, I can not put

that reaction and the failure to act down to ignorance. I conclude it was deliberate given both Mr Kay and Ms Ennis spoke about the requirement to act fairly in employment matters, their desire to 'get things right' and their normal reaction to heated resignations.

[42] In the circumstances I conclude Sub 5's actions amount to a dismissal. A dismissal is a sending away and that is what I conclude occurred here given Sub 5's acceptance of a heated resignation, its failure to follow up when they learned Mr Gomez thought he had been dismissed and their failure to consider reinstating Mr Gomez as their evidence suggests they have done with others in similar circumstances. It is a dismissal Sub 5 simply can not justify, though that is not surprising given Sub 5's belief Mr Gomez resigned and its position that the meeting at which he resigned was not disciplinary.

[43] The conclusion that a dismissal effectively occurred and that it is unjustified raises the question of remedies. Mr Gomez seeks lost wages and \$4,000 as compensation pursuant to s.123(1)(c)(i) of the Act.

[44] Mr Gomez's wage claim is minor when compared to many that come before the Authority as he commenced another job on 2 May 2011. The information I have, which includes a discussion of the roster under which Mr Gomez worked, indicates the claim totals \$2,601.90.

[45] Section 128(2) of the Act provides that the Authority must order the payment of a sum equal to the lesser of the sum actually lost or 3 months ordinary time remuneration. Obviously a month's loss is the lesser sum and the fact an alternate job was sourced so quickly is evidence that Mr Gomez took his duty of mitigation seriously. Contribution aside, I see no reason why the amount claimed should not be awarded in full.

[46] Turning to compensation. Mr Gomez seeks \$4,000 but failed to support his claim with any evidence. The claim is not excessive (indeed refreshingly reasonable) but while I accept it natural some hurt emanate from an unjustified termination, the failure to evidence the claim means the award will be minimal. I consider \$2,000 appropriate.

[47] The conclusion that remedies accrue means that I must, in accordance with the provisions of s.124, address whether or not Mr Gomez contributed to his demise in any significant way. My conclusion is yes – he did contribute.

[48] I reach that conclusion for the following reasons. The chain of events which ended with the resignation commenced with concerns about Mr Gomez's conduct. While the question of whether one has substance (the alleged non-attendance at call outs) is debated, Mr Gomez accepts his response to Code 9 was inappropriate. There is then his conduct upon returning to the yard on the morning of 31 March. An employer is entitled to discuss operational matters and expectations, yet Mr Gomez initially refused to participate and did so in a manner likely to aggravate. There is then his conduct during the meeting. My acceptance of Ms Ennis's evidence means I accept that Mr Gomez failed to participate in a meaningful way. By acting in this manner he was also acting in breach of his statutory duty to be responsive and communicative with his employer (s.4(1A)(b) of the Act).

[49] Given the factors outlined above I conclude Mr Gomez's conduct contributed to the situation in which he found himself. I also conclude a reasonable person could have foreseen that, though I suspect Mr Gomez was blind to the situation given a propensity to emotive overreaction. That he acted in such a manner was alleged by both Mr Kay and Ms Ennis. This is a claim I accept given my observations of Mr Gomez and his responses during the investigation.

[50] In the circumstances I conclude the remedies awarded should be reduced by 20% for contributory conduct.

Orders

[51] For the forgoing reasons it is concluded Mr Gomez has a personal grievance for unjustified dismissal and the following orders are made;

- i. The respondent, Sub 5 Private Security Limited, is to pay the applicant, Mr Robert Gomez, \$2,081.52 (two thousand and eighty one dollars and fifty two cents) as recompense for wages lost as a result of the dismissal; and
- ii. Sub 5 is to pay Mr Gomez a further \$1,600.00 (one thousand, six hundred dollars) as compensation for humiliation, loss of dignity and injury to feelings pursuant to section 123(1)(c)(i) of the Act.

[52] Costs are reserved.

M B Loftus
Member of the Employment Relations Authority