

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2011] NZERA Auckland 368
5312642

BETWEEN LYDIA MAOATE
AND ALLIED INVESTMENTS
LIMITED

Member of Authority: Yvonne Oldfield
Representatives: Paul Blair for applicant
Diana Hudson for respondent
Investigation Meeting 2 December 2010
Submissions: 14 December 2010 and 28 January 2011 from Applicant
14 January 2011 from Respondent
Determination: 22 August 2011

DETERMINATION OF THE AUTHORITY

- A. The decision by the respondent, Allied Investments Limited, to dismiss Ms Maoate on notice on 30 June 2010 was justified.**
- B. The subsequent decision to dismiss Ms Maoate summarily during her notice period was also justified.**
- C. Ms Maoate's personal grievance application is declined.**
- D. Costs are reserved.**

Employment Relationship Problem

[1] Ms Maoate was dismissed after approximately 16 months in her job as a security guard. She says that this dismissal was unjustified and unfair and seeks remedies of lost wages and compensation.

[2] On 19 May 2010 the respondent's general manager, Damian Black, began a formal disciplinary investigation into two allegations of misconduct by Ms Maoate: that she had made unauthorised statements to the media and that she had failed to return certain training materials to the respondent when instructed to do so. On 30 June Mr Black wrote to her confirming that her employment was terminated on two weeks notice. He advised that payment would be made in lieu of notice, with payment of all outstanding monies, on Wednesday 7 July.

[3] On 2 July Mr Black wrote to Ms Maoate again, setting out the respondent's view that the employment agreement continued in force until 13 July (the end of the notice period) and that in the meantime she remained under a duty of fidelity to the respondent. She was asked to respond to a new allegation that (during the notice period) she had allowed herself to be interviewed and filmed and had made statements:

“commenting on the terms of your termination and the termination itself.”

[4] Mr Black went on:

“this is a form of gross misconduct warranting instant dismissal. I am considering this matter and invite you to respond to me before 5pm Monday July 5th...”

[5] Ms Maoate did not respond. On 6 July Mr Black wrote to her one last time saying that she was dismissed for gross misconduct effective immediately. Outstanding wages and holiday pay, but not pay in lieu of notice, were paid out to her on 7 July.

Issues

[6] Ms Maoate claims that the investigation which commenced on May 19 was unfair because she had been led to believe that the matters in question were resolved in a meeting on 20 April 2010.

[7] Ms Maoate admitted some contact with the media but not all of that alleged. She says that when she did speak to the media it was justified as a form of “whistle blowing.” She also says that on the advice of her union, Unite, she handed the training materials to them instead of to the respondent as instructed. She believes both the dismissal on notice and the summary dismissal were substantively unjustified.

[8] The issues for determination are:

- i. whether the investigation which commenced on 19 May was fair and in particular whether the matters in question had already been resolved, thus precluding further disciplinary proceedings;
- ii. whether the dismissal on notice was substantively justified, and
- iii. whether the summary dismissal was justified.

(i) The investigation

[9] The events that led to the dismissal began some time beforehand. From 2009 onwards Ms Maoate had been engaged in training for a security qualification at level 2 of the NZQA framework. It was important, from the respondent’s point of view, that staff obtain this qualification because many clients insisted on having fully trained guards on their sites. Ms Maoate was required to work her way through a series of workbooks, filling in answers and exercises as she went. Guidance and support where needed were to be provided by her supervisor, Glen Thompson.

[10] By February 2010 Ms Maoate and other members of staff were behind with the completion of their workbooks. Some were feeling unclear about what was required of them. On 18 February the training manager, Mr McDowell, sent Mr

Thompson and other supervisors an email with attachments (assessor guidebook, some model answers and a letter to staff.) The email itself read:

“Hi all

Attached is a letter outlining requirements for NZQA, also attached is a copy of suggested answers, please read and review and put in your own words and ideas.

There is now no excuse to not do this.

ALL site managers please make all staff of this [sic], print off and place on staff memo boards etc, please all reply by email as acknowledgement of receiving and doing this.”

