

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2011] NZERA Auckland 185  
5306907

BETWEEN

ROGER WILLIAM  
SCHOENHARDT  
Applicant

AND

ALLIED INVESTMENTS  
LIMITED t/a ALLIED  
SECURITY  
Respondent

Member of Authority: K J Anderson  
Representatives: G Rodgers, Advocate for Applicant  
C McDowall, Advocate for Respondent  
Investigation Meeting: 21 February 2011 at Hamilton  
Determination: 6 May 2011

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] The applicant, Mr Schoenhardt, claims that he was unjustifiably constructively dismissed on 7<sup>th</sup> May 2010. He asks the Authority to find that he has a personal grievance and award him various remedies including reimbursement of wages for 26 weeks and compensation of \$12,000. The respondent, Allied Investments Limited t/a Allied Security (Allied), denies that Mr Schoenhardt was constructively dismissed, or dismissed at all, and says that he abandoned his employment.

**Legal identity of employer**

[2] The cited respondent party to these proceedings was *Damian Black t/a Allied Security*. It is now established and mutually accepted that the legal entity that employed the applicant is: Allied Investments Limited t/a Allied Security. The records

of the Authority and the intituling on this determination have been amended, by consent, to reflect the correct respondent party to the proceedings.

### **Background Facts and Evidence**

[3] It appears that Mr Schoenhardt commenced his employment with Allied on or about 22<sup>nd</sup> December 2009. He reported to Mr Chris McDowall, the New Zealand Operations Manager for Allied.<sup>1</sup> He was employed as a casual employee to carry out security related duties. Mr Schoenhardt's first work assignment was on the above date working at the Auckland Fish Market. His next assignment was at the "Detonate" New Year's Eve concert – 31<sup>st</sup> December 2009/1<sup>st</sup> January 2010.

[4] An employment agreement signed by Mr Schoenhardt on 17<sup>th</sup> December 2009 records that he was employed as a *Casual Guard*. The agreement is headed:

THIS IS AN INDIVIDUAL EMPLOYMENT AGREEMENT FOR AS & WHEN  
REQUIRED (IRREGULAR) HOURS.

Clause 2 of the agreement provides that:

Your "Position" and "Place of Work" are shown on the first page of this agreement. You agree that you will perform all duties usually carried out by someone holding your position. You also agree to undertake any other duties that you are capable of carrying out and to change duties from time to time to suit our operation.

And at clause 4 of the agreement:

You will work as and when required with no fixed or guaranteed hours on any day.

[5] Following the New Year's Eve assignment, Mr Schoenhardt did not have any further work assignments until 11<sup>th</sup> February 2010. From this date, he began to work at, and was rostered to provide security services for, a Hamilton McDonald's food outlet, each Thursday, Friday and Saturday night from 11:00p.m. to 4:00a.m. An issue has arisen about whether Mr Schoenhardt's employment status changed from casual to permanent part-time at this point. That is arguable. But given what eventually transpired and the overall circumstances, it is not a matter that needs to be determined by the Authority. I would only comment that if Mr Schoenhardt had continued to work a regular roster at McDonald's, then it is likely that this would be deemed to have been permanent part-time employment.

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<sup>1</sup> Mr McDowall resides in Hamilton.

## Issues Arising

### **The Hampton Downs Assignment / Admission to Hospital**

[6] In addition to his work at McDonald's, Mr Schoenhardt carried out several other assignments. One of these was at the Hampton Downs car racing facility located north of Hamilton. There is a conflict in the evidence of Mr Schoenhardt and that of Mr McDowall in regard to how Mr Schoenhardt was given this assignment, and what transpired during and after his departure from the Hampton Downs site. While this conflict in the evidence, and the matters it pertains to, are not directly relevant to the subsequent termination of Mr Schoenhardt's employment, the overall evidence does reflect, to some extent, on the nature of the relationship between the two men and the credibility (and weight) of their respective evidence overall.

