

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2011] NZERA Auckland 86
5300070

BETWEEN WAYNE MUNRO
 Applicant

AND HIBISCUS COAST
 SECURITY LIMITED
 First Respondent

AND JOHN DOWDEN t/a
 SAFEGUARD SECURITY
 Second Respondent

Member of Authority: Dzintra King

Representatives: Barry Hayes, Counsel for Applicant
 Bharat Bhanabhai, Counsel for Respondent

Investigation Meeting: 28 October 2010 at Auckland

Additional Evidence
Supplied 12 November 2010

Submissions Received 20 January 2011 and 23 February 2011 from Applicant
 21 February 2011 from Respondent

Determination: 7 March 2011

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant, Mr Wayne Munro, says that he has been unjustifiably constructively dismissed and that he has been unjustifiably disadvantaged by Hibiscus Coast Security Ltd. The Statement of Problem asserts that the actions of the employer (the applicant accepted that the employer was the first respondent) led him to resign on 22 February 2010 because of the following breaches of duty:

- False allegation of assault to Police;

- Failing to investigate Mr Munro's conduct or have a meeting to hear from him;
- Abusive conduct by the employer; and
- Suspending Mr Munro without pay for 16 months.

[2] The unjustified action is the suspension without pay that occurred on 14 October 2008.

[3] The applicant seeks reimbursement of lost wages from 14 October 2008 until 22 February 2010. He also seeks compensation of \$20,000.

[4] There is also an issue regarding non-payment of holiday pay. The respondent accepts that holiday pay has not been paid and is willing to make the appropriate payment.

Background

[5] Mr Munro commenced employment around 11 January 2008 as a security guard. On 14 October 2008 Mr Munro had a physical altercation with Mr Dowden, the partner of the director of the company, Ms Maureen Jackson. The Police were called and a statement was taken from Mr Munro, who was then charged with assault by the Police. He was taken away from the premises by the Police. One of his bail conditions was not to contact his former employer or to go within a certain area of the premises. Shortly afterwards, Mr Munro appeared in the North Shore District Court and entered a not guilty plea. He elected trial by jury. The matter was eventually heard in the Auckland District Court on 23 November 2009 and Mr Munro was found not guilty.

[6] The altercation between Mr Munro and Mr Dowden appears to have been precipitated by Mr Dowden questioning Mr Munro about some magazines in Mr Munro's work vehicle. Mr Dowden asked where the magazines had come from. Mr Munro replied that that was none of his business. Mr Dowden then said that Mr Munro was suspended without pay until he got an answer. At that stage a physical altercation took place.

[7] Mr Dowden said he had spoken to Mr Graham Preston, the General Manager, and the person who handled employment matters, the day before about concerns he had that Mr Munro was illegally taking fuel. They spoke about the need to suspend Mr Munro. Mr Dowden knew Mr Preston was drafting a letter but did not see it before it went out. Mr Dowden said Mr Munro's employment would have been terminated because of the fuel issue.

[8] Mr Munro said he was given the letter on the morning of 14 October by an employee whose name he could not remember. There had been no prior discussion with him about it.

[9] The letter stated that in response to a serious incident the company felt that Mr Munro had committed serious misconduct. Mr Preston then referred to a term of the employment agreement which permitted suspension without pay. There was no such term in the employment agreement. The letter went on to say that the suspension without pay would start forthwith:

... until a complete investigation is carried out in accordance with company procedures. Once the company has completed its investigation, including any third party investigation notification will be given to you to attend a meeting to further discuss the potential outcome.

Constructive Dismissal Claim

[10] The resignation of Mr Munro on the grounds of constructive dismissal did not take place until 22 February 2010, some 16 months after the suspension.

[11] A letter written by Mr Hayes on 22 February said that he was raising a personal grievance on behalf of Mr Munro for constructive dismissal. He referred to the suspension letter dated 14 October 2008 and also stated:

There are obviously further breaches of duty here by your company in making up a false charge against my client, failing to investigate the employment conduct matter at all and have a meeting to hear from my client, abusive conduct by Mr Dowden and imposing an excessive disciplinary sanction.

Because of these breaches of duty my client hereby resigns and brings a claim for constructive dismissal. Alternatively, he relies on an unjustified decision by the company which disadvantaged him, which was to suspend him on 14 October 2008.

[12] One of the major issues to be determined in this matter is the date of the termination of employment. Mr Munro said in his evidence that after receiving the suspension letter he felt depressed and distressed that he had to find income from another source and find another job. He applied for other jobs from October onwards but was unable to find work because of the criminal charges pending against him. In December 2008, for example, he applied for a job as a process worker but was asked about the Police check. On 1 February 2009, he applied for a job as a security guard in Henderson and he also applied for several other jobs over that year. He said that after receiving advice from his counsel, he resigned from his position on the ground of constructive dismissal on 22 February 2010. He also said he could not have continued working for Hibiscus Coast after he had been arrested.

