

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI
TE WHANGANUI-Ā-TARA ROHE**

[2019] NZERA 586
3032371

BETWEEN

OPETAIA SIALE
Applicant

AND

PROFESSIONAL PROPERTY
AND CLEANING SERVICES
LIMITED
Respondent

Member of Authority: Michele Ryan

Representatives: Simon Meikle, counsel for the Applicant
Guido Ballara, counsel the Respondent

Investigation Meeting: 12 March 2019 at Wellington

Submissions Received: On or 20 March 2019 from the Applicant
On or by 31 March 2019 from the Respondent

Date of Determination: 11 October 2019

DETERMINATION OF THE AUTHORITY

[1] There is a permanent order prohibiting publication of the identity of the respondent's clients referred to in the course of the Authority's investigation.

Employment Relationship Problem

[2] Mr Opetaiia Siale was employed by Professional Property and Cleaning Services Limited (PPL) as a cleaner for almost 5 years.

[3] Over the course of the second half of his employment Mr Siale worked exclusively on sites operated by a PPL client, who I have referred to as DPR in this determination.

[4] On 12 April 2018 DPR sought to revoke Mr Siale's access to its sites and PPL agreed to withdraw him from working at DPR's locations.

[5] Mr Siale says he was given no opportunity to comment on the issue of his exclusion before it was made. He says his dismissal was therefore unjustified and further, that he was unjustifiably disadvantaged when he was suspended. He asks the Authority to reinstate him to his position and award him lost wages, compensation, and costs.

[6] PPL rejects Mr Siale's claims.

The Authority's Investigation Meeting

[7] The Authority's investigation into Mr Siale's claims was heard over a full day. It has not been necessary to set out every factual dispute between the parties or all the material provided. As is permitted by s 174 of the Employment Relations Act (2000) this determination states findings of fact and law necessary to dispose of Mr Siale's claims. This determination has been issued outside the timeframe set out at s 174C(b) where the Chief of the Authority has decided exceptional circumstances exist.¹

[8] Mr Siale and Ms Kim Ellis, an organiser for E tū Incorporated, provided written and oral evidence to the Authority as did several individuals on behalf of PPL, including Mr Andrew Ho, the sole director of PPL; Mr Paul Williams, and Mr Andre Reynolds. A further witness provided evidence to the Authority concerning his convictions whilst working for PPL.

Summary of background information

[9] In 2001 Mr Siale was convicted of common assault and wilful damage for which he undertook a community based sentence. When he began working for PPL in mid-2013, the conviction was covered under the Criminal Records (Clean Slate) Act 2004 and he was not obliged to disclose the matter.

[10] In August 2015 Mr Siale assaulted a person employed by a different cleaning company whilst working at the site of one of PPL's clients. The client requested Mr Siale be excluded from its premises. PPL appears to have accepted Mr Siale's explanation that he was provoked, and issued him with a final written warning. PPL subsequently placed Mr Siale

¹ Pursuant to s 174C(4)

with DPR. The following year, on 9 May 2016 Mr Siale was convicted of ‘Assault with Intent to Injure’ in connection with the August 2015 incident.

[11] In August 2017 PPL was awarded a services contract with DPR having previously obtained the work as a subcontractor.

[12] Clause 11.2 of the contract set out a process by which PPL was to remove an employee from DPR worksites if DPR reasonably considered the employee did not meet its requirements. PPL was also required to obtain criminal convictions reports from the Ministry of Justice (colloquially known as an ‘MOJ’ or ‘police’ check) for those of its employees working on DPR sites, which were satisfactory to DPR. Mr Siale accepts he was reluctant to give his consent to allow PPL to obtain information about his convictions.

[13] On 13 October 2017 PPL received a copy of Mr Siale’s MOJ check which revealed both convictions.² Mr Siale says PPL already knew of the second conviction whereas PPL says it was unaware of it until it received the Conviction Report.

[14] In early November 2017 PPL forwarded Mr Siale’s MOJ check to DPR. DPR responded by email with the following:

... As the latest conviction is quite recent and of a serious and violent nature the next step is for PPL to provide DPR with a risk assessment.

