

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

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

[2023] NZERA 432  
3200899

BETWEEN

THOMAS MARSTERS  
Applicant

AND

ALLIED INVESTMENTS  
LIMITED t/a ALLIED  
SECURITY  
Respondent

Member of Authority: Geoff O’Sullivan

Representatives: Thomas Marsters in person  
Brenda Thom, counsel for the Respondent

Investigation Meeting: 7 June 2023 at Wellington

Submissions and other  
information received: up to and including 20 June 2023.

Date of Determination: 9 August 2023

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] Thomas Marsters was dismissed from his employment with Allied Investments Limited (Allied Security) on 20 May 2022 because:

- (a) Allied Security found he had defecated on school grounds whilst on duty; and
- (b) on 16, 17 and 18 April 2022 he had failed to attend any of his rostered shifts and had failed to inform anyone of his absence.

[2] Allied Security concluded that both the grounds constituted serious misconduct on their own.

[3] Mr Marsters says that his dismissal on these grounds was unjustified. He denies that he was guilty of defecating on the school's grounds and although accepting he may have failed to attend rostered shifts, he says there were justified reasons as to why that occurred.

[4] Mr Marsters claims lost wages, compensation for humiliation, injury to feelings and loss of dignity of some \$12,000. He originally claimed wage arrears, holiday pay on wage arrears, and a penalty for failure to pay wage arrears. At the commencement of the investigation meeting, Mr Marsters advised that the wage arrears claim (and therefore the penalty claim) was no longer being pursued. This was on the ground that he now accepted that that matter had been settled prior to his dismissal.

[5] Allied Security deny Mr Marsters' claims. They say each of the two grounds put forward justified dismissal each on their own. They say either of the two grounds relied on would justify dismissal on its own. They say they followed a full and fair process after properly putting the allegations to Mr Marsters and listening to his explanations. At the commencement of the investigation meeting, Allied Security also said it was pursuing a counterclaim of some \$779.21 for an overpayment made to Mr Marsters on the basis of information he submitted which Allied Security says was incorrect. During the course of the investigation meeting, Allied Security withdrew their counterclaim.

### **The Authority's investigation**

[6] The Authority heard from two witnesses, namely Mr Marsters and Mr Joe O'Boyle who was a Senior Operations Manager for Allied Security. Mr Denis Roets, a Regional Manager for Allied Security, had filed a written brief of evidence, but because Mr Marsters withdrew his claim for arrears of wages, he was not required to give evidence. Both Mr Marsters and Mr O'Boyle either swore or affirmed their evidence and spoke to their briefs.

### **Background**

[7] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all the evidence and submissions received.

[8] Mr Marsters commenced work as a security guard for Allied Security, starting on 21 October 2021 and finishing with his dismissal on 20 May 2022. Prior to this, he had worked

for a construction company doing general maintenance. Following his dismissal, Mr Marsters registered with recruitment agencies and he says between the time of his dismissal and now, he earned approximately \$3,500.

[9] On Saturday 26 March 2022, Mr Marsters visited a primary school as part of his patrol. This included doing a walkaround, checking the doors were locked and that there was nothing suspicious happening. He said there were times he would check matters that were not necessarily part of his job description. In respect of this school, that meant he walked a short way between two sheds because in his words he had a feeling in his bones that if someone was going to try and steal something from the school, the tools/equipment sheds would be a place they would take stuff from. The passage between the two sheds was naturally short and ended at a fence of approximately 1.8 metres in height. The photographs produced to the Authority showed a basin which looked more like a trough at the end of the passageway and at the base of the fence.

[10] Mr Marsters says Allied Security had not supplied him with a torch and accordingly the only light he had was the torch on his phone and he says as he turned into the passageway he turned this off because he did not need it. It was clear from the evidence checking the passageway would have only taken seconds. Mr Marsters says he does not know why it took him extra time. He says his phone may have ‘dinged’, he may have looked to see whether or not there was a message, or he may simply have rested as he suffers from asthma. But in any event, Mr Marsters’ evidence was that the patrol that night was uneventful.