Unemployment Benefit

[13] Mr Munro made an application for an unemployment benefit on 22 November 2008. On his application, in response to a question asking *Are you still working?* he ticked the option *No*. In response to the question *Why did you leave your last job?* he wrote *Fired*. In response to the question *Please indicate what steps you and your partner have taken to get other assistance, reduce costs or increase income?* he wrote *Looking for full time employment*. The interviewing officer noted on the form that Mr Munro was available for work. On a form relating to personal details where Mr Munro was asked to give details of the change in his circumstances, he wrote *I was working for Safeguard Security and I was assaulted by my boss and suspended*.

[14] On 5 December 2008, in response to correspondence from WINZ, Mr Preston wrote a letter stating:

*Furthermore, Safeguard Security wishes to inform Work and Income that your client has **not** had his employment terminated in any shape, way or manner but has been **suspended without pay** following a very serious breach of his employment contract with this company. I attach a copy of the letter your client received in this instance. Safeguard Security is also of the belief that your client has been requested to attend the North Shore District Court for a hearing on 21 January 2009 in relation to this serious matter.*

[15] Mr Munro said that he had no intention to represent to anybody that he had been dismissed and was simply following the advice of the WINZ staff member. Mr Munro is of the view that he was granted an unemployment benefit even though he was suspended without pay and not in fact unemployed. Section 89 of the Social

Security Act deals with the standard eligibility requirements for an unemployment benefit. Subsection (1) provides:

A person is entitled to an unemployment benefit if he or she satisfies the criteria in subsections 2, 3 and 4 and –

- (a) Is not in full time employment, but –*
 - (i) is seeking it; and*
 - (ii) is available for it; and*
 - (iii) is willing and able to undertake it; and*
 - (iv) has taken reasonable steps to find it.*

[16] It is clear that a prerequisite for being granted an unemployment benefit is that the person is not in full time employment.

Was Mr Munro dismissed?

[17] At the hearing Mr Munro stated that, in his mind, he knew he was not going to be employed by the company any longer and did not consider himself employed. He said he felt he could not go back and could not have continued to work after his arrest. I agree with Mr Bhanabhai that the holding of that view is in all likelihood the reason that Mr Munro wrote on the WINZ form that he had been fired because he was of the view that his employment had come to an end.

[18] The grievance was raised on 22 February 2010. The respondent did not raise an objection the matter being out of time. The employer has given implied consent to the raising of the disadvantage grievance.

[19] In relation to the suspension issue the suspension of Mr Munro on 14 October without pay was unjustified. He was not given an opportunity to comment on this issue; he simply had a letter handed to him. There was no contractual provision for suspension without pay.

[20] When asked why he had resigned Mr Munro said it was on the advice of his lawyer. There is no connection between the events that took place in 2008 and the resignation that was notified 16 months later. Mr Munro said it was clear to him, after the incident where he had a physical altercation with Mr Dowden and was arrested, that he could not return to work.

[21] Mr Munro did not raise any protest at the time about his unjustified suspension. He made no attempt to contact the employer nor did he instruct anyone

else to contact the employer. Instead, he looked for other employment and made an application to WINZ for an unemployment benefit.

[22] The employment terminated on the day that he received the suspension letter and had the altercation with Mr Dowden. Mr Munro accepted that he could not go back to work. He regarded the employment as at an end.

[23] The fact that Mr Preston wrote to WINZ saying the employment had not been terminated does not alter the fact that Mr Munro saw the employment as having come to an end and acted accordingly by looking for other employment and making an application for an unemployment benefit,

[24] Mr Munro was not constructively dismissed. He did not attribute his feeling that he could not go back to work to the fact that he had been suspended and that he believed that that was unjustifiable and a breach of his employment agreement. He felt he could not go back to work because of the physical altercation that had taken place between the parties and the fact that the Police had been called and he had been removed from the premises.

[25] There was no constructive dismissal.

Unjustified Disadvantage

[26] The suspension was unjustified. There was no prior consultation and it was without pay.

[27] There was an unjustified disadvantage.

Remedies

[28] Because the employment terminated on 14 October, which was the day of the suspension, and Mr Munro was paid to that date, there can be no award of wages.

[29] When I asked Mr Munro about the effect of the suspension he spoke about the stress of the trial but said nothing about the effect of the suspension. I have no evidence of any distress suffered by Mr Munro that is attributable to the suspension and cannot make an award of compensation.

Holiday Pay

[30] Any unpaid holiday pay is to be paid forthwith. If there is any difficulty calculating this leave is reserved to return to the Authority on that issue.

Costs

[31] Mr Munro is legally aided. If the parties are unable to resolve the issue of costs, Mr Munro should file a memorandum within 28 days of the date of this determination. The respondent is to file a memorandum in reply within 14 days of receipt of the applicant's memorandum.

Dzintra King
Member of the Employment Relations Authority