[11] The email and attachments were “cc’d” to Mr Black however he later told the Authority that the material was not successfully delivered to his email address (or some of the others in the address list) because of the size of the attached files.

[12] The materials were passed on to Ms Maoate. Her evidence is that she understood that Allied management (either Mr McDowell or Mr Black) were promoting this use of the assessor guides and that she immediately expressed misgivings about it to Mr Thompson. He denies this saying at the time she seemed pleased to be able to refer to the guidebooks. Whatever she thought, there is no dispute that she kept the materials and proceeded to work through the booklets for the course. In April she and Mr Thompson sat down together for half a day to go over everything and make sure that it was properly completed, and then she handed them in.

[13] Meanwhile on or soon after 25 March Ms Maoate and Mr McDowell had been in dispute over another training related matter. As part of the course Ms Maoate was obliged to undertake first aid training. Mr McDowell told Ms Maoate that the company would pay for the training itself, but not for the time she spent on the course. He said her choices were either to lose a day from her weekly pay, or, if she preferred to keep the week’s pay intact, to take a rostered day off to attend the course. (As Mr Black subsequently confirmed, Mr McDowell was in fact wrong about this. Ms Maoate’s employment agreement entitled her to be paid to attend the course.)

[14] Mr Thompson was sitting in the same office as Ms Maoate while this conversation was being conducted over the phone. He says that when she came off the

call Ms Maoate told him that if she were not paid to attend the first aid course she would “make Mr McDowell suffer” and went on to say that she was concerned that the use of the guidebooks was cheating. Mr Thompson says that this was the first occasion Ms Maoate had expressed this concern to him.

[15] Ms Maoate says that whilst on the call she also told Mr McDowell of her concerns about the guidebooks but he has no recollection of this and Mr Thompson can confirm only the comment made directly to him.

[16] Ms Maoate attended the first aid course on 9 April. Whilst there she told others of her concerns around payment and about trainees being given assessor guidebooks. Meanwhile, she had already spoken to her union, Unite, about both matters, with the result that Barry Sutherland, a Unite organiser, arranged for a Dominion Post reporter to interview her about what was being described as cheating. It remains unclear about exactly when the reporter first contacted Ms Maoate but it appears to have been shortly before 14 April, when the same reporter contacted Mr Black.

[17] Mr Black told the Authority that the reporter did not give him Ms Maoate’s name but revealed her identity by referring to his informant as female (Mr Black told me Ms Maoate was the only woman staff member in training at that point.) The next day he rang Ms Maoate who confirmed that she had spoken to a reporter and had the assessor guides at her home. He asked her to go and get them and bring them back to the office. Ms Maoate left work but after speaking to Mr Sutherland (and on his advice) dropped the books off to him instead of bringing them back as requested.

[18] Later that day Mr Black spoke to Ms Maoate who confirmed that she had returned without the books (which were now at the Unite office.) There is no dispute that after a series of calls between Mr Black, Ms Maoate and Mr Sutherland an arrangement was made for the parties to meet on 20 April. What is in dispute is what each understood to be the purpose of the meeting. Mr Black says he saw the meeting as an information gathering exercise. He wanted to establish what had happened with regard to a number of issues: the original distribution of the guidebooks, Ms Maoate speaking with the media, and the fact that she did not bring back the guidebooks when instructed to do so. (He also still needed to get the books back.)

[19] Ms Maoate and Mr Sutherland say they thought the meeting was to be disciplinary in nature. Ms Maoate says that she was partly influenced to think in this way because when she first spoke with Mr Black and confirmed what she had done he told her “*not to bother turning up to work tomorrow.*” Mr Black has subsequently denied saying this to Ms Maoate and pointed out to the Authority that she did in fact report for work as usual the next day (as rostered).

[20] The meeting proceeded with Mr Black, Ms Maoate, Mr Sutherland and Mr Minto (also of Unite union) in attendance. Ms Maoate explained how she had come to have the guidebooks, and stated that she told Mr Thompson and Mr McDowell of her concerns about using them. She explained that because her concerns had not been addressed she had approached her union for advice which in turn had led to her speaking with the Dominion Post. On her behalf her representatives argued that her actions amounted to ‘whistle blowing.’