[11] Mr Marsters had been initially employed as a security officer in the Static team and was predominantly based at Countdown sites. Primarily because he was unable to wear a facemask, he was transferred to the mobile patrol team. Allied Security say that Mr Marsters’ transfer was problematic because of his refusal to work initial weeks, failing to answer or return calls and often refusing shifts because he was sick. The evidence indicated that although Mr Marsters was contracted to do 36 hours per week, this was only achieved on seven of the 31 weeks of his employment and prior to the school incident, Allied Security had become increasingly concerned regarding Mr Marsters’ failure to attend shifts and in particular failing to notify the company that he would be absent.

[12] On 28 March 2022, Allied Security received a complaint from the school that the Deputy Principal had found human faeces in an area that a patrol guard had been seen entering.

This had been captured on motion sensitive CCTV. When Allied Security investigated, the school confirmed that the Deputy Principal had found human faeces in a basin between two sheds at approximately 10.40 am on Monday 28 March 2022. The area had been checked by the school at approximately 3.30 pm on Friday 25 March 2022. The CCTV footage showed a guard entering the area but did not show anyone else entering or leaving during the above period.

[13] An initial investigation by Allied Security established that Mr Marsters was the guard rostered to patrol the school that night and indeed Mr Marsters confirmed that was so. Mr Marsters was written to and invited to attend an investigation meeting on 12 April 2022 relating to the matter. The delay in dealing with the issue was explained that this was because Mr Marsters was not available.

[14] Mr Marsters worked his rostered shift on 13 April 2022 but failed to attend shifts rostered for 16, 17 and 18 April 2022. He did not notify the company that he would be absent.

[15] Allied Security emailed Mr Marsters on 19 April 2022 scheduling an additional investigation meeting for 22 April 2022. At this stage, Allied Security had two concerns. First, the alleged incident at the school and secondly Mr Marsters continually not notifying the company that he would be absent.

[16] Allied Security met with Mr Marsters on two occasions, namely 28 April and 18 May 2022. Mr Marsters confirmed that he was the person who entered and exited the alleyway where the faeces were found but denied responsibility. He said that when he checked the area there were no faeces there. He also noted that he would have had access to toilets at multiple sites, including at the school. He raised a number of questions including whether or not the faeces could be identified as human in origin, whether or not they were adult or children's faeces, whether or not someone could have accessed the space out of sight of the camera and whether or not a neighbour may have thrown faeces over a fence, and that in any event he had bad knees and it would not be physically possible for him to have defecated in the timeframe.

[17] Allied Security also put to Mr Marsters its concerns that he was not notifying the company of absences, whether they be for sick leave or otherwise. Mr Marsters put forward a number of reasons why he had not notified the company of absences. He said he suffered from allergies and that in early 2016 allergies had made his face swell up and his right eye close "like having it glued closed". He also said he could not see out of his left eye and that on

16 April 2022 the same thing happened again. He said he could wake up and not see anything and he couldn't use his phone. He said his mobile phone had a touch screen but he could not remember where he left it and when he did reach it, the battery had gone flat, but he did not know this until his vision improved. He said he did not seek medical help and didn't have the money to spend on an appointment with his doctor.

[18] Following the investigation, Allied Security rejected Mr Marsters' explanations regarding the faeces incident at the school. They put to him that he was the only person in the vicinity where the faeces were found for a period which extended over a 78 hour timeframe as revealed by the CCTV footage. Mr Marsters was also adamant that there were no faeces in the alleyway or in the basin when he went through it. In respect of his queries regarding the type of faeces, Allied Security held that it was reasonable to assume that an educated adult could make this assessment.

[19] Having investigated the physical site, Allied Security considered it was unlikely that anyone else could be to blame because they would need to climb a 1.8 metre high fence, defecate in the basin and then climb back if they were not to be seen. They also noted that the area was not specified as an area that required checking in that Mr Marsters should have been able to easily check the area if he felt such a need, by walking past and flashing in his torch. Mr Marsters' response to this was that he had no torch, although he did use the torch on his phone.

[20] Having considered the matter, Allied Security decided on the balance of probabilities Mr Marsters was responsible for the faeces. It also found that on 16, 17 and 18 April 2022 he had not attended any of his rostered shifts and had not informed anyone of his absence. Mr Marsters had also added a further explanation that the absences were caused in large by an outstanding personal grievance with Mr Rotes and reiterated he could not call in to advise because of his swollen eye. Allied Security did not accept Mr Marsters' explanations at least partly because it did not accept that Mr Marsters would have been so incapacitated yet not sought medical assistance. Further, no explanation was proffered by him after his failure to report for his shifts and was only raised when Allied Security instigated disciplinary procedures. The company considered that both the matters it was investigating amounted to serious misconduct and were behaviour contrary to the company's Code of Conduct. By letter dated 20 May 2022, the company confirmed its decision to summarily dismiss Mr Marsters from his employment.

