

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2022] NZERA 17
3112712

BETWEEN

MICHAEL SPICER
Applicant

AND

ALLIED SECURITY LIMITED
Respondent

Member of Authority: Helen Doyle

Representatives: Maryline Suchley, advocate for the Applicant
Nathan Williams, advocate for the Respondent

Investigation Meeting: 18 November 2021 at Dunedin

Submissions Received: 18 November 2021 from both parties
Further information 22 December 2021 from the Respondent
received: 17 January 2022 from the Applicant

Date of Determination: 25 January 2022

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Michael Spicer was employed by Allied Security Limited (Allied Security) in February 2020 to undertake security roles. He entered into a written casual employment agreement that described his position as variable and he was paid a base rate of \$19 per hour. The last work Mr Spicer undertook for the company was on 21 March 2020.

[2] Mr Spicer says that he was unjustifiably dismissed from his employment by text message from the Managing Director of Allied Security Damian Black. Further that he was disadvantaged during his employment because there was a failure to provide him with a safe workplace from bullying, a failure to address his raising of potential hazards and a failure to pay him for some training that he undertook.

[3] Mr Spicer seeks compensation, reimbursement of lost wages and costs.

[4] Allied Security says that Mr Spicer was employed on a casual employment agreement. It says that there was no guarantee of any minimum work hours and that he could accept or decline work offered as he wished. It does not accept that it dismissed Mr Spicer and says he remained on their books in which it was noted that he was no longer able to legally work with Allied Security in security roles as his Certificate of Authority expired on 27 May 2020. It says that he was provided with a safe workplace and the alleged bullying did not occur. Allied Security no longer maintains its initial view that some of the grievances were raised out of time.

[5] The parties attended mediation but were unable to resolve the employment relationship problems.

The issues

[6] The Authority needs to determine the following issues:

- (a) How did the relationship commence?
- (b) What are the material provisions in the employment agreement?
- (c) How did the relationship operate in practice?
- (d) What was the nature of the relationship?
- (e) Was Mr Spicer dismissed?
- (f) If there was a dismissal, was it unjustified?
- (g) Did Mr Spicer suffer disadvantage in his role, and if he did suffer disadvantage then was it unjustified?
- (h) Should he have been paid for training?

How did the relationship commence?

[7] Mr Spicer approached Allied Security by email dated 13 February 2020 looking for some regular casual work of 10-12 hours per week. That email was sent to the Dunedin Regional Manager Russ Whitaker. Mr Spicer then emailed Mr Black directly on 17 February 2020.

[8] Mr Spicer was interviewed by Mr Black on 19 February 2020. There was a discussion about the types of work that was available with Allied Security. The types of work included work on a Dunedin City Council street patrol project and any ad hoc work that would be assigned on a weekly basis. The street patrol work was of a seasonal nature from February until April and then from August to December. As a student Mr Spicer could only work to a maximum of 12 hours per week otherwise it would impact his student allowance. He refers in text messages to the need to bank hours over 12 hours. There was a discussion about how work could be offered by email in the Allied Security When2Work system and could be accepted or declined. That was an email system that offered work to casual employees, usually a week in advance.

What are the material provisions in the employment agreement?

[9] Mr Spicer was provided with a written employment agreement after the interview. He took it home and signed it on 20 February 2020 and in all likelihood scanned it back to Allied Security.

[10] The employment agreement provided that it was a casual individual employment agreement and the position was variable with a base rate of \$19 per hour.

[11] Clause 1 provides that the first month of employment is probationary.

[12] Clause 3 provides agreement not to do other work in competition unless written permission is provided.

[13] The hours of work, expectations and potential consequences of turning down work were set out materially as follows in clauses 4 to 6:

4. You will work as and when required with no fixed or guaranteed hours on any day.
5. You may decline to accept any particular offer of work but if you do so on more than two consecutive occasions or decline work regularly, we may after consultation with you end this employment agreement. You agree to notify us promptly if you are not able to do work that you have agreed to.
6. Just because we are sometimes able to offer you work on successive days or weeks does not mean that you should expect, or that we will provide, regular ongoing work.