[21] Ms Maoate also confirmed that she had given the books into the care of her union organiser on his advice. Mr Minto undertook to return the booklets (which were still at the offices of Unite.) Ms Maoate ended by offering assurances that she would not speak with the media again without company authorisation. She and her representatives say that as far as they were concerned, that was the end of the matter.

[22] Mr Black, on the other hand, says he was only just starting to sort out what had been going on. As he had explained in the 20 April meeting he had informed the ETITO (the relevant Industry Training Organisation) of the situation and planned to report to them when he had completed further investigation into what had happened. He eventually did so in two stages, tabling an interim report to the ETITO in late April and (after further staff interviews) a more detailed report in early May. The ETITO also undertook its own investigation and produced a draft report by late May.

[23] The guidebooks were delivered to the respondent’s offices in early May. At around the same time, on 5 May, the Dominion Post ran a story about the alleged “cheating” which drew from a Unite press release and quoted Ms Maoate. It was followed on 8 May by a piece in the Waikato Press which stated:

*“Auckland security guard Lydia Maoate told The Dominion Post **this week** she was told that if she did not complete the NZQA training she could lose her job – though her pay rate would not go up- and was then given answer booklets...*

...

*“What I don’t agree with is sitting a course **knowing that I have cheated**, knowing that I’m not credited or qualified.”*

(emphasis by the Authority.)

[24] When the story broke, Mr Black was overseas. On 19 May, after his return, Mr Black wrote to Ms Maoate calling her to a disciplinary meeting. His letter advised that the meeting was to discuss:

- *“Your actions in contacting the media and Unite Union regarding the training guide book issue and how and why this occurred.*
- *Your refusal to follow an instruction from your employer to return the guide book and your subsequent handing of that book to a third party.”*

[25] Mr Black told the Authority that he had two reasons for deciding to proceed with a disciplinary investigation at this point. One was that it seemed that Ms Maoate may have breached her undertaking not to speak to the media again. The second was that his inquiries of other staff had elicited information which contradicted Ms Maoate’s earlier assertions that she had raised concerns about the guidebook before speaking with the news media.

[26] Unite responded on Ms Maoate’s behalf to say that she would not attend as she considered all matters had already been dealt with. Over the next month there were a number of exchanges between the company and Unite on Ms Maoate’s behalf and attempts by Unite to stop the disciplinary process through legal action.

[27] In a letter dated 15 June Mr Black wrote to Ms Maoate saying that in light of her refusal to meet, he was putting to her the information he had and offering her an opportunity to reply to the issues.

[28] Some of this material was as already discussed in the meeting of 20 April. There was also some new information, as follows:

- i. Mr Thompson and Mr McDowell denied that she had raised objections to the use of the guidebook when they were distributed;
- ii. her booklet records and course attendance confirmed that between early February and late April she continued her training and documentation with the guidebook in her possession;
- iii. Mr Thompson reported that after arguing with Mr McDowell (in Mr Thompson's hearing) Ms Maoate told Mr Thompson that she would "get" Mr McDowell and "cost him his job"
- iv. newspaper articles dated post April 20th carried a direct statement from her which made it appear that she continued to make statements to media after being warned not to and undertaking the same.

[29] Finally on 22 June Ms Maoate attended a disciplinary meeting. In response to what had been put to her she made the following points:

- i. upon first receiving the guidebook in April Ms Maoate told Mr Thompson that she felt this was cheating and did not agree with using it to complete her course. He advised her to talk to Mr McDowell about it;
- ii. Ms Maoate used the guidebooks because she had previously been pressured by Mr McDowall to complete the course;
- iii. she talked to Mr McDowall about her concerns when she had a heated argument with him about the payment for the first aid course;
- iv. she acknowledged the undertaking she had given on 20 April and denied making further statements to the media since then.

