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Hines v TK Security Limited (Wellington) [2018] NZERA 2052; [2018] NZERA Wellington 52 (6 June 2018)

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Hines v TK Security Limited (Wellington) [2018] NZERA 2052 (6 June 2018); [2018] NZERA Wellington 52

Last Updated: 4 July 2018

IN THE EMPLOYMENT RELATIONS AUTHORITY WELLINGTON

[2018] NZERA Wellington 52
3020113

BETWEEN CRAIG HINES Applicant

AND TK SECURITY LIMITED Respondent

Member of Authority: Michele Ryan

Representatives: Bede Laracy, Advocate for Applicant

Jenny Murphy, Advocate for Respondent

Investigation Meeting: 12 February 2018 at Palmerston North

Submissions Received: 13 February 2018 from Applicant

21 February 2018 from Respondent

1 March 2018 "In Reply" from Applicant

Determination: 6 June 2018

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] TK Security Limited provides static and mobile security services for local businesses and residential customers in Marton. Gordon Shadbolt and his wife Karen have been equal shareholders and directors of TK since October 2014.

[2] Craig Hines was employed by TK Security Limited (TK) for approximately

2½ years as a Security Guard.

[3] On 21 June 2017 he was summarily dismissed. Mr Hines asks the Authority to find his dismissal was substantively and procedurally unjustified, and to award him corresponding remedies and costs.

Summary of additional relevant information

[4] The catalyst for Mr Hines' dismissal began with a complaint from the director of Ward Furniture Ltd, (WFL) a client of TK's. Tony Ward gave evidence as to the cause of the complaint.

[5] By way of background, he advised that several years ago a security guard employed by a different company had not conducted adequate security checks at WFL. More recently, TK attended to WFL's security needs which included nightly inspections of its premises and swift responses to alarm activations. WFL has a security camera in the shop display area.

[6] Although the exact date was unclear, sometime in 2016 a roller door was discovered unlocked prior to the business opening. The matter was reported to Mr Shadbolt at the time.

[7] In early May 2017 a staff member reported a roller door was again unlocked before morning opening.

[8] Over the ensuing month Mr Ward monitored whether the door was being properly checked by leaving it unlocked before TK's expected site inspections. On Tuesdays to Saturdays the door was subsequently secured by whoever from TK attended the premises, but on Sundays and Mondays it remained unlocked.

[9] That pattern led to the complaint.

[10] On 7 June 2017 Mr Ward informed Mr Shadbolt that the guard responsible for patrolling the building at the material times was not to return to WFL's premises. The concerns were recorded in a brief email.

[11] Mr Shadbolt met with Mr Ward. They examined CCTV footage recorded on from 5 June 2017. Mr Hines was seen entering the shop floor (from a side area) and glancing at the front door from a distance of approximately 2 to 2.5 metres before moving away. This style of assessment led Mr Ward and Mr Shadbolt to have additional concerns about the adequacy of Mr Hines' security check of the front door.

[12] The Shadbolts met with Mr Hines and his representative on 14 June 2017, having sent him a copy of the complaint and a letter setting out the allegations several days earlier.

[13] Mr Hines reported he had assessed the front door was in accordance with the training he received when his employment began.

[14] He thought had checked the roller door over the material period but accepted the roller door had been found unlocked on 8 occasions following his site visits over the past month. He stated *"I will fall on my sword as it were ... I am human." "If I made a mistake the first time then it's just reinforced the mistake"*. No further explanation was provided.

[15] Mr Shadbolt wrote to Mr Hines on 15 June 2017 expressing incredulity regarding the failure to check the roller door. He further rejected Mr Hines' portrayal of the training he had been given, or that it was acceptable to assess the security of the front door by a visual check alone.

[16] Mr Shadbolt advised WFL had lost confidence in TK's services and in turn TK had lost trust and confidence in Mr Hines to perform his role. Mr Hines was asked to provide a response to TK's preliminary decision to dismiss.

[17] Mr Hines' representative responded in writing. He raised issues about the substantive justification for the proposed dismissal and the process undertaken by TK. Those matters form the basis of the Authority's inquiry, which I shall return to.

[18] Mr Shadbolt sent a final letter to Mr Hines on 21 June 2017. He stated there was no alternative to dismissal. Mr Hines was informed his dismissal was effective immediately.