7. We will pay you for each hour that you work at the rate of pay shown on the first page of this agreement. This rate applies whenever you work. We will pay you weekly by direct credit to a bank account nominated by you.

[14] Clause 14 provides that employment may be ended by the giving of one weeks' notice by either party.

[15] Clause 30 contains a restrictive covenant for a period of six months in the nature of restraint of trade, non-solicitation and not being employed by any current or former clients of the company unless agreed to.

[16] Clause 35 provided examples of behaviour that may justify dismissal.

[17] Clause 36 requires the employee to hold or obtain licences including a certificate of approval to be a responsible employee of a security guard.

[18] Clause 38 is headed termination by client and frustration of contract. It provides that Mr Spicer acknowledges that the client may request the employer to cease provision of the services of the employee at any time. If this occurs then Allied Security will act reasonably to find alternative work for Mr Spicer where practical. There may be agreement by either party to end the employment which if that occurred would be effective immediately. If there is no alternative work and no termination, that the employee will remain an employee and move to employment "on a causal basis" and may be offered work on a time by time arrangement. The employer will not be liable for any wage payments on termination. It provides that payment for wages is on a work performed basis and if no work is performed no payments will be made.

The relationship in practice

[19] Mr Spicer worked for five weeks for Allied Security.

First assignment involved three different types of work

[20] Mr Spicer's first shift on 21 February 2020 with Allied Security was guarding rubbish skips. He then undertook some work for another employer. Mr Spicer then returned to work for Allied Security at a concert event at Otago University on 22 February 2020 and started to work on the street patrol later in the evening of 22 February and into the early morning.

Grabbing and dragging?

[21] At the university concert event Mr Spicer was instructed to stand by a fire exit. His evidence was that he considered he had been relieved by a supervisor to leave the event and commence work with the street patrol. He went to leave the event. Mr Black then asked where he was going and Mr Spicer was required to return to the fire exit. He said in his oral evidence that Mr Black “for a moment” pulled him in the direction to go describing the time involved in the interaction as “one second.” The statement of problem and written evidence referred to grabbing and dragging in a broader manner.

[22] Mr Black denied that there was any physical touching by him of Mr Spicer. He said that Mr Spicer and his colleague had departed when he arrived at the site at 9.45 pm and had not advised anyone. He rang Mr Spicer and his colleague and asked them to return. They did and Mr Spicer was asked to return to his guard duty at the fire exit until he was told he could stand down which he recalled was about 1am. He said that Mr Spicer was compliant and there was no need to touch Mr Spicer.

[23] The Court of Appeal has described the standard of proof to be applied in employment proceedings as “the balance of probabilities flexibly applied according to the gravity of the matter”.¹ In making a finding of fact about what occurred at the university event I record that the allegation is a serious one akin to a technical assault. The Authority needs to be clearly satisfied on the balance of probabilities that what is alleged occurred.

[24] I accept that Mr Black was concerned that the fire exit remained unguarded and in all likelihood could have become angry. That has to be weighed with the undisputed evidence that Mr Spicer was compliant and returned to his post in front of the fire exit when asked. It is less likely in those circumstances that Mr Black would have needed to make physical contact and pull Mr Spicer even momentarily toward the fire exit. As Mr Black said in his evidence it was a busy venue and that type of behaviour by uniformed security would likely have been observed. Mr Spicer sent two text messages to Mr Black with routine inquiries during the evening after the alleged event and did not make mention of any incident. It was not referred to before Mr Spicer stopped undertaking work for Allied Security although he communicated fairly regularly with Mr Black over the short period he undertook work.

¹ *Whanganui College Board of Trustees v Lewis* [2000] 1 ERNZ 397 at [20].

[25] I do not find it established to the required standard that Mr Black grabbed and pulled Mr Spicer at the university event.

Further work carried out

[26] After that first weekend Mr Spicer worked on street patrol between 10 pm and 4am on 28 and 29 February, 6 and 7 March, 13 and 14 March and 20 and 21 March 2020.