[30] Ms Maoate's representative at the meeting was Mr Minto. He argued that the Waikato Times had simply quoted the Dominion Post incorrectly (with the words: "*Lydia Maoate told The Dominion Post this week...*") Mr Black responded by saying that he would ask the reporter to confirm when the statement was made but Mr Minto pointed out that it was unlikely the paper would talk to Mr Black due to source protection.

[31] The remaining discussion was essentially a recapitulation of the earlier discussion about the return of the guidebooks. Nothing new emerged from that.

[32] On 24 June Mr Black wrote to Ms Maoate summarising the information gathered to that point and his preliminary conclusions. He advised that:

"Glen Thompson ...denies that you ever mentioned to him any concern around the issue of the guide. He assisted you to complete your assignments using the guide, and confirms that you were happy to do so..."

It is not accepted that you raised any objection to using this material as claimed by you..."

[33] Noting that the May newspaper articles indicated that she made statements after her 20 April undertaking that she would not do so, he also advised:

"John Minto advised on your behalf that this was not the case, and that the interview predated these discussions, we undertook to endeavour to confirm this with the journalist concerned. We have contacted the Dominion Post and they are not prepared to confirm your version of events. If you wish us to take this into consideration please provide appropriate evidence to substantiate this."

[34] Mr Black advised that he considered Ms Maoate to have acted in breach of the confidentiality clause in her employment agreement. He also noted that she had chosen to speak to the media in preference to using the contractual process for dealing with employment relationship problems. He concluded the letter by saying;

"your actions...are a breach of the duties [of] loyalty, fidelity and good faith expected from any employee. Faced with a similar situation we can have no faith that you would follow due process and address your concerns in the appropriate manner, choosing instead to indulge in a media campaign designed to discredit your employer or even a client."

The Company no longer has trust and confidence in you as an employee and we believe that your continued employment with Allied Security is therefore untenable.

Before confirming this decision we would provide you or your representative with an opportunity to provide submissions in writing as to why we should continue your employment.”

[35] On 28 June Mr Minto presented a written submission which summarised Ms Maoate’s position on the matters discussed so far. It did not provide any new information to substantiate the assertion that the Waikato Times had incorrectly quoted the Dominion Post but expanded on one issue as follows:

“The company says it is proposing to terminate the employment of Lydia Maoate from her position as a security guard employed by Allied Security because the company no longer had trust and confidence in her and therefore that her continuing employment is untenable. We don’t believe this is a reasonable position to take given the fact the company has known of the issues which were discussed at length on 20 April and yet in the ensuing nine weeks the company has continued to employ Lydia in her position of responsibility with a major client...

there is nothing which has come to light since the 20 April meeting which has not been explained fully and accurately by Lydia.”

[36] On 30 June Mr Black replied, confirming the decision to dismiss. He explained that on the question of whether she had raised the issue of cheating he preferred the evidence of Chris McDowell and Glen Thompson to that of Ms Maoate. He noted that he had received nothing to show that the Waikato Times had erred in its reference to the timing of Ms Maoate’s interview. He rejected the assertion that the respondent had delayed the disciplinary process and pointed out that it was the union which had attempted unsuccessfully to block that process. Finally he noted (quoting Mr Minto):

“The Company takes exception to the continued claim that the training practices “at face value are fraudulent.” The independent report completed on behalf of the ETITO does not support this contention in any way.”

[37] The ETITO’s independent report had confirmed that the assessor guidebooks were not intended for use by trainees but confined itself to describing their distribution as ‘inappropriate.’ There was no reference in the report to any conduct amounting to ‘cheating’ although the report recommended improvements to the respondent’s delivery of training.

[38] These conclusions were consistent with the way training and assessment was conducted. Trainees were not required to work through the books under exam

conditions but rather they are expected to ask for guidance and assistance from colleagues and supervisors.¹ The ETITO's findings are also consistent with the evidence that the guidebooks did not enable Ms Maoate to do all the exercises in her work books: she needed a further half day's help from her supervisor before she was able to complete them.

