IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

AA 19/10
5149977

	BETWEEN	DALLAS LEEVEY Applicant
	AND	NEWMARKET GUARD SERVICES LIMITED Respondent

Member of Authority:	Alastair Dumbleton
Representatives:	David Jenkins, advocate for Applicant Lewis Bunge, counsel for Respondent
Investigation Meeting:	25 May 2009
Submissions Received	4 and 18 June 2009
Determination:	19 January 2010

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The Authority has investigated the suspension and dismissal of Mr Dallas Leevey by Newmarket Guard Services Limited ("NGS"). As Mr Leevey's claim is a personal grievance, it falls to be determined under s 103A of the Employment Relations Act 2000.

[2] In applying that provision the Authority must consider the actions of the employer and how the employer acted, and determine objectively whether they were what a fair and reasonable employer would have done in all the circumstances at the time of the suspension and dismissal.

[3] To remedy his grievance Mr Leevey has sought from the Authority orders requiring NGS to reinstate him to employment as a Security Officer, reimburse him

lost wages from the date of dismissal to the date of reinstatement, and compensate him $20,000 for humiliation, stress, loss of dignity and injury to feelings.

[4] Mr Leevey has also claimed an additional $980.80 as arrears of annual leave payments owing to him.

[5] I accept that the employer's involvement in disciplinary action taken against Mr Leevey arose in the way set out in a letter dated 5 January 2009 written by Mr Alan Young, Managing Director of NGS. That letter outlined to Mr Leevey an allegation of misconduct against him arising from his actions on 17 December 2008 while working under the supervision of Mr Adam Wheeler, Operations Supervisor of the company.

[6] Mr Wheeler had complained about Mr Leevey's actions which he considered sufficiently serious to warrant an investigation. In his letter Mr Young advised Mr Leevey:

> *The incident he* [Mr Wheeler] *outlined contains some serious allegations of gross misconduct, specifically foul and abusive language, failure to comply with an instruction from a Supervisor and threatening language and behaviour.*

[7] Mr Young went on to record the fact that he had met with Mr Leevey and his mother on 24 December and had been given a statement by Mr Leevey of his account of the incident complained of by Mr Wheeler. Mr Young also referred to a recording that had been made at the time on 17 December by Mr Wheeler on a portable CCTV device that he usually wore in the course of his job, and he noted that that recording had been made available for Mr Leevey to listen to at a later meeting on 30 December.

[8] Mr Young went on in his letter to refer to the written statement made by Mr Leevey on 30 December:

> *You also stated that the initial conversation between yourself and Adam was overheard by Pauline Tamahere who was present at the time whilst you were at MTS. I subsequently have spoken to Pauline and she has provided me with supporting information that supports your story regarding the language used by Adam Wheeler when he first asked you to go to City Markets. I would make the point that Pauline's statement also highlights that you questioned the instruction given to you.*

[9] Mr Young finished his letter by advising that he was elevating his inquiry to a disciplinary hearing, which Mr Leevey was invited to with a support person. Mr Young also advised that a possible outcome of that hearing was a written warning or termination of his employment.

[10] The disciplinary hearing took place the following day, 6 January 2009. At the conclusion of it Mr Leevey was handed a letter written by Mr Young advising that his employment was to be terminated immediately.

[11] Mr Young advised that allegations of serious misconduct against Mr Leevey had been upheld by NGS. They were the following:

> *Failing to comply with a reasonable instruction from a supervisor.*
>
> *Using threatening language to a fellow employee and supervisor.*
>
> *Using foul and abusive language.*

[12] Also in his letter, Mr Young referred to the Standing Orders of NGS in relation to acceptable behaviour by an employee. He drew attention specifically to the orders requiring an employee to comply with any order issued by a Supervisor and prohibiting an employee from leaving a site without the permission of a Supervisor. Further, Mr Young referred to what were described as *Offences* in the NGS Handbook. They included refusing a lawful or reasonable instruction and using threatening or abusive language to a Manager or Supervisor. He said in his letter:

> *I am satisfied that the Company has made you aware of these rules as you have demonstrated your knowledge of these rules by signing the last page of both the Standing Orders and Employee's Handbook, copies of which are in your employment file.*

[13] These documents were produced to the Authority and the signature of Mr Leevey is on both of them.

[14] A copy of the recording made on the CCTV device worn by Mr Wheeler on 17 December was provided to the Authority. At the beginning of it Mr Leevey and Mr Wheeler can be heard arguing over *"swearing on the phone,"* with the former maintaining that the latter had sworn at him in saying that he was *"to follow…… fucking order."* Any swearing is denied by Mr Wheeler, who says:

> *I didn't, I told you to follow your orders.*

[15] Then Mr Leevey says:

> *No you didn't you said that's a fucking order, don't talk to fucking people like that or you will get a fucken hit, got it?*

[16] Mr Wheeler asks Mr Leevey, *"are you threatening me?"* to which the latter replies:

> *Did I fucking stutter? You have to apologise mate. I want a written apology.*

[17] Mr Wheeler says:

> *You have got problems now you are threatening me Jesus Christ as well as calling me a cunt and hanging up in my ear.*

[18] The tape finishes with Mr Leevey saying that he didn't need *"this crap"* and was taking stuff up to MTS, a different client location. Mr Wheeler asks him *"are you abandoning your employment are you?"* to which Mr Leevey replies *"no."* Then Mr Wheeler asks *"can you let me talk or not"* and Mr Leevey again replies *"no."*

[19] I am satisfied that the inquiry and the way it was conducted by NGS was what a fair and reasonable employer would have done in the circumstances.