## **Analysis and conclusions**

[21] Defecating in a basin on a school property whilst undertaking duties as a security guard could easily be viewed by an employer as serious misconduct. The issue therefore is, using the test in s 103A of the Employment Relations Act 2000 (the Act), Allied Security would need to be satisfied that Mr Marsters was guilty of the action complained of. Accordingly, it is necessary to consider the process Allied Security undertook in reaching its conclusions.

[22] Allied Security have also relied on the fact that Mr Marsters had failed to attend rostered shifts and had not notified the company that he would be absent. Allied Security also justified its dismissal of Mr Marsters on the basis he had failed to attend rostered shifts and had not notified the company that he would be absent. As set out above, it had not accepted his explanations which were only raised when Allied Security instigated a disciplinary process. In other words, Mr Marsters at no time volunteered the explanation when he returned to work. It was open to Allied Security to reject the explanation Mr Masters gave it.

[23] Allied Security met with Mr Marsters and his representative to discuss the allegations. It was accepted that Mr Marsters denied responsibility for defecating on the school grounds, and that he was equally adamant that the faeces were not there when he checked the area. Each explanation he put up was considered. Allied Security at the end of the day considered those explanations but did not accept them. It had continuous CCTV footage over a 78-hour timeframe which showed no one else entering the area. Mr Marsters had confirmed to Allied Security, and indeed did the same during the investigation meeting, that when he checked the area there were no faeces. He had also said that he would have had access to toilets at multiple sites including the school. He accepted, however, that Allied Security had made it clear to him that under no circumstances was he to use the school toilets. In response to that, Mr Marsters simply said that if he had an urgent need, he would have disobeyed that instruction.

[24] The test of justification set out in s 103A of the Act requires me to determine whether Allied Security's action in dismissing Mr Marsters for defecating on the school property, was an action that a fair and reasonable employer could have taken under all the circumstances. In other words, it is Allied Security's investigation and response to its findings that is significant.

[25] Allied Security fully investigated the allegation before dismissing him. Mr Marsters' was given a reasonable opportunity to respond to the concerns and the explanations he put forward were genuinely considered. Allied Security sought out what evidence was available

and put the evidence they had to Mr Marsters with their concerns. They met with him and his representative to discuss his responses which were clear and substantive. Allied Security understood Mr Marsters' position, but at the end of the day did not accept his explanations. Allied Security were entitled to come to the conclusion they did.

[26] I find that it was open to Allied Security to conclude that Mr Marsters had defecated in the area and accordingly was guilty of serious misconduct warranting dismissal. I reiterate, Allied Security was entitled to reach the conclusions it did based on the evidence it received, and on the investigation it conducted.

[27] Allied Security also relied on other factors, namely that Mr Marsters had failed to attend any of his rostered shifts and had failed to inform anyone of his absences. Again, the allegations were properly investigated and fairly put to Mr Marsters for response which he did.

[28] I find it was open to Allied Security to reach the conclusions it did in respect of Mr Marsters' absences. Dismissal for this offence may seem harsh, however under the circumstances as I have already found Allied Security was entitled to conclude Mr Marsters was guilty of serious misconduct warranting dismissal in respect of the defecation, it has already justified its dismissal.

### **Conclusion**

[29] Allied Investments Limited trading as Allied Security have met the test of justification and accordingly Mr Marsters' dismissal under the circumstances was justified. It follows there are no remedies.

### **Costs**

[30] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves. If they are not able to do so and an Authority determination of costs is needed, any party seeking costs may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of the written determination in this matter. From the date of service of that memorandum, the other party will then have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted. The parties could expect the Authority to determine costs and ask to do so on its usual

notional daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.<sup>1</sup>

Geoff O'Sullivan  
Member of the Employment Relations Authority

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<sup>1</sup> [www.era.govt.nz/determinations/awardingcosts-remedies](http://www.era.govt.nz/determinations/awardingcosts-remedies)