Determination

[39] The company disputes that all matters in contention were resolved on 20 April. It says, first of all, that the meeting that day was not a disciplinary meeting, nothing was ever said to indicate that it was, and Ms Maoate was not entitled to treat it as disposing of the matters discussed there. Secondly it says that in any event, further matters had come to light which justified the pursuit of disciplinary action.

[40] Even if Mr Black did, in the heat of the moment, tell Ms Maoate not to come back to work I am not satisfied that this is enough for the meeting of 20 April to be regarded as disciplinary in nature. A disciplinary meeting need not be highly formal and structured but its purpose, the matters for discussion, and the outcome must be spelt out clearly. That was not the case here.

[41] In any event new matters subsequently came to light which warranted further investigation. Mr Black established that between February (when she received the training guide) and April (when she spoke to Unite and to the media) Ms Maoate had completed all her workbooks and handed them in. He also had confirmation that Mr Thompson and Mr McDowell denied receiving any complaint from her until the day when she argued with Mr McDowell over payment for the first aid course. Finally, and most critically, new reports in the papers indicated that Ms Maoate had spoken to the media after giving her 20 April undertaking that she would not do so.

[42] This new material was of legitimate concern to the employer. It was entirely fair and reasonable for Mr Black to initiate a formal disciplinary process if only for the purpose of investigating this information.

¹ National Certificate in Security [Level 2] Assessor Guide p.5.

The reasons given for dismissal

First allegation: "... contacting the media and Unite Union regarding the training guide book issue and how and why this occurred."

[43] At the Authority investigation meeting the respondent acknowledged that it was not serious misconduct for Ms Maoate to talk to Unite about issues around the use of the guidebooks. It was accepted that she was entitled to seek advice from her union about any employment relationship problem, including something related to training, and that to be able to get advice she needed to be able to tell them of her concerns.

[44] However the statements reported in the media as having been made by Ms Maoate remained a very serious concern for the respondent. The respondent's view was that the statements were unauthorised, inaccurate and brought the respondent into disrepute. Mr Black also concluded that (in the absence of any verification of the contrary) Ms Maoate had repeated her comments to the media after her 20 April undertaking. Finally, he suspected that Ms Maoate's motive was not genuinely to address issues relating to unethical practices, but was influenced by her argument with Mr McDowell.

[45] The following points are not in dispute:

- i. Ms Maoate's media contact was not authorised by the respondent;
- ii. despite being invited to do so, Ms Maoate's representative, Mr Minto, failed to verify the assertion that there was no media contact after 20 April;
- iii. Mr Black was unable to verify that assertion for himself because the reporter concerned refused to discuss the source of the story or the surrounding circumstances, and
- iv. Ms Maoate's representative, Mr Minto, knew that Mr Black was unable to do so.

[46] I am satisfied that it was reasonable, in these circumstances, for Mr Black to conclude that it was more likely than not that Ms Maoate spoke with the news media after 20 April when she had undertaken not to do so.

[47] I also consider it self-evident that the statements made then brought the respondent into disrepute.

[48] Finally, given the conclusions of the independent ETITO report, I do not accept that Ms Maoate's statements to the media were entirely accurate.

[49] One argument remains to be addressed and that is whether the disclosures to the Dominion Post could be regarded as protected in terms of the protections afforded to 'whistle blowers.' (As noted already Ms Maoate was entitled to seek advice from her union about a matter which could affect her employment. No further discussion is required of her contact with Unite as she does not need "whistleblower" status for that.)

[50] The Protected Disclosures Act 2000 requires a private sector employee who wishes to make a disclosure to do so either by way of any specific internal procedures (if they exist) or to make the disclosure to the head or deputy head of the organisation. In circumstances where there is a belief that the head of the organisation may be implicated in the wrongdoing the individual may approach whatever is the "appropriate authority" (examples given include the Police, Ombudsman, and Serious Fraud Office.)