[7] I note that Mr Schoenhardt's evidence varies somewhat. In a five page statement attached to his *Statement of Problem*, (SOP) he says that Mr McDowall contacted him on Saturday, 17<sup>th</sup> April 2010, asking if he could work at Hampton Downs from 7:00p.m. 18<sup>th</sup> April to 7:00a.m. 19<sup>th</sup> April 2010. Mr Schoenhardt states that he informed Mr McDowall that he would have to check with his partner as he would have to use her car to travel to Hampton Downs. Mr Schoenhardt then states that Mr McDowall rang him again at 3:50a.m. on Sunday 18<sup>th</sup> April: "in a drunken state pleading with me to undertake this work." Mr Schoenhardt states that he agreed to do the work but he was feeling unwell and had experienced stomach pain for the prior two weeks. However, in his evidence to the Authority at the investigation meeting, Mr Schoenhardt makes no mention of having stomach pain prior to accepting the assignment or of Mr McDowall being in a "drunken state." He also says that he rang back Mr McDowall on Sunday morning (18<sup>th</sup> April) and agreed to do the work at Hampton Downs. It was also agreed that the two men would meet for Mr McDowall to put petrol, to the value \$50, in the car that Mr Schoenhardt had the use of. The evidence of Mr McDowall is that he was on security duty at a local hotel, along with other Allied staff, when he called Mr Schoenhardt to obtain confirmation if he could take the Hampton Downs assignment. Mr McDowall denies that he had been drinking and he has provided a written statement from one of the other Allied staff, Mr Josh Goodwin. Mr Goodwin confirms that he worked with Mr McDowall until 4:15a.m. on Sunday 18<sup>th</sup> April 2010 and then Mr McDowall drove him and another Allied employee home. The evidence of Mr McDowall is further collaborated by the

time sheets that have been produced for the period in question; they show the hours of work for Mr McDowall and Mr Goodwin along with other Allied employees that worked with the two men.

[8] Mr Schoenhardt commenced the Hampton Downs assignment on Sunday evening, 18<sup>th</sup> April 2010. His evidence is that he experienced “serious abdominal pain” and at 2:10a.m. on Sunday 19<sup>th</sup> April, he contacted the Hampton Downs client and informed her that because of the abdominal pain he was experiencing, he had to go home. Mr Schoenhardt says that because he had been told not to contact Mr McDowall outside work hours, he did not notify him that he was leaving the site.<sup>2</sup> Mr Schoenhardt drove back to Hamilton and went to the Waikato Hospital. Via a text, Mr Schoenhardt’s partner, Ms Leanne Hughes, informed Mr McDowall of the admission of Mr Schoenhardt to hospital. Mr Schoenhardt says that Mr McDowall rang him at “around 8:32a.m.” on 19<sup>th</sup> April to ascertain if he was still at the hospital. The evidence of Mr Schoenhardt is that Mr McDowall then sent a text to him “at around 10:30a.m.” the same day. Mr Schoenhardt says that the content of the text was that Mr McDowall had been to the emergency department at the hospital and could not find Mr Schoenhardt and that Mr Schoenhardt was “lying” about being in hospital. Mr Schoenhardt was discharged from the hospital later that morning and he dropped off a hospital medical certificate to Mr McDowall. Mr Schoenhardt says that Mr McDowall accused him of lying about being in hospital. Mr Schoenhardt alleges that when he presented the medical certificate and showed his hospital wrist band, Mr McDowall said: “I don’t care and if I wanted to know where you were I would have sent two of my goons up there.” But in his SOP attachment Mr Schoenhardt makes no mention of the latter statement that he says that Mr McDowall made. There is another variance between his SOP statement and his evidence to the Authority. In the former he makes no mention of Mr McDowall phoning him at the hospital, only the text.