[27] I am not satisfied aside from the first weekend when Mr Spicer worked 18 hours that he worked otherwise in excess of 12 hours each week. That conclusion is strengthened by the gross amount used to calculate the holiday pay.

Street patrol no longer operating and the text messages between Mr Spicer and Mr Black on 23 March 2020

[28] On 23 March 2020 Mr Black advised employees including Mr Spicer by email that he had “deleted street patrol with restart tbc.” The evidence established that the reason the street patrol was no longer operating was due to COVID 19. Mr Black asked that if the employees wanted alternative work to let him know. Mr Spicer emailed back the same day and asked for alternative work.

Alternative work discussed

[29] Later that day Mr Spicer sent messages to Mr Black. He advised that he had messaged Mr Whitaker that he was available for any shift that came up. He referred to needing to get paid for losing the street patrol shifts and that there was available government assistance for Allied Security.

[30] Mr Black advised that there was other work on day shifts. Whilst some work such as the street patrol and hospitality had stopped or decreased because of COVID 19 there had been an increase in supermarket work. Mr Black sent information about that work out to employees including Mr Spicer. Mr Spicer was positive about the work but indicated he could only walk to work. He asked to work at one supermarket however was advised that was already covered. Mr Spicer then asked to be put on one shift a week at another supermarket. It is likely from the text messages that followed that Mr Spicer was put on that day shift at the supermarket. Mr Spicer asked if the patrol could pick him up and take him home. Mr Black messaged that they may be able to and gave Mr Spicer the phone number.

Mr Black becomes frustrated

[31] Mr Spicer then messaged that “I will only be able to do it with a lift”. Mr Black responded “Okay I’ll take you off the shift. You are too painful”. Mr Spicer responded to Mr Black to keep him on standby and that he [Mr Black] knew what he could and could not do.

Text messaging continues 25 March 2020

[32] Mr Spicer messaged Mr Black on 25 March to ask about what a particular shift involved. Mr Black responded and explained. He said he would let Mr Spicer know if it was still available. Mr Spicer asked to be kept in the loop.

Work required to be within walking distance emphasised by Mr Spicer

[33] Mr Spicer messaged Mr Black on 27 March 2020 and asked him to let him know if anything comes up within walking distance and that he needed one shift to make up for lost street patrol shifts. Mr Black responded “Ok”.

Holiday pay request 28 March 2020

[34] On 28 March 2020 Mr Spicer sent a text message to Mr Black requesting his holiday pay be paid out. Mr Black advised by message that Mr Spicer would have to drop off his uniform as Allied Security do not pay holiday pay unless it is returned or a bond paid on it. He explained in his evidence that this was a requirement of casual employees as the uniforms cost \$350 and Mr Spicer had not paid a bond.

[35] Mr Spicer then asked Mr Black in a text message about financial assistance due to the lockdown. Mr Black responded that Mr Spicer had turned down work. Mr Spicer denied turning down work. Mr Black then messaged that Allied Security is an essential service and Mr Spicer is allowed to travel to work. In his evidence Mr Black explained that there was no wage subsidy available for Allied Security because turnover did not decrease as a result of forward contracts.

[36] Mr Spicer then messaged Mr Black and stated:

My DCC shifts have been removed. We had an agreement these were guaranteed shifts. Therefore the nature of the work was part-time. You are breaking the law.

[37] Mr Black replied: “Ok do not message me again. Drop off uniform.” Mr Black denied that he dismissed Mr Spicer. He said that he expected that Mr Spicer would communicate with Mr Whitaker or the other local manager.

Uniform returned

[38] On 7 April 2020, Mr Spicer handed in his uniform and the holiday pay was paid out.

Conversation with Mr Whitaker?

[39] In his evidence at the Authority investigation meeting Mr Spicer said that when he returned his uniform he spoke to Mr Whitaker and asked him if he had been dismissed. He said that Mr Whitaker responded “Damian doesn’t want you working here anymore”.

