

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 152A/10
5271740

BETWEEN

ALAN LOWNDES
Applicant

AND

JOHN DOWDEN t/as
SAFEGUARD SECURITY
AND
NS SECURITY LIMITED
(formerly HIBISCUS COAST
SECURITY LIMITED)
Respondents

Member of Authority: R A Monaghan

Representatives: C Bennett, advocate for applicant
J Dowden for Safeguard Security

Investigation Meeting: 12 October 2010

Determination: 10 November 2010

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Alan Lowndes says his former employers, John Dowden and NS Security Limited (formerly Hibiscus Coast Security Limited), dismissed him unjustifiably on the ground of poor performance.

[2] In a determination dated 1 April 2010 I found that Mr Dowden trading as Safeguard Security, and Hibiscus Coast Security Limited (HCSL), were Mr Lowndes' employer jointly.¹ According to the companies office record HCSL changed its name to NS Security Limited on 9 April 2010, but I continue to refer to it as HCSL.

[3] This determination addresses the merits of Mr Lowndes' personal grievance.

¹ *Lowndes v John Dowden t/as Safeguard Security and Hibiscus Coast Security Limited* 1 April 2010, AA 152/10

Background

[4] Mr Lowndes commenced employment as a security officer on the '91 nights' run on 3 September 2008.

[5] In a letter on 'Safeguard Security Patrols' letterhead, signed by Graham Preston as general manager and dated 6 February 2009, Mr Lowndes was asked to explain why his run sheet for the preceding week did not include the times at which certain clients were visited. A concern was also raised as to why Mr Lowndes had not identified that a fork hoist had been left running in a client's timber yard.

[6] Visit times were included in the copy of the run sheet provided to the Authority. However Mr Lowndes accepted that he had not completed the visit times at the time the visits were made, and said he did so later. The explanation he gave to the Authority and Mr Preston was that he was working at night and there was no light available by which he could see and complete the sheet. In particular, the interior light of his vehicle was not working. He told the Authority he could not recall whether he considered using his torch.

[7] Regarding the fork hoist, Mr Lowndes accepted that it was left running and said he had not seen it on his first visit to the client's premises. The premises comprised a building surrounded by an area of land incorporating the timber yard, all of which was enclosed by a perimeter fence. Mr Lowndes explained that, as he had been instructed to do by another security officer, he entered the premises and walked around the building in an anticlockwise direction, shining his torch towards the perimeter fence. Stacks of timber obscured his view of the fork hoist, so he did not see it. In a return visit he would walk around the building in a clockwise direction, and could then see the fork hoist.

[8] In a further letter to Mr Lowndes dated 11 February 2009, again signed by Mr Preston, the explanation in respect of the failure to complete visit times was not accepted. Moreover it was noted that the visit times had now been completed, and Mr Lowndes was asked how he could have completed them properly a day or so after the visits were made. Mr Lowndes believed he had adequate recall of the times, and was able to apply that recall when completing the run sheets.

[9] The letter also said the explanation of the failure to observe the fork hoist was unacceptable. It was apparent, and Mr Lowndes accepted, that the perimeter had not been patrolled. Had the perimeter been patrolled Mr Lowndes would have seen the fork hoist. It was also pointed out that a fork hoist has a yellow flashing light, which Mr Lowndes should have seen. Mr Lowndes said he did not see it.

[10] In a letter dated 4 March 2009, again signed by Mr Preston, Mr Lowndes was advised that because of his poor performance over the preceding 6 months, clause 21 of his employment agreement was being invoked. The clause as invoked read:

21. Probationary Period

21.1 The first six months of every new employee's employment shall be a trail (sic) period.

21.3 SAFEGUARD SECURITY & HIBISCUS COAST SECURITY LTD reserves the right to terminate the employment at any time during the probationary period by giving one working weeks notice.

21.4 ...

[11] A list of incidents then followed. They included Mr Lowndes being allegedly responsible for: the destruction of the front wheel of a work vehicle on 7 January 2009; damaging a ranch slider door at Southern Cross Hospital (a client) on 9 January 2009; and causing serious damage to the 91 nights patrol vehicle on 3 March 2009. The contents of the letters of 6 and 11 February were also referred to. In reliance on clause 21.3, Mr Lowndes' employment was terminated immediately.

[12] A second letter signed by Mr Preston was also dated 4 March 2009. The letter again cited clause 21 of the employment agreement and listed the same incidents. Instead of advising Mr Lowndes he was dismissed, it advised that a meeting was sought on 9 March 2009. Mr Lowndes said he was given both letters together.

[13] There was a meeting on 9 March. In the interim Mr Lowndes had taken a period of bereavement leave. According to Mr Lowndes, Mr Preston told him that the owners of the business wanted him sacked. He was duly dismissed.

[14] By letter to Mr Dowden dated 25 March 2009 Mr Lowndes sought a statement of the reasons for the dismissal. He did not receive a response.

Determination

[15] The test of the justification for a dismissal is whether dismissal was the action a fair and reasonable employer would have taken in all the circumstances at the time.

[16] The provision of the two 4 March letters to Mr Lowndes leads me to consider it likely that a decision to dismiss had been made at or about that time, with an ineffective attempt being made to portray matters differently.

[17] To the extent that clause 21.3 of the employment agreement was relied on in support of the dismissal procedure, probationary clauses of that kind do not excuse employers from their obligations of good faith and fair treatment. They mean that, although the employee's performance may be more carefully monitored than that of a permanent employee, the employer remains obliged to warn the employee if the performance is placing at risk the continuation of the employment beyond the end of the probationary period. The personal grievance procedure, and the relevant law, remains applicable if employment is terminated in reliance on the clause. Such clauses can be distinguished from what are now 'trial period' clauses under s 67A of the Employment Relations Act 2000.