The Authority's investigation

[19] Mr Hines gave written and oral evidence to the Authority as did a former colleague and employee of TK, Michael MacKinnon.

[20] On behalf of TK, Mr Shadbolt also provided written and oral evidence. As noted, Mr Ward gave evidence at the Authority's investigation and answered questions.

[21] A recording of the meeting held between the parties on 14 June 2017 was provided and I was able to view the CCTV footage referred to in this determination.

[22] I have not recorded all the information received by the Authority concerning this employment relationship problem but have stated findings of fact and law necessary to dispose of the matter.¹

[23] This determination has been issued pursuant to s 174C(4), four days after the time frame recorded at s 174C(3)(b), where the Chief of the Authority has decided exceptional circumstances exist.²

The law

[24] The Authority is required to examine whether TK'S actions were justified. Whether a dismissal is justifiable is determined by the Authority inquiring into the employer's actions, both as to whether there were reasonable grounds for the dismissal and whether the process taken to reach that decision was fair. Both inquiries are assessed against what a fair and

reasonable employer could have done in all the circumstances at the time of the dismissal.³

Were there were substantive grounds to dismiss Mr Hines?

[25] At the Authority's investigation meeting Mr Hines' focus centred on several factors as reason to find his dismissal was substantively unjustified.

[26] He says there is a discrepancy between statements made by TK concerning the standard of inspection required when assessing the security of the front door. Next, he says his failure to check the roller door was a performance issue not conduct warranting dismissal.

[27] Alternatively, he says TK's decision to dismiss may have been influenced by aggravating factors within in the employment relationship and that he should have been given a warning.

Procedures and training

[28] Mr Hines points to TK's preliminary decision letter which stated he was taught to "*physically check the [front] door padlock*", and later, the letter of dismissal which said "*all locks and doors must be physically checked*". He says those statements are at odds with TK's prior assertion (in the allegations letter) that he had

¹ As permitted by s 174(C)(4) Employment Relations Act

² Pursuant to s 174C(4)

³ Section 103A employment Relations Act 2000

been "*required to check the [front] door sliding bolts and the door lock (which is a dead bolt) by examining it closely*". Mr Hines takes issue with the difference between a 'physical check' and a 'close inspection'.

[29] The parties' dispute whether Mr Shadbolt informed Mr Hines that manual testing of the front door locks were required. I consider it likely that Mr Hines' induction training included a demonstration of Mr Shadbolt physically pulling on the front door padlock to assess whether the lock system was properly engaged.

[30] I pause to note Mr Hines' visual inspection of the front door on the night in

question was at a distance and cursory. On any objective standard it fell short of a

'close examination'. But the evidence does not assure me that Mr Shadbolt made it clear that physical handling of the front door padlock was a mandatory requirement. I am unwilling to conclude Mr Hines' failure to perform a physical check on the front door was a breach of his duties in those circumstances. That finding does not dispose of Mr Hines' claim in his favour however.

[31] I am not satisfied that the actions or omissions regarding the front door were TK's primary concern or the basis for TK's decision to dismiss. I prefer Mr Shadbolt's evidence that Mr Hines' failure to check the roller door over was the substantive reason for the dismissal. I accept TK could have better articulated that finding in its letter of dismissal but I do not consider

clumsy drafting alone changes the substantive finding and reasons for Mr Hines' dismissal. I am satisfied that TK's views about Mr Hines' manner of assessing the front door was ancillary to the reasons on which TK rely as justification for the dismissal.

[32] Regarding the induction concerning the roller door, Mr MacKinnon's evidence is that he was trained to physically check the roller door. Mr Hines did not challenge this evidence.

Performance or conduct

[33] A performance issue may arise in circumstances where an employee does not carry out a task because s/he is unaware of it, does not have the requisite skill to execute it, or where there is some other external impediment preventing the employee from performing a task.

[34] None of these features are present in this case. Mr Hines does not assert he was ignorant of the requirement to check and ensure the roller door was secure.

[35] Mr Hines had worked for over 30 years in a range of security related positions. By his own evidence he had advanced expertise with security equipment and best practice processes.

[36] Mr Hines did not provide any evidence or information to establish the task of assessing WFL's roller doors locks was beyond his skill set or that there was some factor which impacted on his performance.

