

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2023] NZERA 638
3178859

BETWEEN

KRISTY MILNE
Applicant

AND

ALLIED INVESTMENTS
LIMITED t/a ALLIED SECURITY
Respondent

Member of Authority: Philip Cheyne

Representatives: Mary-Jane Thomas, counsel for the Applicant
Brenda Thom, counsel for the Respondent

Investigation Meeting: 26 July 2023 in Invercargill

Submissions and Information Received: 9 August and 27 October 2023 from the Applicant
22 August and 27 October 2023 from the Respondent

Date of Determination: 30 October 2023

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Kristy Milne worked as a security officer from February 2019 for a business (SCS) that provided security and emergency response services at Tiwai Point. Ms Milne started a period of parental leave in November 2021 but intended to return to work in May 2022.

[2] In about December 2021, a new provider (Allied Investments Limited) was engaged to provide security and emergency responses services at Tiwai Point to start in February 2022. Allied Investments Limited trades as Allied Security.

[3] It is common ground that the provisions of Part 6A of the Employment Relations Act 2000 (the ERA) concerning continuity of employment if employees' work was affected by restructuring are potentially relevant, as Ms Milne's position was covered by Schedule 1A of the Act and the contracting arrangement was subsequent contracting. However, AIL says that Ms Milne was not legally able to elect to transfer under Part 6A because she did not hold a Certificate of Approval (COA) under the Private Security Personnel and Private Investigator's Act 2010 (PSPPL Act) at the relevant time.

[4] Damien Black is the sole director and shareholder of Allied Investments Limited (AIL). There were exchanges mainly between Mr Black and Ms Milne from December 2021 to about April 2022 about her prospective return to work at Tiwai Point. However, Ms Milne did not return to her position at Tiwai Point.

[5] By her solicitor's letter of 7 April 2022, Ms Milne raised a personal grievance claim of unjustified dismissal based on AIL not offering to employ her on her existing terms and conditions and advising her on 10 March 2022 that her job was no longer available. Ms Milne seeks compensation and reimbursement as remedies for her personal grievance claim.

[6] In its reply, AIL says that it told Ms Milne that a role for her was being held open pending confirmation of her certificate of approval (COA). After Ms Milne's COA was renewed, AIL offered her a role it considered was consistent with her previous role with SCS. Ms Milne raised issues about whether the offer matched her prior position. AIL later offered a further position which Ms Milne did not take up.

[7] Despite mediation, matters were not resolved.

The Authority's investigation

[8] By consent, the proceedings were amended to reflect the respondent's correct name.

[9] Most relevant documents were included with the statements of problem and in reply. Some additional material was lodged later.

[10] Ms Milne and her partner (Stephen Iozano y Bonstein) gave evidence and answered questions.

[11] Mr Black gave evidence and answered questions. Grant Gutschlag is AIL's supervisor and contract manager at Tiwai Point. He too gave evidence and answered questions.

[12] In this determination, I will state relevant factual findings, state and explain relevant legal findings, and express conclusions on issues necessary to conclude the matter and set out any orders.

[13] Many of the relevant events are documented, but some events are in dispute. I will deal with those disputes to the extent necessary. The following issues arise:

- (a) Could Ms Milne elect to transfer to AIL?
- (b) If so, did AIL dismiss Ms Milne?
- (c) If yes, were AIL's actions and how it acted those of a fair and reasonable employer?
- (d) If Ms Milne has a personal grievance, what remedies should be ordered?

Could Ms Milne elect to transfer to AIL?

[14] It is accepted that Ms Milne was not the holder of a Certificate of Approval (COA) at the time her right to elect to transfer to AIL on the same terms and conditions of employment arose. There is evidence to support Ms Milne's position that she had completed all the requirements but her COA had not been issued because of an administrative problem. However, it is not necessary to set out the specifics or make any findings about that.

[15] The PSPPL Act lists persons who must hold a COA under that Act. It also creates an offence making a person liable on conviction to a fine if the person is employed and does not hold a COA. Under s 55, a COA authorises the holder to work during the currency of the certificate as an employee of a licensee carrying on the business to which the certificate relates.

[16] The PSPPL Act does not expressly define “employed”. It does however define those who are covered by the Act by describing tasks being performed in the course of employment or as a contractor. I need only set out the relevant parts of one example:¹

In this Act, **property guard employee** means an individual who in the course of his or her employment, or engagement as a contractor, by a property guard-

- (a) guards, elsewhere than on premises owned or occupied by the property guard,
...
- (b) monitors in real time, ...
 - (i) a burglar alarm or similar ...
 - (ii) a camera or similar ...
- (c) responds to any device ... that has been activated ...