[20] It was contended for Mr Leevey that an invitation given by Mr Young to Mr Leevey's mother during the disciplinary investigation to enter into negotiations for a termination by mutual consent, amounted to a constructive dismissal. I disagree. Mr Leevey plainly was actually dismissed on 6 January 2009. Just as an employment relationship can be formed by agreement, it can be terminated by agreement and in the circumstances there was nothing improper or in bad faith about an attempt by the employer to seek such an agreement from the employee. Mr Young's invitation to negotiate was declined.

[21] A particular matter for consideration by the Authority is how the employer dealt with information it had that Mr Wheeler, the Supervisor, had sworn at Mr Leevey to begin with and by doing so may have sparked the incident on 17

December. A witness, Ms Pauline Tamahere, had provided Mr Young with a written account of that in an email on 30 December 2009. It appears she was mistaken about the date being 12 December, but it seems clear she was referring to the same matter that became the subject of argument between Mr Leevey and Mr Wheeler. She said that she had heard their exchange on speakerphone where Mr Wheeler had requested Mr Leevey to go to a particular client location at City Markets. Mr Leevey had asked *"what will I be doing down there"* and Mr Wheeler had replied *"whatever I fucken tell you to do."*

[22] Ms Tamahere told Mr Young that the conversation had stopped abruptly at that point and Mr Leevey had said to her *"well I'm off to see what I'm fucken well doing."*

[23] Mr Young had accepted, he said in his letter of 5 January, this account as supporting Mr Leevey's explanation that his Supervisor had sworn at him.

[24] The question is what allowance, if any, should a fair and reasonable employer make when a more senior employee has possibly provoked misconduct by swearing in breach of the company rules.

[25] On the facts of this case I am satisfied that a fair and reasonable employer would have reached the same conclusion as Mr Young that there was serious misconduct on the part of Mr Leevey, particularly in respect of a plain and unmistakable threat to physically strike Mr Wheeler but also disobedience of a reasonable instruction to carry out duties. A fair and reasonable employer would have seen those matters as being at a distinctly higher level of misconduct than the swearing that had heightened tension between Mr Wheeler and Mr Leevey.

[26] Mr Young was entitled to accept from Mr Leevey that the latter had felt intimidated by the remark of Mr Leevey *"don't talk to fucking people like that or you will get a fucken hit, got it?"* It was also a reasonable conclusion Mr Young reached that Mr Leevey had abandoned his post contrary to an express instruction of his supervisor and contrary to work rules that Mr Leevey had acknowledged were binding on him.

[27] Applying s 103A of the Act, I determine that viewed objectively the actions of NGS and how it acted were what a fair and reasonable employer would have done in all the circumstances as they existed at the time it acted.

[28] Although there was no consultation of Mr Leevey by Mr Young before he stood him down on 18 December, on pay, this seems a fair and reasonable action of the employer in circumstances where it had been alleged that an employee had threatened his supervisor and also disobeyed instructions as to the performance of basic duties.

[29] Mr Leevey has no sustainable personal grievance whether in regard to his claim of constructive dismissal or the actual dismissal I find he was subjected to. Neither does he have a grievance arising from his suspension. (His contribution to or blame for the situation that gave rise to any grievance is likely to have resulted in minimal or nil remedies.)

[30] With regard to the claim by Mr Leevey for short-paid holiday pay, I accept the calculations presented on behalf of NGS as correct and it follows there was no underpayment. In quantifying the claim *"ordinary weekly pay"* (OWP) as defined by s 8 of the Holidays Act 2003 was used. The formula provided by the Act requires the employee's gross earnings for the four calendar weeks before the end of the pay period immediately before the calculation is made, to be divided by four. As pointed out on behalf of NGS, the calculations for Mr Leevey are based on his gross earnings for six calendar weeks – November 16 to December 31 – before the end of the pay period when the calculation was made. I accept that the $877.45 paid by NGS after Mr Leevey's dismissal for the fourth week of holidays due to him, was sufficient to make up the short-fall. There is therefore nothing further owed for holiday pay.

[31] Costs are reserved. If asked to make an order the Authority may consider whether NGS should bear its own costs in the circumstances, to reflect the employer's shortcomings in the way it assisted resolution of this employment relationship problem.

[32] Mr Leevey's representative, Mr Jenkins, wrote to NGS on 12 January 2009 raising a personal grievance. He sought a written response within 10 days and also requested, under the Privacy Act, copies of all documents in the company's possession or under its control containing information about Mr Leevey. Further, Mr Jenkins expressly requested, with evidence of authority from Mr Leevey provided, copies of the wages, time and holiday records kept for his employment.

[33] NGS did not respond to the grievance as raised until after a statement of problem was lodged in the Authority and the company had been required to lodge a statement in reply.

[34] The company did not supply the requested information under the Privacy Act and Employment Relations Act with regard to wage and holiday records, allowing this to remain a continuing cost consuming problem up until the investigation meeting.

[35] Further, although the employer had earlier indicated its willingness to attend mediation, from advice given by the Mediation Service and confirmed by Mr Bunge in submissions, I accept that although NGS showed up at the Mediation Service on the date fixed it decided not to commence mediation and did not engage in that process at all as required.

[36] In that regard in my view NGS unreasonably denied both itself and Mr Leevey an opportunity to, if not settle this matter, then isolate the real issues before them so that their time and money could be used most efficiently to resolve this matter.

[37] If an application for costs is to be made by NGS it is to be in writing, filed and served within 14 days of the date of this determination. Mr Leevey is to reply to the application within a further 14 days.

A Dumbleton
Member of the Employment Relations Authority