Determination Number: AA 62/06
File Number: AEA 780/05

Under the Employment Relations Act 2000

BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE

BETWEEN	William Tuhega (Applicant)
AND	PR Security Limited (Respondent)
REPRESENTATIVES	Sarah Bush, for Applicant Rick Greer, for Respondent
MEMBER OF AUTHORITY	Janet Scott
INVESTIGATION MEETING	23 February 2006
DATE OF DETERMINATION	6 March 2006

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

Mr Tuhega submits he was unjustifiably dismissed from his employment. To remedy his alleged grievance he seeks lost remuneration and compensation pursuant to s. 123 of the Act.

The respondent denies that Mr Tuhega was dismissed. It submits Mr Tuhega was a casual employee who was not offered further security work.

Background

The respondent provides security guards to guard retail establishments. Mr Tuhega had some years experience in this work and on 5 November 2004 he applied for a position with the company. On 13 November he was rung and asked to start work immediately. He did not have a current security licence and when he advised this he was told that it did not matter. He was issued with a uniform and commenced work that day. Mr Tuhega was not provided with a written employment agreement. Neither was there discussion and agreement on his terms of employment. He did not go through an induction process and nor did he receive training.

Mr Tuhega worked for the respondent over three weeks on nine days. The respondent apparently received three complaints about Mr Tuhega albeit he was not advised of this.

On 23 November the applicant was working at Countdown, Mt Wellington. His son came to the site and remained there. This is not acceptable practice in the industry and a company supervisor reported the fact that Mr Tuhega's son was on site with him and wearing an item of company uniform while Mr Tuhega was wearing a non-uniform jacket.

25 November was the last date that Mr Tuhega worked for PR Security Ltd. On 26 November he had telephone conversation with Ms Waru (Operations Manager). The parties dispute the details of

this and subsequent conversations but what is clear is that Mr Tuhega returned his uniform and did not work for the company again.

The Position of the Parties

Position of the Applicant

It is Mr Tuhega's position that his employment was permanent. At no time was he informed otherwise. He also submits that he was given no notice of any concerns relating to his employment. Nor was he given any opportunity to meet with the respondent to address any complaints received. Mr Tuhega accepts his son came to the workplace on the night of 23 November. He came to bring Mr Tuhega some food. Mr Tuhega asked a Countdown manager if his son could remain on site with him and permission was given. Mr Tuhega wanted his son to observe him in his duties.

Mr Tuhega said that Rose Waru rang him on the morning of 26 November. She inquired about his son being at Countdown and was angry that he had been there. She said his son had been wearing the PR uniform. Mr Tuhega denies this. Mr Tuhega's phone failed and he rang her the next day. He apologised for having his son at the site. Ms Waru would not listen. He was told he was fired and that he was to return his uniform.

Mr Tuhega said he asked for more work. However, when he was told that he would not be paid until he had returned his uniform he returned it on 8 December. Even then he did not get paid. It was only after he threatened to involve the Labour Dept that he was paid.

Respondent's Position

The respondent admits that Mr Tuhega was employed to fill a gap in an emergency situation and at an extremely busy time of year. It accepts that no employment agreement was given to Mr Tuhega. It also accepts that no terms and conditions were discussed with him prior to sending him out on his first job or thereafter.

The respondent's evidence on a number of points is contradictory. On the one hand it is the position of the respondent that Mr Tuhega was employed as a casual worker. On the other hand it was submitted in oral evidence that the company rarely employs casuals and would expect that someone with Mr Tuhega's experience would have been employed as a permanent employee. It is also the case that the company's own brief describes Mr Tuhega as a permanent part-time security officer (20 March response to Mr France's submission of grievance Pt 7).

In her evidence Ms Waru said that Mr Tuhega was not dismissed but that she told him he would not get any more work until he had come into the office to see her to sort out the issue of his son having been on the job – which was unacceptable to the employer. He was told that if he was not coming in to talk about it then he should return his uniform. Mr Greer, on the other hand, said that the company received three complaints about Mr Tuhega and while they do take people on and train them he thought from Mr Tuhega's resume that he was experienced. He said they were busy and he decided "we didn't have time to muck about with this".

Mr Greer also submitted that Mr Tuhega had signed the application form which stated:

"If employed, I understand that I will be on a three month trial and could be dismissed without notice, if standards are not met".