[9] It appears that Mr McDowall did ring Mr Schoenhardt at the hospital but he did not send a text as Mr Schoenhardt alleges. At the investigation meeting, when Mr McDowall asked Mr Schoenhardt to produce the alleged text the latter’s response was his phone had: “dropped a few texts.” And when Mr McDowall asked Mr Schoenhardt to explain to the Authority what was discussed during the 8:30a.m.

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<sup>2</sup> The evidence of Mr McDowall is that he had to instruct Mr Schoenhardt to remove the privacy barrier from his phone so that it could be identified who was calling. It seems that Mr Schoenhardt was in the habit of texting Mr McDowall outside the generally recognised hours of work.

phone call, Mr Schoenhardt responded that he: “was under morphine” and could not remember the details of what was discussed. But when Mr McDowall put it to Mr Schoenhardt that he seemed to be able to remember what to put in his statements for the Authority, Mr Schoenhardt responded that: “Maybe I remembered some of the conversation – maybe I didn’t.” Mr McDowall told the Authority that the Waikato District Health Board is an Allied client and it would have been a simple matter to have an employee check if Mr Schoenhardt had been admitted to the hospital rather than Mr McDowall making a visit, even if he was inclined to do so – which he made it clear - he was not. But in any event, this was not necessary as he had spoken to Mr Schoenhardt by phone at 8:30a.m. and asked him to bring in a medical certificate.

[10] I have to say that I found much of what Mr Schoenhardt had to say about the Hampton Downs assignment and its aftermath at the hospital, regarding his contact with Mr McDowall, to be lacking in credibility and to be bordering on fanciful. I certainly gained some understanding of why Mr McDowall would be sceptical in regard to what Mr Schoenhardt was telling him at times.

[11] There is some confusion in the overall evidence regarding Mr Schoenhardt returning to his duties at McDonald’s. It is established that he was on duty on the evening of Sunday, 25<sup>th</sup> April 2010, when there was an incident involving a scuffle between customers, possibly involving pepper spray. It appears that there was some criticism from McDonald’s and consequently Mr McDowall, in regard to how Mr Schoenhardt handled the situation. Mr Schoenhardt alludes to having to “stand down” until it had been “sorted” but then his evidence is that, on 26<sup>th</sup> April; he received his hours of work for the forthcoming week and they were the same as he had been previously working. Mr Schoenhardt was required to meet with Mr McDowall on 28<sup>th</sup> April and upon doing so, he was informed by Mr McDowall that he was not to go behind the counter at the McDonald’s shop.

[12] It appears that there was some confusion about the expectations that McDonald’s had in regard to Mr Schoenhardt’s role and his perception of that role. He was informed by Mr McDowall that there would be a meeting on 6<sup>th</sup> May 2010 between Mr McDowall and a McDonald’s manager to, as Mr McDowall put it: “eliminate any confusion for Roger.” Mr Schoenhardt was required to meet with Mr McDowall later that day for the purpose of obtaining instructions in regard to what

McDonald's required. The evidence of Mr McDowall is that he had a discussion with Mr Schoenhardt and clarified "what exactly was required" by the McDonald's management. This included the fact that Mr Schoenhardt was not permitted to go behind the counter at the shop unless there was a valid reason to do so. Further training options were also discussed.

### **Incident on 7<sup>th</sup> May 2010**

[13] Mr Schoenhardt was on duty at the McDonald's site on the evening of Friday, 7<sup>th</sup> May 2010. The evidence of Mr McDowall is that at approximately 11:20p.m, he received a phone call from the McDonald's duty manager, Mr Darragh Miller, requesting "... a new guard, one that would do the job he is meant to." Mr McDowall says that Mr Miller informed that Mr Schoenhardt had been behind the counter and helped himself to a drink out of the vending machine and he was "not allowed" to do this but "did not listen" to Mr Miller. Mr McDowall then phoned Mr Schoenhardt and asked why he had been behind the counter and received a denial. Mr McDowall says that he explained the nature of the call he had received from Mr Miller and then asked Mr Schoenhardt to "simply perform the role" as had been discussed the day before.