[18] While certain concerns were raised with Mr Lowndes in February 2009, they did not progress to a point where Mr Lowndes was advised the successful completion of his probationary period was in jeopardy. With the exception of the damage identified on 3 March the incidents raised in the 4 March letters occurred in January, and if they were to be relied on they should have been raised in the February letter.

[19] Otherwise Mr Lowndes accepted that he had damaged the wheel and the ranch slider, and that he had backed into a fence post and caused damage to a company vehicle on 3 March 2009. As I have already set out, he acknowledged the concerns put to him in February, and provided explanations.

[20] However two fundamental requirements of a fair procedure are that an employee have an opportunity to be heard on matters alleged against the employee before a decision is made, and that the employer approach the allegations with an open mind regarding the eventual outcome. Neither occurred here. These failures, coupled with the failure to adopt a suitable warning procedure with reference to Mr Lowndes' probationary status, mean I find the decision to dismiss was not the action an employer acting fairly and reasonably would have taken.

[21] For these reasons I find the dismissal was unjustified.

Remedies

[22] Mr Lowndes seeks the reimbursement of remuneration lost as a result of his personal grievance, and compensation for the injury to his feelings.

[23] Mr Lowndes was paid \$780 (gross) per week. He obtained alternative employment three weeks after his dismissal, but said he earned only \$630 per week. He left that job in September 2009 because surgery on his knee was pending. He quantified his loss as \$3,900.

[24] There was relatively little evidence of injury to feelings.

[25] In determining the remedies to be awarded I am obliged to consider the extent to which the employee's conduct contributed in a blameworthy way to the circumstances of the personal grievance.

[26] With reference to the concerns raised about Mr Lowndes' conduct I find as follows.

1. Failure to complete times of visits to client premises at the time visits made.

[27] Mr Lowndes said he had carried out the run in question so many times he knew exactly the times at which he made each visit, so was able to insert the times later. He said other security officers took the same approach unless there was an incident, in which case the time would be recorded immediately. That is an

unsatisfactory response from someone who should have recognised the importance of preparing accurate records that would withstand scrutiny. Even if the interior light of Mr Lowndes' vehicle was not working, this was not enough to meet the concern about the failure to complete the record at the time of the visit.

2. Failure to notice fork hoist left running

[28] Mr Lowndes' explanation was that he performed the patrol in accordance with a procedure advised by other security officers. In the absence of any evidence to the contrary I accept that was so, although it suggests a need for better training. Mr Lowndes also sought to suggest there was no harm done because the client maintained close video surveillance of its yard. This attitude could reasonably cause concern.

3. Damage to wheel in January

[29] Mr Lowndes accepted he was responsible for the damage. Mr Dowden said the tyre and its rim were destroyed and that the vehicle's steering was affected. The damage was of a kind that suggested the vehicle had hit the kerb at speed. Mr Lowndes doubted that the steering was affected and said he hit the kerb at low speed.

4. Damage to ranch slider door

[30] Renovations were being carried out at Southern Cross Hospital and builders were present at the relevant time. They were using the hospital's reception area and the road outside as a working area. When Mr Lowndes parked his vehicle outside the reception area there were no obstructions and there was room to manoeuvre. When he returned to collect the vehicle a truck had parked behind it and a ranch slider door had been laid out on the road frontage on the other side of the truck from the side on which Mr Lowndes was parked.

[31] In order to leave Mr Lowndes needed to turn his vehicle around so that it pointed towards the driveway leading to the exit. The truck was parked between his vehicle and the driveway. A third vehicle was also parked nearby and I accept this created limited room for Mr Lowndes to move. However instead of attempting to drive forward and turn around to face the driveway, Mr Lowndes attempted to reverse

his vehicle around the truck before facing the driveway. He did not see the ranch slider and drove over it in the course of reversing.

5. Damage caused on 3 March

[32] Mr Lowndes accepted that when he reversed the vehicle into the gatepost he caused damage to the bumper and tailgate, but did not accept that the damage included a broken window. According to an invoice Mr Dowden provided after the investigation meeting, the cost of repair was \$2,857 (incl GST). Since no counterclaim has been properly made in respect of that matter I make no order for repayment.

6. Conclusion

[33] In that he was guilty of carelessness when using a company vehicle, and a less than careful approach to carrying out his patrols on the occasions noted in February, I find Mr Lowndes was guilty of blameworthy contributory conduct. I assess his level of contribution as 33% and reduce the amounts I would otherwise have awarded accordingly.

Orders of the Authority

[34] I preface the following order by referring to the fact that I have found Mr Dowden trading as Safeguard Security and HCSL were Mr Lowndes' employers jointly. I record further that HCSL did not participate in the preliminary meeting and that the Authority was subsequently unable to serve its director with a summons following directions that certain information be provided.

[35] The employer as I have found it to be is ordered to pay to Mr Lowndes:

- a. \$1,300 as reimbursement of remuneration lost as a result of his personal grievance; and
- b. \$1,000 as compensation for the injury to his feelings caused by the personal grievance.

Costs

[36] Costs are reserved.

[37] The parties are invited to resolve the matter. If they are unable to do so any party seeking an order for costs shall have 28 days from the date of this determination in which to file and serve a memorandum on the matter. The other party shall have a further 14 days in which to file and serve a memorandum in reply.

R A Monaghan

Member of the Employment Relations Authority