It is also the respondent's position that a security supervisor reported that Mr Tuhega's son was on site at Countdown Mt Wellington on the night of 23 November. That supervisor reported that Mr Tuhega was wearing a non - uniform jacket and his son was wearing a company jumper. Mr Tuhega told the supervisor his son was with him because there was no one at home to watch him. The next day there was a complaint from Countdown about Mr Tuhega not wearing security uniform. When asked about his son being on site the Countdown manager agreed a night supervisor had given permission but this was because the supervisor thought that the young man was going to be employed by PR Security Ltd.

The respondent's position is that it had received three complaints about Mr Tuhega's performance from clients who did not want him back on their sites. All their work is in public retail locations and they had no other workplaces they could send him.

The respondent accepts that the complaints received about Mr Tuhega's performance were not raised with him with a view to hearing any explanation from him.

Legal Framework

If I decide as a matter of fact that Mr Tuhega was as permanent employee and that he was dismissed, then I must go on to decide whether the decision to dismiss Mr Tuhega one that a reasonable and fair employer could have taken in the circumstances? (*W & H Newspapers Ltd v Oram* [2002] 2 ERNZ 448).

It is convenient in determining whether or not the employer has acted fairly and reasonably in all the circumstances to consider whether it had ***good reasons*** for the actions it took in respect of Mr Tuhega's employment and ***whether he was treated fairly in the process.*** Demonstrating the following steps were taken is essential to showing that a dismissal is justified.

Investigation: the employer must carry out a full investigation of all the relevant facts before actually terminating the employee and the result of such an investigation should be communicated to the employee. The investigation carried out by the employer must be fair and thorough and sufficient to allow the employer to arrive at a reasonable belief that misconduct or poor performance exists such that dismissal is warranted. *Airline Stewards and Hostesses (NZ) IUOW v Air New Zealand Ltd* [1990] 3 NZILR 797. No investigation will be thorough and complete without inquiry of the worker.

Warning*:* The employer must warn the employee in relation to any misconduct or poor performance. The employee must be advised his or her job is on the line if there is no improvement in conduct or performance and the employee must be given sufficient time to show improvement. Where poor performance is an issue the respondent must provide the training necessary to enable the employee to reach the required standard of performance.

Opportunity to be heard: Before the dismissal is effected the employee must be provided with a real opportunity to be heard and to offer an explanation to the allegations made. The worker should be advised of their right to representation and notice to the employee should advise how seriously the allegations are viewed and if the worker's employment could be in jeopardy. An opportunity to be heard also requires that serious consideration will be given to the worker's explanations. That consideration must be free from bias and predetermination.

Reasons: Reasons for the dismissal must be given to the employee before the dismissal is effected and it is only the reasons given at the time of the dismissal that may be subsequently relied on to justify the dismissal.

Issues to be Decided

- Was Mr Tuhega a casual worker or a permanent part time worker?
- Was Mr Tuhega dismissed?
- Did the respondent carry out a thorough and fair inquiry that disclosed conduct capable of being regarded as serious misconduct?
- Was dismissal an option open to the respondent based on the inquiry conducted and having regard to what a fair and reasonable employer would do in all the circumstances?

Discussion and Findings

Section 64 of the Employment Relations Act provides that individual employment agreements must be recorded in writing.

There was no written agreement between these parties. Mr Tuhega applied for a job on 5 November 2004 and on 13 November he was telephoned and offered work commencing immediately. There was no discussion of terms whatsoever. However, it certain a contract was formed because Mr Tuhega performed work when requested and was paid for that work.

The respondent relies on an agreement (signed only by Ms Waru and presented at mediation after the employment had ended) which purports to describe Mr Tuhega as an on call casual worker as proof of its position.

Certainly Mr Tuhega's services were utilized at short notice to fill gaps that appeared in the company's roster. To that extent the work performed resembled casual employment but for me to find that Mr Tuhega was a casual employer I would need to be satisfied that that was what was agreed between the parties. The agreement presented after the event does not satisfy this test especially given that it is not disputed that there was no discussion/agreement between the parties either before or during Mr Tuhega's employment in relation to the terms and conditions that would govern the relationship. My finding in this matter is also influenced by the respondent's contradictory evidence that it rarely engages casuals and its own documentation that describes Mr Tuhega as a permanent part-timer. I find then, having regard to all the evidence, that Mr Tuhega was a permanent part-time employee.

As a permanent employee it was not open to the employer to simply cease offering work to Mr Tuhega. I find, in any event, this was not a case where the employer ceased to offer work to an employee. Mr Tuhega was explicitly dismissed from his employment and told to return his uniform.