[14] The evidence of Mr McDowall is that about ten minutes after speaking to Mr Schoenhardt, he received a text from him informing that he was leaving the McDonald's site. Mr Schoenhardt has produced the text he sent. It was sent at 11:20p.m and says: *I am going home now.* Mr McDowall responded at 11:30p.m: *If u leave u will not get paid wages or holiday pay.* Shortly after, Mr McDowall was informed by Mr Miller that Mr Schoenhardt had left the work place. Mr McDowall then arranged for another security person to come and fill the role of Mr Schoenhardt for that shift.

[15] Mr Schoenhardt accepts that he received the phone call from Mr McDowall but his evidence to the Authority is at considerable odds to that of Mr McDowall because he says that Mr McDowall said: "You are behind the counter, don't lie, you are to get out from behind the counter and you are fired." Mr Schoenhardt says that his response was: "Are you firing me or are you dismissing me?" His further evidence is that Mr McDowall then said: "I don't know what I'm going to do with you I will see you on Monday but you are to stay there and finish your shift but you won't get paid for it." But in the statement attached to the SOP, there is a different version of

what Mr Schoenhardt alleges was said by Mr McDowall. Here, Mr Schoenhardt writes that Mr McDowall rang him at 23:25 and said:

I told you to stay out from behind the counter but I have been told you went behind the counter last night and got a drink – you are fired!!! I couldn't believe that I had just been fired over getting a drink!!!!

Mr Schoenhardt's further evidence to the Authority is that he then called his partner, Ms Hughes, and informed her that he: "had just been fired."<sup>3</sup> Mr Schoenhardt says that he also told "Ben" – a McDonald's staff member - that he had been "fired" but there is no evidence from this person. Mr Schoenhardt also says that he then sent a text to Mr McDowall informing him that he was going home as: "I didn't think it was fair to work 5 hours and not receive pay."

[16] Once again there is a substantial difference in the version of the events of 7<sup>th</sup> May that Mr Schoenhardt gave at the investigation meeting compared with that contained in the written statement attached to the SOP. Mr Schoenhardt also told the Authority that Mr McDowall: "... knew he was going to fire me before he even rang me." Mr Schoenhardt suggests that Mr McDowall had previously arranged to have a replacement security person to come to the McDonalds site and that the "dismissal" was prearranged. But overall I prefer the evidence of Mr McDowall as it is corroborated by statements from Mr Miller, Mr Craig Richards, Director of CR Security, who was contacted by Mr McDowall to go to the McDonalds site following the departure of Mr Schoenhardt; and also Mr Scott Reedy, the person who eventually took over the remainder of Mr Schoenhardt's shift. The evidence of Mr Schoenhardt about the events of the night in question is fundamentally lacking in credibility and some of it, I suspect, is little more than a self-serving fabrication.

### **The events after Friday, 7<sup>th</sup> May 2010**

[17] The evidence of Mr McDowall is that he had no further communication with Mr Schoenhardt over the weekend, albeit, as I understand it, Mr Schoenhardt would normally work on Saturdays. Mr McDowall says that he sent a text to Mr Schoenhardt on Monday 10<sup>th</sup> May requiring him to return the uniform, as this was to remain at McDonald's. Mr Schoenhardt was informed that when he returned the uniform he would be paid his wages. Mr McDowall says that Mr Schoenhardt replied via a text informing that the uniform would be returned on Tuesday 11<sup>th</sup> May 2010. But the

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<sup>3</sup> Ms Hughes confirmed this by oral evidence at the investigation meeting.

evidence of Mr McDowall (on this matter) is not correct as it is disproved by the evidence of Mr Schoenhardt. He says that he received a phone message from Mr McDowall (left at 10:20a.m.) on Monday, 10<sup>th</sup> May. This message was played to the Authority at the investigation meeting and it is also transcribed into an email (2<sup>nd</sup> June 2010) from Mr Rodgers to Mr Damian Black:

*Roger, Chris here mate, obviously you walked off the job on Friday so you need to return your uniform to the office. Your pay and holiday pay is being on hold until we get it back. I am in Christchurch until Wednesday but Scotty will be in the office or you can leave it at reception. Once we have your jersey and jacket and what not back, we will release your final pay. That's all. Cheers, bye"*

[18] The further evidence of Mr McDowall is that he received a fax from Mr Schoenhardt's advocate (Mr Rodgers) on Thursday, 13<sup>th</sup> May enquiring why Mr Schoenhardt had not been paid. In a subsequent telephone conversation, Mr McDowall informed Mr Rodgers that all matters pertaining to Mr Schoenhardt's pay entitlements would be handled by the company's human resources department. The conversation between Mr McDowall appears to have been somewhat terse with Mr McDowall terminating the conversation after Mr Rodgers began talking about pursuing a personal grievance. There is little evidence as to what occurred between 13<sup>th</sup> May and 20<sup>th</sup> May but on the latter date, Mr Damian Black, the General Manager of Allied, wrote to Mr Schoenhardt:

This is to notify you of an employment problem that has arisen. Specifically you left your place of work and you entered a client workspace after being specifically told not to enter that area. Please bring a support person to this meeting. If gross misconduct is found you may be dismissed or another disciplinary action taken. Please contact me via my mobile to arrange a time to meet and go through this information.

Via an email dated 25<sup>th</sup> May, Mr Rodgers responded for Mr Schoenhardt and informed that Mr Schoenhardt considered that he: "... has been summarily dismissed by the words, action, and manner of his manager." Mr Rodgers informed that the opportunity to "discuss the situation" would be welcomed but not in a disciplinary setting as it was considered that Mr Schoenhardt was no longer employed by Allied.

[19] There was an ongoing exchange of emails between Mr Rodgers and Mr Black; the general tenor being that there was a difference of view as to whether Mr Schoenhardt had been dismissed or whether he was required to attend a disciplinary meeting. Mr Schoenhardt's position is summarised in a further email from Mr Rodgers to Mr Black dated 1<sup>st</sup> June 2010:

I would like to confirm that we both have a similar understanding as to where things sit as far as the discussions we have been having regarding Roger.

- Rodger is no longer employed by Allied Security.
- Roger has handed in his uniform and was expecting his final pay two weeks ago.
- He has done this on the instructions of his manager Chris.
- Roger has a voicemail on his phone from Chris telling him to hand in his uniform and that he would be paid out his holiday pay.
- As you felt that you were uncertain about Roger's employment status with Allied Security, he has given you a letter to this effect.<sup>4</sup>
- You acknowledged your understanding of the intention to return the uniform in your email of 19<sup>th</sup> May when you said "**However if the uniform has been returned then Roger should have been paid by now, seems odd?**"
- My earlier attempts at mediating this matter failed when Chris refused to discuss it with me and then hung up the phone as I was talking.
- It would be inappropriate for someone who is no longer your employee to attend a disciplinary meeting.
- An application has been filed at the Employment Relations Authority for a hearing to discuss among other things, the manner of Roger's dismissal.
- We would welcome the opportunity of being able to discuss these issues directly with you. As we have said in the letter that was forwarded to you earlier, these issues relate mainly to Roger's treatment by his manager Chris. They include harassment, intimidation, discrimination, false accusations, lack [sic] health and safety training, unjustified dismissal, improper procedure, and lack of good faith in employment discussions.

Is this where you see things sitting at the moment Damian?