This should include but not be limited to:
The location and type of work this person is doing.
The risk potential in that environment.
Any other factors that may add risk.

[15] PPL began making arrangements to obtain a risk assessment. A formal request was eventually made to a psychological services provider in mid-February 2018. There is no evidence that the MOJ check accompanied the referral.

[16] Mr Siale underwent a psychological assessment on 22 February 2018. He was advanced a draft of the psychologist’s assessment report for comment shortly after.

[17] On 1 March 2018 PPL received a final copy of the report. Notably the psychologist’s report referred only to the “*single*” event of 2015. In the report’s conclusion, the

² The protection afforded to the first conviction was lost once Mr Siale was convicted for a second time.

psychologist noted Mr Siale's completion of the community sentence without incident, his apology to the victim, and various references furnished by referees. He advised:

In the absence of any other reports to the contrary ... this assessor is of the opinion that Mr Siale does not currently pose a risk to the public and has shown in vitro evidence of his ability to management situations of public abuse appropriately.

[18] The report was promptly forwarded to DPR. On 2 March 2018 DPR wrote PPL in fairly strong terms and expressed its dissatisfaction with the psychology report. DPR observed the report made no reference Mr Siale's first conviction and questioned whether an assessment as to risk could therefore have been properly made.

[19] PPL advised DPR that it would return to the psychologist to have the assessment report take into account the first conviction and an event involving Mr Siale which had occurred subsequent to the initial referral. On 5 March 2018 PPL forwarded a copy of the MOJ check to the services from which it obtained the report and advised it contained inaccuracies. The essence of the response PPL received was that the additional information was outside the parameters agreed and consented to at the time the assessment was undertaken.

[20] PPL accepts it took no further action in obtaining a risk assessment regarding Mr Siale. I shall return to this matter.

[21] In a letter dated on 9 April 2018 DPR notified PPL of its intention to invoke the provision within the services contract to have Mr Siale removed from its sites. DPR requested PPCS meet with it to discuss the issue the following week.

[22] On 10 April 2018, PPL Operations Manager, Mr Paul Williams, contacted Mr Siale to arrange a meeting to discuss PPL's correspondence. Mr Siale was unwilling to meet with PPL until he received formal written notification of a meeting. A letter to that effect was given to him on 12 April 2018. Mr Siale was asked to attend a meeting on 17 April 2018 "*... to discuss a serious matter brought to our attention by DPR*".

[23] Concurrently, the director of PPL, Mr Andrew Ho, met with DPR on 12 April 2018. His evidence is that the DPR remained concerned about Mr Siale's convictions and unhappy with the psychologist's evaluation concerning potential risk. Mr Ho says he was asked to

remove Mr Siale from DPR sites, to which he agreed, effective immediately. PPL confirmed in writing the following day that Mr Siale had been “officially stood down”.

[24] In or around this time PPL appointed an external HR consultant, Mr Andre Reynolds, to communicate with Mr Siale and his representative on this matter. In the early evening of 12 April 2018 Mr Reynolds contacted Mr Siale’s union representative, Ms Kim Ellis. The material portion of the email states:

... PPL was aiming to hold a meeting with Opetaiia to discuss with him their proposal to suspend him on full pay whilst they look into a matter. They wanted his views on that, and I now ask for your comments in this regard ...

If you are unable to respond before Opetaiia’s next normal shift, kindly note with him that he is not to report to DPR for work, but rather to the PPL office.

[25] There is evidence that the pair subsequently spoke on the phone. In an email sent at 8.54 pm Ms Ellis advised:

Thanks for the chat tonight, you have provided no further information “other than what is in your email ...” to give us reason to agree to Ope being suspended. On that note we do not agree to this suspension.

I’d like to make a point that if you want to suspend someone from working at a site their (sic) needs to be a vailed (sic) reason.

[26] At 9.21 pm by email Mr Reynolds advised Ms Ellis that Mr Siale was “*suspended on pay for up to one week so that PPL can consider the matter further.*” Mr Siale alleges his suspension was procedurally flawed and he was unjustifiably disadvantaged as a consequence.