[17] AIL holds a licence under the PSPPL Act. The requirement at s 44 that certain persons must hold a COA is followed by s 45 which creates an offence and liability on conviction for a fine for the person who holds a licence as follows:

(1) No person who holds a licence may employ, engage as a contractor, or permit to act as a responsible employee any individual who does not hold an appropriate certificate of approval.

[18] A “responsible employee” means employees who are covered by the Act in relation to the work being performed, as mentioned above.

[19] The argument is that Ms Milne could not elect to transfer to and never became an employee of AIL because her former employer was not legally able to employ her, even for the purpose of keeping open Ms Milne’s employment during her parental leave. For present purposes, I will assume that SCS was in breach of the PSPPL Act with respect to Ms Milne’s employment at the time relevant to the application of Part 6A regarding continuity of work.

[20] On the foregoing assumption, the Contract and Commercial Law Act 2017 is relevant. Under s 72, a contract lawfully entered into does not become illegal or unenforceable by any party because its performance is in breach of an enactment, unless the enactment expressly so provides or its object clearly so requires.

¹ Private Security Personnel and Private Investigators Act 2010 ss 13 - 19.

[21] Ms Milne's employment relationship was in the state of a "statutory suspension" by effect of the PSPPL Act.² Given that, SCS's performance of the contract required them to hold open Ms Milne's position pending her return from parental leave. Performance at the time did not involve Ms Milne doing any work covered by the PSPPL.³

[22] The PSPPL Act does not expressly provide that an employment agreement performed in breach of the PSPPL Act is illegal or unenforceable by a party to the employment agreement. Section 3 of the PSPPL Act expresses the Act's purpose. Having regard to the purpose and more generally the PSPPL Act, its object does not clearly so require. It follows that the employment agreement between SCS and Ms Milne was not illegal or unenforceable, even if its performance would have been in breach of the PSPPL Act.

[23] Ms Milne may not have given SCS written notice of her intention to take parental leave, despite s 31 of the Parental Leave and Employment Protection Act 1987. However, Ms Milne's evidence, which I accept, is that SCS agreed that she would take extended leave, so the application of s 35(1)(b) of that Act protected Ms Milne's entitlement to extended leave. Alternatively, despite any irregularity in Ms Milne's application for parental leave, SCS allowed her to exercise her rights and benefits under the Act in accordance with s 68. I find that Ms Milne was on parental leave under with the Act when employees of SCS became entitled to elect to transfer to AIL.

[24] I accept Ms Milne's evidence that SCS told her that AIL had been awarded the contract at Tiwai Point. In its communications to Ms Milne, SCS may not have properly complied with the notice requirements set out at s 69G of the Employment Relations Act 2000 (ERA). Nonetheless, I find that Ms Milne had a right to elect to transfer to AIL. Ms Milne's right was protected by s 69FA of the ERA, despite any non-compliance by SCS.

[25] Mr Black for AIL phoned and spoke with Ms Milne on 23 December 2021. Mr Black knew from the site operator that Ms Milne was one of the SCS employees who had a right to elect to transfer to AIL. Ms Milne's evidence is that Mr Black asked her if she intended to return to work after her parental leave and she confirmed that she would return. Ms Milne's

² *Flight Attendants and Related Services Assn Inc v Air New Zealand Ltd* [1993] 2 ERNZ 1.

³ Private Security Personnel and Private Investigators Act 2010 s 17.

evidence is also that Mr Black asked about her COA and she told her that she had completed the necessary training and that SCS had paid the fee in October 2021.

[26] Mr Black's evidence is that he knew before the call that Ms Milne did not have a COA so he asked her about that. Mr Black says that he told Ms Milne that she would not be able to transfer her employment to AIL unless she had a valid COA before 7 February 2022. Mr Black also says that he told Ms Milne that if she did not have a COA by then, they would offer her a new position as the "10th employee or cover guard" when she returned from her leave.

[27] I will return to the point about a new position, but I accept Mr Black told Ms Milne on 23 December 2021 or in one or more of the following conversations that she needed to obtain her COA by 7 February 2022 to transfer.

[28] On 13 January 2022, Ms Milne spoke with the Ministry of Justice who have responsibility for the issuing of COAs, her training provider and NZQA. From this, Ms Milne understood that that steps were being taken that would allow the issue of her COA. A little later that day, Ms Milne received a call from Mr Black. Mr Black's evidence is that Ms Milne advised him that her COA was still in progress. It is likely that Ms Milne described what she knew as a result of her other calls that day. It is common ground that Mr Black told Ms Milne that her role was being held open pending the renewal of her COA.