[40] There had been no reference to the conversation with Mr Whitaker in the statement of problem which was the first time the grievances’ were set out in any detail. In clause 2.4 of the statement of problem it was stated that the final text message from Mr Black on 28 March 2020 was when Mr Spicer understood that he was dismissed. When the statement in reply was lodged it stated that Allied Security did not accept that there was discussion about ending the relationship by either party. Further that Mr Spicer remained live in the payroll system and was able to apply for shifts. With knowledge of that view there was no reference to the conversation with Mr Whitaker in Mr Spicer’s original and reply statements of evidence.

[41] Mr Whitaker did not attend at the Authority investigation meeting. As part of its investigation after the meeting the Authority wrote to Mr Whitaker under s160 of the Employment Relations Act 2000 (the Act) and put the evidence to him for his response. It sent the communication with Mr Whitaker to Ms Suchley and Mr Williams.

[42] Mr Whitaker responded in writing. He wrote that he was not present when Mr Spicer returned his uniform and that he did not have the conversation that Mr Spicer said he did in his evidence. He stated that with his training about looking after staff he would “never say such a thing” even if he was told to by a manager.

[43] Ms Suchley responded and stated amongst other matter that Mr Whitaker is employed by Allied Security and that impacted on the reliability of his responses. Further she pointed

out that Mr Spicer disputed that he remained in the system so that he could access and accept offered work.

[44] There is a dispute about conversations when Mr Spicer returned his uniform. This requires the Authority to assess the reliability of Mr Spicer's evidence. The passage of time between the alleged conversation in early April 2020 and the investigation meeting is significant. What was said or written closer to the time becomes relevant in assessing reliability. There is less risk at that point of the memory fading and subconscious elements which may include adversarial bias coming into play. The fact that there was no mention of this conversation earlier when the grievances were raised, in the statement of problem or written statements of evidence does assume some significance about its reliability. Mr Spicer's original statement of evidence provides in paragraph 10 that it was Mr Black's text messages combined with no offer of further work with Allied Security that supported dismissal.

[45] I cannot be satisfied that Mr Whitaker made a statement to Mr Spicer that Mr Black did not want him working there any longer. Had he done so it is more likely than not it would have been referred to earlier in correspondence, pleadings and statements of evidence. Mr Whitaker did sign the employee uniform issue document attached to the statement of problem that Mr Spicer's uniform was returned on 7 April 2020. That may support that he was present on 7 April 2020 when Mr Spicer returned the uniform although equally he could have been advised that the uniform had been returned by someone else. I do not need to reach a conclusion about that.

What was the nature of the relationship?

[46] Determining the nature of the relationship in this case is important. If it was a casual relationship then there is no continuing obligation on Allied Security to offer Mr Spicer any further shifts or for Mr Spicer to accept any shifts offered. That is because with casual employment the employment relationship only exists during periods of work or engagement to work. In between times the parties have no obligations to each other. Whilst a casual employee could bring a personal grievance claim for dismissal that is limited to a situation where the employee was terminated during an engagement or period of work.

[47] *Jinkinson v Oceana Gold (NZ) Ltd* is a leading Employment Court judgment about casual employment.² In *Jinkinson* Judge Couch considered what was meant by the terms “casual”, “ongoing” or “permanent”. He stated that whatever the nature of the relationship the parties will have mutual obligations during periods of actual work or engagement. The distinction between casual employment and ongoing employment is in the extent to which there are mutual employment related obligations between periods of work. If the obligations only exist during periods of work then employment will be regarded as casual but mutual obligations which continue between periods of work mean there will be an ongoing employment relationship.³

[48] Ms Suchley submits that the nature of the relationship between Mr Spicer and Allied Security was permanent part-time and that he was not a casual employee. She places reliance on clauses in the employment agreement that she says are inconsistent with a casual employment relationship and create mutual on-going obligations. She also relies on the degree of regularity and continuity with the shifts Mr Spicer worked in the street patrols over five weekends and the fact that holiday pay was not paid as a component of each pay. Further she says that Mr Spicer was guaranteed a certain number of hours of work each week.

The employment agreement

[49] As Ms Suchley submits there are aspects of the employment agreement which are inconsistent with a causal employment agreement such as an agreement not to undertake other work in competition without written permission, restrictive covenants and a probationary period. Ms Suchley submits that at the end of the probation period Mr Spicer became a permanent employee. I do not find that submission persuasive. It is not as straightforward a matter as that. Holiday pay was not paid with each pay.