It is clear too that the respondent relied, to justify its actions, on the statement contained in the application form that an employee on trial could be dismissed without notice *if standards are not met*. To this extent the respondent has the erroneous view that less stringent obligations of fairness apply to those who are on a trial period. Section 67 of the Act makes provision for trial periods and it stipulates that they must be specified in writing. Essentially, however this legislative provision

codifies the position that had already developed through case law under the Employment Contracts Act 1991. The case law as it developed requires employers to supervise and review a probationer's performance, communicate any concerns to the probationary worker, give fair warning that the employment will not be made permanent if the required performance standards are not meet and a reasonable opportunity for improvement must be allowed. In short these requirements are the same as those that apply to any worker – probationer or permanent – in the management of performance concerns.[1]

The problem with this dismissal is that was conceived and carried out in a manner that was completely inconsistent with the rules of natural justice (procedural fairness). The employer carried out no inquiry whatsoever into the complaints it received about Mr Tuhega. There being no full and fair inquiry it was just not possible for the respondent to arrive at a genuine belief, honestly held that there had been misconduct by Mr Tuhega that justified his dismissal. The failure to carry out any inquiry was compounded by the failure to put the worker on notice of the allegation(s) against him (including notice of the seriousness with which those allegations were viewed), the failure to allow him the opportunity to obtain representation and the failure to allow him the opportunity to explain/refute the allegation(s).

It needs to be added too, that the complaints about Mr Tuhega not wearing his security uniform would not give grounds to dismiss him unless he had been counselled/ warned about this and had reoffended in the face of warnings that he was to wear his uniform at all times. The complaint that Mr Tuhega had his son on the job may have been more serious as the evidence shows that Mr Tuhega knew, from his experience in the industry, this was not an acceptable practice. However, the respondent could not exercise the option to dismiss Mr Tuhega without a full and fair enquiry that revealed that Mr Tuhega's actions did indeed amount to serious misconduct and after having regard to how it treated other employees who infringed against company rules in this way.

Determination

Mr Tuhega was unjustifiably dismissed and he has a personal grievance against his former employer PR Security Ltd.

Remedies

S.124 of the Act dictates that I consider the extent to which (if at all) the worker contributed to the events that gave rise to the personal grievance.

The uniform issues would not in themselves ever have justified dismissal without having first put Mr Tuhega on clear notice that he would be dismissed if he did not wear the uniform in a visible manner whilst on the job. In relation to the matter of Mr Tuhega's son being on the job the evidence shows that Mr Tuhega is an experienced security officer and he knew from industry experience that it was unacceptable to have family members present on site. However, he did seek and receive permission from the Night Supervisor at Countdown and this would have needed to have been weighed in the mix along with other matters that were revealed on any inquiry into the events of that night. These and other important issues (e.g. the question of who was wearing the company uniform that night) should have been examined in an inquiry conducted by the employer prior to coming to any decision that dismissal was justified in all the circumstances. No inquiry was

[1] I note for the record that an amendment to the Act in 2004 has strengthened the law relating to trial/probationary periods. If they are not specified in writing the employer may not rely on any such agreed terms and the employment may become permanent. (Section 28 of the Employment Relations Amendment Act (No.2) 2004 effective 1 December[1]).

conducted and these issues remain unanswered. That being the case I am unable to say with any confidence that Mr Tuhega contributed to the events that gave rise to his dismissal.

Lost Remuneration

I direct the respondent to pay to Mr Tuhega 13 weeks lost remuneration ($3,193 gross).

Compensation pursuant to s.123(1)(c)(i)

This dismissal has clearly affected the applicant. The applicant did not understand why he was summarily dismissal and it has left him upset and bewildered. That is understandable. The decision to dismiss Mr Tuhega was fundamentally flawed and the process was profoundly unfair.

In all the circumstances I direct the employer to pay Mr Tuhega $5,000 net under this head.

Holiday Pay

Mr Tuhega never received his holiday pay. ***By consent I direct that Mr Tuhega be paid his holiday pay i.e. $43.14 gross - being 6% of his total earnings.***

Claim for a penalty

The applicant seeks a penalty in respect of the respondent's failure to provide a written employment agreement. In all the circumstances and having regard to the fact the employer now recognises its obligations in this regard and has taken steps to comply with the law I decline to award the penalty sought.

Costs

Costs are reserved. The parties are directed to file and serve submissions on the subject and the matter will be determined

Janet Scott
Member of Employment Relations Authority