

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

AA 425/09  
5275020

BETWEEN RAYLEEN MCGRUTHER  
Applicant

AND EVENTS SECURITY  
SERVICES LIMITED  
Respondent

Member of Authority: Robin Arthur  
Representatives: Alan Taylor for Applicant  
No appearance for Respondent  
Investigation Meeting: 26 November 2009 in Hamilton  
Determination: 27 November 2009

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] From July to November 2008 Rayleen McGruther worked as a security officer on the Te Awamutu campus of Te Wananga o Aoteroa (TWOA). Her employer, Events Security Services Limited (ESSL), provided security services to TWOA.

[2] Ms McGruther was employed under the terms of an employment agreement she signed in late 2004. After signing that agreement she was away from work for a long period due to a motor accident in which she sustained severe injuries.

[3] Although her agreement is headed "Casual Individual Agreement", her hours of work at the TWOA campus were regular and ongoing – 5-10pm, five days a week.

[4] On 12 November 2008, ESSL manager, Mike Scully, rang Ms McGruther and told her she was to stop working at the campus due to complaints to TWOA about her work. Her last day of work there was 14 November 2008. She was replaced by another ESSL security officer.

[5] Ms McGruther says she was unjustifiably dismissed without any proper notice or investigation by ESSL of concerns about her performance and given no opportunity or assistance to improve.

[6] ESSL, by its statement of reply, denies dismissing Ms McGruther but says it was required to move her due to the dissatisfaction of its client, TWOA. It says she was offered work elsewhere but declined.

[7] Ms McGruther seeks remedies of orders for unpaid holiday pay, interest on that holiday pay, lost wages, compensation for hurt and humiliation and her costs. She also seeks a penalty against ESSL for not providing copies of her wage and time records and personnel file which her representative requested when she raised her grievance.

### **Issues**

[8] The issues for investigation and determination by the Authority are:

- (i) Was Ms McGruther dismissed, and if so, was that unjustified; and
- (ii) Whether or dismissed or not, was Ms McGruther unjustifiably disadvantaged by how ESSL dealt with complaints by TWOA about her performance; and
- (iii) Did ESSL fail to provide information properly requested by Ms McGruther's representative?

### **The investigation**

[9] The Authority's investigation meeting was scheduled after ESSL had not attended mediation despite several attempts by the Department of Labour Mediation Service to make arrangements – first by referral and then under direction of the Authority. Non-compliance with a direction to mediation is a breach of s.159(2) of the Employment Relations Act 2000 (the Act) – a fact advised to both parties in the notice of direction to mediation.

[10] In a telephone conference with the Authority Member and Ms McGruther's representative, ESSL managing director Vince Low agreed to the investigation

meeting date and a timetable direction for ESSL to lodge witness statements from him, Mr Scully and TWOA's security manager, Dave Neilsen.

[11] ESSL did not lodge these statements as directed, despite a reminder notice from the Authority, and no representative attended the Authority's investigation meeting.

[12] At 4.44pm on the day before the notified investigation meeting, Mr Low sought an adjournment due to unspecified "*work commitments*". By minute of 25 November, the Authority advised that the adjournment application was declined and the investigation meeting would proceed under the Authority's powers to do so if a party failed, without good cause, to attend or be represented. Mr Low responded with an email suggesting that the Authority telephone him, Mr Scully and Mr Neilsen to verify ESSL's views.

[13] I proceeded to investigate and determine this matter under clause 12 of Schedule 2 of the Act. I am satisfied ESSL was aware of the investigation meeting and had notice that, should ESSL not attend, the Authority could issue a determination in Ms McGruther's favour without hearing evidence from ESSL. ESSL had ample opportunity to prepare and attend but chose not to do so and must bear the consequences.

[14] I did hear sworn oral evidence from Ms McGruther in addition to a written witness statement which she confirmed was true and correct. I also heard a brief submission from her representative on remedies sought.

## **Determination**

### *Unjustified dismissal*

[15] I find Ms McGruther was unjustifiably dismissed by ESSL on 12 November 2008, with effect from 14 November 2008.

[16] Ms McGruther accepts Mr Neilsen had talked with her about concerns he had about how she had carried out some of her duties. This included locking down areas in a way which inconvenienced some staff and taking keys home with her. She accepts that she had twice made a mistake resulting in her taking keys home but says she also took steps to minimise any resulting inconvenience. She had also taken extra

measures to ensure security of artworks at an exhibition on the campus which had annoyed Mr Neilsen. However, performance issues were not formally raised with her and no formal warnings were given to her by ESSL.

[17] The telephone call from Mr Scully on 12 November was the first notice she had from ESSL of performance concerns. No proper steps were taken to notify her of specific concerns, give her an opportunity to respond, clarify requirements and give her an opportunity to improve.

[18] There was no suggestion those concerns amounted to serious misconduct but ESSL's actions in removing her from working on the campus had the practical effect of summarily dismissing her from all work with the company.

[19] Ms McGruther accepts Mr Scully did suggest that he might be able to find her other work at security communications centre in Hamilton, but she did not have a driver's licence and failed a licence test shortly after her dismissal. Without a licence, she could not legally travel the 32km drive from her home in Te Awamutu to work in Hamilton. While she was unable to pursue that only tentative work prospect, neither did ESSL provide or suggest any other work for her. For that reason, I reject ESSL's assertion that Ms McGruther remained employed by the company after 14 November 2008. She was in fact dismissed and, I find, in an unjustifiable manner.