Mr Black responded the same day informing that he didn't see things that way. Mr Black further informed that:

Roger is an employee of Allied and has been asked to attend a meeting to discuss his leaving the site. I now have statements from the manager and clients contradicting all of Roger's statements. Roger was asked by the manager to return the McDonalds uniform that he took from the site which he should not have! You have assumed this means the full Allied uniform which it does not nor did it intend to. Roger will have an opportunity to present the text messages and voice mail he has at the meeting with me.<sup>5</sup>

[20] The parties did not meet on 3<sup>rd</sup> June 2010 but subsequently attended mediation, without resolution.

### **Was Mr Schoenhardt dismissed?**

[21] Upon consideration of the evidence available, I conclude that Mr Schoenhardt was not dismissed (constructively or otherwise) on the evening of 7<sup>th</sup> May 2010.

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<sup>4</sup> This letter has not been produced to the Authority nor has its content been alluded to other than in the email.

<sup>5</sup> Via a second letter dated 28<sup>th</sup> May 2010, Mr Schoenhardt was invited to attend a meeting on 3<sup>rd</sup> June 2010.

Rather, I conclude that he made a conscious decision of his own free will to leave the McDonald's site after a telephone conversation with Mr McDowall. While Mr Schoenhardt claims that he was constructively dismissed on that evening the weight of the evidence does not support this contention. I further conclude that after having made the decision to leave the workplace, Mr Schoenhardt then attempted to paint the scene as a dismissal when it was not. I find that it is more probable that Mr Schoenhardt simply decided that he no longer wanted to work for Allied and left. He then attempted to portray the circumstances of his departure as a dismissal. And, it has to be said, the messages from him are inconsistent and confusing. On the one hand he says that he was "summarily dismissed" and "fired" but the claim he has brought to the Authority is that he was constructively dismissed. While it is clear that there was some regular tension between Mr McDowall and Mr Schoenhardt and that Mr McDowall could have managed some of the circumstances somewhat better, it is also obvious that Mr Schoenhardt was a difficult and at times, a frustrating person to deal with. In his evidence Mr Schoenhardt has alluded to suffering from Attention Deficit Hyperactivity Disorder (ADHD) but no medical evidence has been produced about this. Nor did he make any reference to such in the "Existing and Previous Conditions" section of the Allied application form that he completed, even though he saw fit to declare a previous hernia operation.

[22] While I have made reference to the inconsistency of Mr Schoenhardt's position relating to his claims, there is also some inconsistency in the position taken by Allied. Firstly, we have the telephone message of 10<sup>th</sup> May 2010 from Mr McDowall informing Mr Schoenhardt to return his uniform and then he would receive his "final pay." Given this message, it is not entirely unreasonable that Mr Schoenhardt might reach the conclusion that his employment with Allied had come to an end then, notwithstanding of course, that he says that this had already happened on 7<sup>th</sup> May. But then we have Mr Black presenting the view that Mr Schoenhardt remained an employee of Allied and that a disciplinary meeting was required regarding the departure of Mr Schoenhardt from the McDonald's site on the evening of 7<sup>th</sup> May 2010. Nonetheless, it seems to me that this inconsistency could have been clarified if Mr Schoenhardt and Mr Rodgers had agreed to meet with Mr Black on 3<sup>rd</sup> June 2010 as he proposed. Unfortunately, rather than accept Mr Black's invitation to meet, Mr Schoenhardt resolutely maintained his view that he had been dismissed and filed an application with the Employment Relations Authority on 25<sup>th</sup> May 2010. This

was without any meaningful attempt to meet and discuss the issues with Mr Black. Regrettably, all of this only tends to suggest that the employment relationship between the parties was unlikely to have worked out in any event and perhaps it would have been better if the parties had sought some assistance earlier rather than handling matters in the way that they did.

### **Determination**

[23] For the reasons set out above I find that Mr Schoenhardt was not constructively or summarily dismissed on the evening of 7<sup>th</sup> May 2010. Rather, I find that he left the workplace of his own free will.

**Costs:** As the respondent was represented by Mr McDowall, as an employee of the company, costs are not a matter for consideration.

**K J Anderson**  
**Member of the Employment Relations Authority**