[50] There are aspects of the employment agreement that are consistent with a casual relationship in that there was no fixed or guaranteed hours on any day and that Mr Spicer would work as and when required. Further that he could decline work although there was reference to if this happens on two consecutive occasions or regularly after consultation the employment agreement may end. There was no expectation that Allied Security provide regular on-going work. Mr Spicer refers to an agreement reached that he was guaranteed the street patrol shifts

² *Jinkinson v Oceana Gold (NZ) Ltd* [2009] ERNZ 225.

³ Above n 2.

but that is not set out in the employment agreement. His position is referred to as “various”. Clause one of the employment agreement provides that the agreement replaces all previous employment arrangements.

[51] Viewed on its own I do not consider that the employment agreement supports to the required extent that the parties had mutual employment related obligations between engagements for employment of an ongoing nature. Those obligations have to be considered with the fact there was no obligation on Allied Security to provide work or on Mr Spicer to accept work, although potentially if work was declined regularly the agreement may end. The employment agreement did not provide guaranteed hours of work.

[52] It is necessary therefore to examine how the relationship worked in practice.

[53] There is a pattern with the work Mr Spicer accepted and undertook for four weekends with the street patrols. The first weekend was different because Mr Spicer worked three different security roles. Two of the roles were related to university student events that take place at the start of the student university year. Over the next four weekends Mr Spicer worked 12 hours each week on Friday and Saturday nights between 10 pm and 4pm. More hours than that would affect his student allowance and he made it known that he preferred night shifts. Mr Spicer was offered shifts by email each week and could accept or decline those shifts.

[54] It is likely as Mr Black said in his evidence that Mr Spicer was offered more shifts during the five weeks but chose not to accept them. Mr Spicer advised in a text message to Mr Black that it would be best to have the night off on 27 March for his brother’s wedding. There was no evidence to support formal leave applications were required. Mr Spicer expressed an interest in security patrol work and stated in a text message he would be happy to swap his 12 hours a week for once a week on patrol. That is not inconsistent with a level of flexibility usually found with casual work.

[55] Whilst there was an element of regularity with the street patrol work Mr Spicer said in evidence that he was aware that the street patrols finished in April and resumed in August. There was then the impact of COVID 19 and the street patrols ended in March rather than April. Mr Spicer said in his evidence that he considered that Allied Security had an obligation after April to offer him other work for a similar number of hours each week. Allied Security advised that there was work available in supermarkets.

[56] The evidence supported that when Mr Spicer was offered supermarket work in March he did not accept it unconditionally but only if he could get a lift to work because the distance to the supermarket was too far to walk. Mr Spicer made inquiries with Mr Black about other potential work. The text messages support that Mr Spicer did not consider he was obliged to accept all work offered.

[57] The Authority has only had a limited period of five weeks work to consider with a different pattern for the first week. There is the additional element that whilst for four weeks there was a degree of regularity the street patrols were always going to end in April 2020.

[58] In *Jinkinson* the Employment Court was able to analyse and reach a view about shift patterns undertaken for 19 months where the employee worked extensively and consistently an average of 45 hours per week, had her performance assessed, was promoted and paid notice. The only time she did not work was when she was on leave. Judge Couch was able to conclude that the pattern of work was “consistent and highly predictable”. He concluded that because of these factors Ms Jinkinson was after a reasonable period entitled to have a legitimate expectation of continuing employment. The obligation on her employer to provide her with work on an ongoing basis arose, it was found, within a matter of months and well before the end of the 19 months period. He concluded that in reality the employment arrangement which was for work “as and when required” was abandoned in favour of an ongoing employment relationship.

[59] I am not satisfied from the evidence about the short period of this relationship that when examined its real nature was different to what was described in the employment agreement. I do not find there was a legitimate expectation of ongoing employment. At the time that the Authority is asked to consider after 21 March 2020 I conclude that this was a casual employment relationship with work as and when required with no fixed or guaranteed hours. I am not satisfied that the parties had mutual employment obligations between periods of work.