[27] Mr Reynolds says he and Mr Ho had discussed whether Mr Siale could be placed on another site but that his convictions were an impediment to finding alternative placement where PPL clients required satisfactory MOJ checks. They further canvassed whether PPL could deploy Mr Siale in a role working directly for it, but they concluded PPL had no identifiable need and the idea was ultimately discarded.

[28] The parties met on 20 March 2018. Mr Reynold’s advised Mr Siale’s exclusion from DPR site left PPL in a situation akin to a technical redundancy. Ms Ellis confirmed she would seek advice on the matter but that the union wished to speak directly to DPR on the matter. Mr Siale was asked to consider whether there was any alterative work he could do.

[29] As it transpires, Ms Ellis did contact DPR seeking to present Mr Siale's position, but that it advised it did not wish to be involved as the matter was an employment issue between PPL and Mr Siale.

[30] On 1 May further discussions were held between Ms Ellis and Mr Reynolds. On 2 May Mr Reynolds advised Ms Ellis that in the absence of any feasible employment alternatives for Mr Siale, PPL had formed a concluded view that his employment would be terminated on one week's notice. It says Ms Ellis agreed with that outcome.

[31] The parties have been unable to resolve their differences and it is left to the Authority to determine the matter.

Discussion

[32] Section 103A of the Employment Relations Act requires the Authority to determine whether a dismissal or an action was justifiable by considering on an objective basis:

... whether the employer's actions and how the employer acted were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred.

[33] In practical terms the inquiry involves an examination not only as to whether there were reasonable grounds on which to dismiss the employee, but also whether the employer complied with procedural fairness when it dismissed the employee. Section 103A(3) sets out a range of procedural matters the Authority must consider. Relevant to this case these include whether the employer raised the concerns and gave the employee a reasonable opportunity to respond to these before taking action or dismissal. The inquiry must also be informed by considerations of good faith.

[34] Cases in the Authority have often recognised the difficult position employers (and employees) may be faced with when a third party advises the employer that it does not want the employer's employee performing work for it.³ In *Workforce Development Ltd v Hill*,⁴ Judge Inglis (as she was then) acknowledged that the obligations at s 103A(3) did not sit comfortably with circumstances where it is the third party's concerns and actions that prevent the employee from performing the work.⁵ Nevertheless, the focus of the law remains on

³ See for example *Peary v ME & SE Jones Transport Ltd* AA 461/05

⁴ [2014] NZEmpC 174

⁵ Above at [32]

assessing whether the employer's actions were what a fair and reasonable employer could have done at the time they occurred.

[35] No argument was put before the Authority that DPR's request and PPL's agreement to obtain a risk assessment in respect of Mr Siale was unreasonable. It is clear from the evidence that Mr Siale was, at least initially, resistant to this approach but that he ultimately agreed to the demand.

[36] In terms of justifying its actions, the difficulty for PPL centres on what it did when it became aware the psychologist's report was unacceptable to DPR.

[37] In evidence, Mr Williams, agreed he did not make arrangements to have Mr Siale undertake a further risk assessment. He says this is because it had been a struggle to get Mr Siale to agree to the first assessment and he decided, therefore, against asking him to attend another. Mr Williams conceded that PPL then "*just sat on it for a while*". I understand from this evidence that nothing further was done by PPL in response to DPR's concerns. The failure is problematic in several ways.

[38] Firstly, PPL had a statutory good faith obligation to be responsive and communicative with Mr Siale and not, whether directly or indirectly, do anything to mislead or deceive. Its failure to notify Mr Siale of DPR's dissatisfaction about the risk assessment in a timely manner created a false assurance for him that the risk assessment report had been satisfactory to DPR.

[39] Next, it is clear the discussion between PPL and DPR on 12 April 2018 regarding DPR's intention to invoke Mr Siale's removal from its sites occurred earlier than PPL anticipated. However, having entered the discussion, PPL could be expected to demonstrate the implied duty of trust and confidence between it and Mr Siale and do all it could reasonably do to preserve Mr Siale's role on DPR worksites. Unfortunately there is no evidence that PPL sought to dissuade DPR from its approach at this juncture. Instead it acquiesced to DPR's demand.