*Unjustifiably disadvantaged*

[20] If I had not found Ms McGruther was unjustifiably dismissed, I would have nevertheless have found she was unjustifiably disadvantaged by how ESSL dealt with the performance concerns expressed to it by Mr Neilsen on behalf of TWOA. The appropriate action of a fair employer would be to have taken earlier steps to meet with her and work out a plan to improve her performance. Dismissal was an option, in these particular circumstances, only if she then failed to meet required standards under that plan.

[21] I find ESSL has not acted as a fair and reasonable employer would have in all the circumstances at the time. Consequently, its actions and how it acted towards Ms McGruther were unjustified. She has a personal grievance which requires remedies.

*Penalty under s130(4) of the Act*

[22] Ms McGruther seeks a penalty against ESSL for not complying with a request through her representative to provide copies of her wage and time records.

[23] I am satisfied Mr Taylor made such a request under s130(2) of the Act, by letter to ESSL dated 12 November 2008, and that ESSL did not comply with that request.

[24] In the context of ESSL's other conduct over Ms McGruther's personal grievance application – particularly its non-compliance with a direction to mediation and with the Authority's timetable directions to lodge witness statements and relevant documents – I am satisfied ESSL deliberately and wilfully failed to comply with Ms McGruther's request for wage and time records.

[25] Under s130(4) of the Act, ESSL is liable for a penalty for its failure.

**Remedies***Holiday pay and interest*

[26] Because ESSL has not provided time and wage records, it is not possible to confirm whether holiday pay was properly paid to Ms McGruther, or the precise income on which that sum should be calculated.

[27] Ms McGruther's evidence was that she was not paid holiday pay with her final pay. In her employment over five months she had no annual leave but took four days of sick leave. She was entitled to payment of 8 per cent of her gross earnings as holiday pay for that five months of employment.

[28] In the absence of information from ESSL, her holiday pay entitlement is calculated at 8 per cent of her weekly earnings of \$240 gross for the 19 weeks from 6 July to 16 November 2008, being \$364.80.

[29] Ms McGruther is also entitled to interest on that amount at the rate of 4.82 percent for the period from 17 November 2008 to 26 November 2009 (375 days) which I calculate to be \$18.06.<sup>1</sup>

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<sup>1</sup> Refer clause 11 of Schedule 2 of the Act.

*Lost wages*

[30] Ms McGruther has not had a new job since her dismissal but I am satisfied she has taken reasonable steps to mitigate her losses. She gave evidence of seeking jobs in security, daycare, aged care and cleaning since her dismissal by ESSL.

[31] I also accept she has been hampered in her job search by the stigma of her dismissal by ESSL which has made other employers reluctant to hire her.

[32] Ms McGruther has received some earnings from a cleaning contract job but she already had that job at the time of working for ESSL so no account is taken of it in calculating lost wages.

[33] Ms McGruther did give evidence that she might have got employment in retail security but did not want to work in that area. For that reason, I limit the award of lost wages to 16 weeks at the rate of \$240 per week. Ms McGruther is awarded \$3,840 under s123(1)(d) and s128 of the Act for lost wages.

*Compensation for hurt and humiliation*

[34] Ms McGruther gave evidence of being shocked and humiliated by her dismissal by ESSL from her job on the TOWA campus. She continues to feel the sting of the effect on her reputation in the relatively small town of Te Awamutu.

[35] The distress and injury to feeling caused to her by ESSL's actions is to be compensated by an award of \$5,000 under s123(1)(c)(i) of the Act.

*Contribution*

[36] Under s124 of the Act, the Authority must consider the extent to which Ms McGruther's actions may have contributed towards the situation giving rise to her personal grievance and, if those actions require, reduce the remedies that would otherwise be awarded.

[37] ESSL failed to provide evidence that would confirm and justify its performance concerns and Ms McGruther did not contribute to its actions in failing to address those concerns properly with her. There is nothing to suggest she could neither have explained her performance satisfactorily nor improved if necessary and required in a proper way to do so. Accordingly, no reduction of remedies is required.

**Costs**

[38] Ms McGruther is entitled to a contribution to reasonably incurred costs in bringing her successful personal grievance application to the Authority. This matter was dealt with in an investigation meeting lasting less than half a day and costs may be dealt with on the common measure of a notional daily rate, currently \$3,000. On that basis, an award of costs is made to Ms McGruther of \$1,500 to be paid by ESSL.

**Penalty**

[39] ESSL is ordered to pay a penalty of \$1,000 for failing to comply with the requirement under s.130(2) of the Act to provide wage and time records when requested to do so by an employee's representative. The penalty is to be paid to the Authority for transfer to the Crown account.

[40] ESSL is to pay the remedies awarded to Ms McGruther and this penalty within 14 days of the date of this determination.

**Summary of determination**

[41] I have found Ms McGruther was unjustifiably dismissed by ESSL because it did not properly address performance concerns raised by its client, TWOA.

[42] Within 14 days of this determination ESSL is to pay to Ms McGruther:

- (i) \$364.80 as holiday pay; and
- (ii) \$18.06 as interest on holiday pay; and
- (iii) \$3840.00 as lost wages under s123(1)(b) and s128 of the Act; and
- (iv) \$5000.00 as compensation for distress and injury to feeling under s123(1)(c)(i) of the Act; and
- (v) \$1,500 as a reasonable contribution to her costs.

[43] ESSL is also to pay to the Authority within 14 days of this determination, for transfer to the Crown account, a penalty of \$1,000 for breach of s130(2) of the Act.

Robin Arthur  
Member of the Employment Relations Authority