[60] Mr Spicer was a casual employee and there was no continuing obligation on Allied Security to provide him with work. It was unfortunate in this case that there wasn't further communication about any other possible work by either party. Mr Spicer concluded he had been treated badly and unfairly and this was exacerbated when he could not find other casual work. He concluded that Mr Black had been “bad mouthing” him. Mr Black denied doing that and there was no evidence before the Authority to support that occurred. Mr Spicer complained

on social media about Allied Security. He was entitled to do that but I cannot rule out the possibility that prospective employers could have been influenced by that.

[61] From a legal perspective once Mr Spicer's last engagement and period of work had ended and he had not accepted new work there was no ongoing employment relationship and no ongoing legal obligations. Mr Spicer was not dismissed when he was not offered more casual work.

[62] I do not find that Mr Spicer has made out his claim of unjustified dismissal.

Unjustified disadvantage

Interactions with Mr Black

[63] The evidence supported that it was unusual for a casual employee to have the level of interaction that Mr Spicer had with Mr Black. Mr Black was the managing director of a company that operated in New Zealand and Australian businesses with a considerable number of employees. Ordinarily most communication about work could be expected to be undertaken with Mr Whitaker or the other local manager. Referring to Mr Spicer as painful was unfortunate. Mr Black said it was a comment made in the context of assessing availability for work. He understood that Mr Spicer would perform the supermarket work and rostered him. Mr Spicer then said he could only do it with a lift and he had to change things. Mr Black said that he became frustrated.

[64] Not every unwise word forms the basis of an unjustified disadvantage claim. All employment relationships have interactions that are not perfect from time to time. The object of the Act is to reduce the need for judicial intervention and parties are encouraged to communicate and resolve as much as possible themselves. I do not find objectively assessed that the evidence establishes Mr Spicer was subjected to repeated behaviour by Mr Black of a bullying nature. I have not found as a fact that Mr Black physically grabbed and pulled Mr Spicer on his first evening of work. No grievance is established on the basis that Mr Spicer was subjected to bullying from Mr Black.

*Health and safety**Beanies*

[65] The text messages show Mr Spicer asking on two occasions about Allied Security beanies. He was told Allied Security did not have beanies. He asked again on another occasion about them and was advised there were only caps. When he was told he could wear one on the street patrol he responded “Cool, I was given one. On skip shift”. The evidence does not persuade me that the failure by Allied Security to provide a beanie was a breach of health and safety obligations. A cap was provided which would have provided some warmth. No grievance is established on that basis.

Stab proof vest

[66] Mr Spicer thought stab proof vests may be appropriate. Allied Security does not provide stab proof vests to any of its employees. The evidence supported that if an incident arose on street patrol of any significance then the police are contacted. I am not persuaded that the failure to provide stab proof vests was a breach of the health and safety requirements even if Mr Spicer thought it was a good idea to have one.

Not paid for training

[67] Mr Spicer asked on several occasions to be trained up for security patrol and said in his evidence that he did attend for a shift in which he sat and observed with the patrol. He was not paid for this. Mr Spicer was advised in advance of undertaking the training in a text message that he would not be paid as there was no work. Mr Spicer responded “OK”. Mr Spicer put forward a counter proposal to wipe the balance owing for the certificate of approval that he had consented in writing to it being deducted. The text messages do not support that his proposal was agreed to. Further by the time the training was undertaken it is likely that the final payment had been deducted. The Authority is not minded to revisit the understanding that the patrol training would not be paid. The circumstances were that Mr Spicer initiated the possibility of training and he knew in advance that he would not be paid and accepted that.

Conclusion

[68] Mr Spicer has not made out any of his grievance claim for unjustified dismissal or disadvantage or his claim to be paid for training. Unfortunately there is nothing further the Authority can do to assist him.

Costs

[69] I reserve the issue of costs. If costs are not resolved Mr Williams is lodge and serve submission as to costs by 8 February 2022 and Ms Suchley has until 22 February 2022 to lodge and serve submissions as to costs in reply.

Helen Doyle
Member of the Employment Relations Authority