[40] Whilst I have no doubt that PPL found itself divided between seeking to satisfy DPR's concerns and its obligations to Mr Siale, I do not accept it had no choice in the matter. In *G & H Trade Training Limited v Crewther*:⁶

“There is almost always a choice. The third party can be made to understand that employees have statutory rights and employers have liabilities to employees and cannot simply bow to demands”.

[41] PPL's decision to defer to DPR amounted to a significant breach of its employment obligations to Mr Siale. At a minimum, PPL should have refrained from making a commitment to DPR to remove Mr Siale from its sites until Mr Siale had been given an opportunity to comment on DPR's concerns and intentions. As noted in *Charles v Waitakere City Council*⁷ such opportunities are inherent to the duties of fair dealing implied into the parties' employment agreement, and PPL's statutory obligation to act in good faith.

[42] I accept PPL genuinely considered alternative placement for Mr Siale subsequent to its agreement with DPR. But the failure to provide Mr Siale with an opportunity to convey his position and/or agree to a means to satisfy DPR's concerns before PPL agreed to withdraw him from DPR, were not the actions of a fair and reasonable employer in all the circumstances. The failure was not minor. Mr Siale was treated unfairly, particularly where it was foreseeable the omission would inevitably lead to Mr Siale's dismissal, as it did.

[43] It follows that I must find Mr Siale's dismissal was unjustified. On this point I reject the assertion that Mr Siale's claim of an unjustified dismissal is estopped on the basis of Ms Ellis' comment (which is denied in any event) to Mr Reynolds immediately prior to PPL's notification of dismissal. If any concession was in fact made, it can have been no more than an acknowledgment that there was likely no suitable alternative work placement available for Mr Siale. I am not at all persuaded that Ms Ellis agreed to forfeit Mr Siale's right to bring a claim in respect of the termination of his employment, or that PPL relied on the statement as justification for the dismissal.

Was Mr Siale unjustifiably disadvantaged when he was suspended?

[44] I am not persuaded that Mr Siale, through his representative, Ms Ellis, was not given an opportunity to comment on the proposal to suspend. At issue is whether PPL through Mr

⁶ [200] 1 ERNZ 513 (EC, Goddard CJ) at [42]
⁷ 19 November 2007, AA 362/07 at [52].

Reynolds, provided sufficient information for Ms Ellis to be able to properly respond to the proposal.

[45] Mr Reynolds and Ms Ellis both provided written evidence and answered questions as to what communicated between them in the telephone call following Mr Reynold's introductory email setting out PPL's proposal.

[46] It is not necessary to make credibility findings as to whose version of the telephone call should be preferred. This is because Ms Ellis' email to Mr Reynolds, sent shortly after the call, registers her uncertainty as to the basis for PPL's proposal. Mr Reynolds reply, to the effect that consultation on the matter did not require agreement, is correct as a statement of law, but it was unwise to proceed to suspend Mr Siale in the circumstances. Without ensuring Ms Ellis was sufficiently informed of PPL's reasons for suspension, and to provide her with further information to that end, I find the procedure to suspend was not the action of a fair and reasonable employer. I accept Mr Siale's evidence that he wanted to go to work and was unaware why he could not. Mr Siale was unjustifiably disadvantaged in this way.

Remedies

[47] Mr Siale had established his claims of unjustified disadvantage and unjustified dismissal and is entitled to remedies.

Reinstatement

[48] Mr Siale requests to be reinstated to his position with PPL. Section 125(2) allows the Authority to order an employee to be reinstated wherever "*practicable and reasonable*".

[49] Evidence given by Mr Ho was that all of PPL's clients require it to have staff undertake MOJ checks and that its clients have the ability to require PPL to remove an employee from their sites. Mr Ho says in his experience the requirement is an industry standard. I was not provided with independent data to confirm the assertion but I note Mr Siale's testimony that his application for a cleaning position with another company was declined on the basis of his convictions. That evidence tends to confirm the industry practice asserted by PPL.