[51] Because Mr Black had been "cc'd" into the email that attached the guidebooks Ms Maoate believed he might be implicated. In such circumstances, an approach to the ETITO, or even to NZQA, might have been warranted. Either of those bodies might qualify as an "appropriate authority" in terms of the Protected Disclosures Act. The Dominion Post, however, does not. I am not persuaded that Ms Maoate is entitled to "whistleblower" protection in relation to her statements to the news media.

[52] In summary, it was reasonable for Mr Black to conclude that Ms Maoate brought her employer into disrepute by making damaging, unauthorised and

inaccurate comments to the media in breach of an undertaking that she would not do so. The comments in question were not in the nature of protected disclosures.

[53] It follows that the conduct in question amounts to serious misconduct and that it was fair and reasonable, in the circumstances, for the respondent to dismiss Ms Maoate on notice.

[54] The foregoing discussion has focussed on the comments alleged to have been made after 20 April. Because I have concluded that the making of these comments justified dismissal in itself it has not been necessary to address all the arguments raised in relation to the making of the earlier statements. For completeness I note the following.

[55] Ms Maoate was given the guidebooks in February. She did not go to the union for advice until April, shortly after her argument with Mr McDowell. In the meantime she kept the materials and completed her workbooks. In these circumstances it was reasonable for Mr Black to accept that she raised no concerns with Mr Thompson when given the books and to conclude that her decision to speak to the media was influenced, at least in part, by the argument.

[56] I also record that no unfairness arose as a result of the time the disciplinary process took to get underway or to come to a conclusion. Some investigation was needed before a decision could be made about whether disciplinary proceedings were warranted, and much of the subsequent delay was a result of Unite attempting to halt the process.

Second allegation: "...refusal to follow an instruction from your employer to return the guide book and your subsequent handing of that book to a third party."

[57] Although the guidebooks were not, strictly speaking, the respondent's property (being ETITO resources) Mr Black clearly needed to recover them and ensure that they were not disseminated any further. His instruction to return the guidebooks was lawful and reasonable in the circumstances, and there is no dispute that Ms Maoate failed to comply with it.

[58] However, just as it was appropriate for Ms Maoate to talk the issue over with her union, it was appropriate for her to show her representative a copy of the materials in order that any advice she received was properly informed. The union's subsequent failure to return the materials promptly is something the union rather than Ms Maoate must be held responsible for. On its own, the second of the matters put to Ms Maoate would not have provided fair and reasonable grounds for dismissal.

Summary dismissal

[59] Following Ms Maoate's dismissal she appeared on television news and gave media interviews discussing her termination and criticising the respondent. By way of example she is reported on the Seek website (2 July 2010) as saying the following:

“Security guard who blew the whistle on her bosses for insisting staff cheat on unit standards, for which they received government subsidies, has been sacked.

Lydia Maoate claims she was fired by Allied Security out of revenge. Officially, she was dismissed for speaking to The Dominion Post and handing answer booklets to her union.

"I have no regrets about exposing them," she said."

[60] Unite also made press releases at the same time, including one in which Mr Sutherland stated:

“Having been exposed for its appalling practices robbing the taxpayer the company has made a vengeful attack on an employee who was brave enough to expose the company. This is crude, cowardly behaviour by a bully-boy employer against an employee with the courage to stand up against a fraud being perpetrated against New Zealand taxpayers.”

[61] Mr Black's evidence to the Authority was that the respondent did receive taxpayer funds, but only sufficient to cover costs incurred in providing external first aid training which could not be provided in-house. I heard nothing from Ms Maoate or Unite witnesses to challenge this assertion and therefore take it at face value.

[62] Like the earlier statements made by Ms Maoate to the media, the remarks she made after her dismissal were unauthorised and inaccurate. In the context of press releases from Unite (of which Ms Maoate must be taken to have been aware) her remarks were extremely damaging to the respondent's reputation. In this way they

were in breach of her ongoing duties of fidelity. It was fair and reasonable, in these circumstances for the respondent to dismiss Ms Maoate without notice.

Costs

[63] The issue of costs is reserved. Any application for costs should be made, with submissions in support, within 28 days of the date of this determination.

Yvonne Oldfield

Member of the Employment Relations Authority