[37] I am not persuaded that the failure to conduct checks on the roller door by Mr Hines was a performance issue that warranted additional training to address or remedy the matter.

Ulterior motive and/or predetermination

[38] No evidence was furnished or deduced to demonstrate TK's investigation was predetermined or that matters separate to its inquiry into the allegations were relied on to dismiss Mr Hines. This aspect of his claim is dismissed.

Findings on whether there were substantive grounds to dismiss

[39] Mr Hines did not dispute TK's allegation that the roller door had been left unlocked in each of the instances he had been charged to undertake the security check at WFL. When questioned by the Authority on the matter Mr Hines conceded he had not checked the door.

[40] I do not accept the submission that Mr Hines' failures can be fairly characterised as a single but continuing act of negligence for which dismissal is not inappropriate. The evidence does not support the proposition. At a minimum Mr Hines did not check the roller door on 8 separate occasions. No cogent explanation was furnished for the omissions other than Mr Hines said he had made a mistake.

[41] TK was entitled to find that explanation wholly unsatisfactory where the sole purpose of attending WFL was to ensure the security of the premises. It was further reasonable of TK to view his actions as a fundamental breach of his employment obligations to it and take disciplinary action on the matter.

[42] I accept TK's evidence that it had lost trust and confidence in Mr Hines to perform his role particularly where the position required him to work without supervision.

[43] In *Angus v Ports of Auckland*⁴ the Full Court observed that s 103A(2) of the Employment Relations Act contemplates that there may be more than one fair and reasonable response or other outcome that might justifiably be applied by a fair and reasonable employer.

[44] TK's decision to dismiss Mr Hines was an option reasonably available to it in all the circumstances.

Was the process used to dismiss Mr Hines fair?

[45] Submissions on Mr Hines' behalf accept TK complied with the minimum standards of procedural fairness set out at s.103A(3). His representative considers TK's process leading to the dismissal was unfair. He points to the correspondence advising Mr Hines of the allegations and says no reference is made to the behaviour of concern as "misconduct" or "serious misconduct" or that the outcome of its investigation might result in summary dismissal.

[46] The argument appears to rely on the absence of particular words as cause for some procedural unfairness.

[47] Whilst there is an obligation in a disciplinary setting for an employer to inform an employee of the allegation(s) at issue and advise of the possible outcome if substantiated. But there is no statutory or common law requirement for an employer to use any particular words or phrases when conveying that information.

[48] Notwithstanding that conclusion, the letter given to Mr Hines detailed the concerns and stated those actions "*may have potentially caused me to lose trust and confidence to perform your role*". The letter further records "*this is a serious matter and your future employment with TK Security may be in jeopardy*". Mr Hines was represented by an experienced advocate throughout TK's inquiry. Dismissal as a possible eventuality was overtly discussed prior to Mr Hines providing a response to the allegations. I am more than satisfied Mr Hines was properly informed of the nature of TK's inquiry and the possible consequences of it.

[49] Next, reference is made to *Secretary for Justice v Dodd*⁵ as providing precedent that TK was obliged to consider alternatives to dismissal before making a final decision. I note that findings in *Dodd* were made pursuant to an alternative statutory justification test than the current legislation. In any event TK did consider the matter. As was clear in the letter of dismissal the only positions available at TK were as a security guard. It did not have resources to continue providing its services to WFL and place Mr Hines on alternative duties without incurring additional costs and resulting inefficiencies and increased costs.

[50] None of the procedural concerns raised identify a procedural flaw which would render Mr Hines' dismissal unjustifiable.

Determination

[51] Mr Hines' dismissal was substantively and procedurally justified. It is therefore unnecessary to determine if he is entitled to remedies, but I make the following comments.

[52] Even if the dismissal had been found to be unjustifiable any remedies awarded would have been at the lower end. Mr Hines obtained paid work for a portion of the timeframe he sought reimbursement of wages and the difference between the loss of earning as a result of his dismissal and his new employment was relatively minimal. There was no evidence of mitigation of loss for the period he was out of work where his he was occupied by events and circumstances not relevant to

the Authority's consideration. Finally, Mr Hines' contribution to the situation that led to his dismissal was significant. That matter would have reduced any possible award.

Costs

[53] Costs are reserved.

Michele Ryan

Member of the Employment Relations Authority

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