[50] On balance I am not persuaded an order to reinstate Mr Siale is practicable and reasonable where there is no certainty PPL will be able to place him with any of its clients. Mr Siale's application for reinstatement is declined.

Lost remuneration

[51] Section 123(1)(b) provides that an employee may be reimbursed a sum equal to the whole or any part of the wages or other money lost by the employee "*as a result of the grievance*".

[52] Mr Siale seeks \$9,454.31 in lost wages.

[53] The evidence concerning Mr Siale's efforts to mitigate his loss of wages was not strong, albeit I accept he applied for a cleaning position with another company. He further says his enrolment in a course which would allow him to undertake security work was rejected due to his convictions. Mr Siale has registered as a job seeker with WINZ and has sought work through word of mouth. Subject to an assessment regarding contribution, I am satisfied Mr Siale has lost wages to the amount he claims as a result of his dismissal.

Compensation

[54] Mr Siale claims \$35,000 in total as compensation for humiliation, loss of dignity and injury to feelings corresponding to his personal grievances. I have taken a global approach to my assessment as to quantum of compensation corresponding to Mr Siale's personal grievance claims.

[55] I accept Mr Siale felt distressed by his suspension. Under questioning, he agreed he became aware of, and accepted, the reasons driving the suspension in the meeting of 20 April 2018. I find any negative impact flowing from the decision to suspend diminished at this point.

[56] Mr Siale provided limited information about the effect his dismissal had on him. I am satisfied he felt humiliated by the loss of his job and affect it had on his status to ability to provide for his family. He referred also to receiving medication from his GP where he struggled to sleep. His partner's unchallenged written evidence records that following his dismissal Mr Saile became increasingly impatient amongst family members which caused tension in the home.

[57] Subject also to an assessment as to contributory behaviour, I assess that an award of compensation of \$12,000 is appropriate.

Contribution

[58] The Authority must also consider the extent, if any, to which the employee's action contributed towards the situation that gave rise to the grievance, and if so to reduce remedies accordingly.⁸

[59] PPL submits remedies should be reduced entirely or significantly where Mr Siale's convictions were the root cause of the dismissal, and where it is suggested Mr Siale was less than forthcoming about his conviction record when he met with the psychologist.

[60] It is clear Mr Siale's convictions triggered DPR's concerns. But I have found Mr Siale's dismissal was largely a consequence of PPL's failure to furnish DPR with a reliable risk assessment report in response to those matters, rather than the convictions in and of themselves. I agree with Mr Siale's evidence that if the convictions were the cause of his removal from DPR it would have halted his access to its sites immediately on receipt of the MOJ check.

[61] On questioning during the Authority's meeting, Mr Siale said he informed the psychologist of his first conviction. I find it unlikely the information would not have been reflected in the psychologist's assessment had Mr Siale reported it, and I did not find his evidence credible on this point. However the referral drafted by PPL to obtain the assessment also made no mention of that conviction and it is unclear whether PPL advised Mr Siale of importance of the matter to the assessment. I can apportion no blame on Mr Siale in these circumstances which would warrant a reduction in remedies.

[62] Finally, I accept Mr Siale's resistance to undertake the risk assessment at first instance likely influenced PPL's decision not to pursue further evaluation. But without advising Mr Siale of the potential for removal from DPR sites if he refused to attend another assessment. I am unwilling to take this aspect of Mr Siale's conduct into account as a factor contributing to the situation that led to his dismissal.

[63] Mr Siale's remedies have not been altered by my assessment as to contribution.

⁸ Employment Relations Act, s 124

Summary of orders:

[64] Professional Property and Cleaning Services Ltd is ordered to pay Opetaiia Siale the following:

- (a) \$9,454.31 (gross) in lost wages pursuant to s 123(1)(b) of the Employment Relations Act 2000.
- (b) \$12,000 as compensation pursuant to s 123(1)(c)(i) of the Employment Relations Act.

[65] The application for reinstatement is declined.

Costs

[66] Costs are reserved.

Michele Ryan
Member of the Employment Relations Authority