[29] Mr Black's evidence also is that he told Ms Milne that she could not "transfer" if she did not have a valid COA by 7 February 2022. Ms Milne's evidence is that Mr Black asked her to provide evidence of her COA by 7 February 2022. It is likely that Mr Black told Ms Milne that she could transfer only if she provided her COA by 7 February 2022.

[30] Mr Black in an email on 14 January 2022 told SCS that AIL "won't be able to transfer her" if Ms Milne did not "sort her security licence by next week". The email was not sent to Ms Milne but it reflects what Mr Black told Ms Milne, before and/or after the date of the email.

[31] Mr Black phoned Ms Milne again on 26 January 2022. Ms Milne's evidence is that Mr Black told her not to worry about her COA, that her job was safe for her to return to and that she did not need to meet the deadline of the 7th of February. Mr Black's evidence is that he repeated his position that Ms Milne could only elect to transfer if she had her COA by the 7th

of February, but otherwise AIL would still hold a role open for her once she had obtained her COA. It is not likely that Mr Black would have changed his position about the need for a COA by the 7th of February for Ms Milne to elect to transfer, so I prefer Mr Black's evidence.

[32] The difficulty for AIL is that it could not validly limit Ms Milne's right to elect to transfer by making it conditional on her obtaining a COA before 7 February 2022.

[33] Mr Black wrote to SCS on 13 January 2022 seeking the names of employees who had elected to transfer and other information. SCS replied on 18 January 2022 with a list, including Ms Milne. At some point, SCS transferred Ms Milne's current holiday pay entitlement to AIL, as required under Part 6A of the ERA. These communications, together with the exchanges between Mr Black and Ms Milne, were sufficient to amount to Ms Milne electing to transfer to AIL.

[34] Ms Milne's terms and conditions of employment at the time included her right to return to her position at the end of parental leave in accordance with the Parental Leave and Employment Protection Act 1987. I find that AIL became her employer for that purpose, by effect of Part 6A of the Employment Relations Act 2000.

Did AIL dismiss Ms Milne?

[35] Mr Black received a screenshot of Ms Milne's COA in an email from her on 10 March 2022. Mr Black then replied by email. He said if one of the "regular team members" resigns between "now and when you return", he would be in touch to offer Ms Milne that role. Mr Black outlined his plan to map out shifts assigned to Ms Milne each week from "staff taking leave etc" when she was available to return. Mr Black referred to his "intention" and he would do "my best to achieve this", to work 3-4 shifts per week in a row to avoid broken weeks and to have set days off.

[36] Ms Milne's evidence is that she called Mr Black. Mr Black's evidence is that he does not recall the phone discussion. Ms Milne is wrong about the sequence, given her phone log and the timestamps on the email exchange. Mr Black's email after the call starts with "As discussed". That and the content of the email lead me to accept Ms Milne's evidence to the extent that she asked about swapping her roster pattern, so she could alternate with her partner's

work roster. Mr Black declined that request. Mr Black told Ms Milne that the position held open for her was a relief role but he would offer her a “regular team” role if there was a resignation. I find that Mr Black told Ms Milne that her previous “role” had gone but she had the relief role with AIL.

[37] Ms Milne went to the site and spoke to AIL’s supervisor (Grant Gutschlag) on 15 March 2022. Ms Milne’s evidence is that she wanted to understand what shifts would look like as a relief worker. Mr Gutschlag’s evidence is that he had been instructed by Mr Black to hold open the “relief” role for Ms Milne. As he had not rostered the role at that point, Mr Gutschlag could not answer all Ms Milne’s questions and directed her to Mr Black. Mr Gutschlag reported the exchange to Mr Black. There is no reason to doubt the foregoing evidence.

[38] Ms Milne’s evidence is that Mr Gutschlag apologised, told her what had happened was “not okay” and said she should seek legal advice. Mr Gutschlag disputes this. Mr Gutschlag’s response to Ms Milne’s queries might have included an expression of apology in a supportive way, as she was “up-tight”. Whether or not Mr Gutschlag said it was “not okay” and suggested legal advice is not material for present purposes.

[39] Mr Gutschlag also says that Ms Milne emptied her locker. I accept that Ms Milne retrieved some items from her locker, but later events establish that she did not empty the locker.

[40] Next, Mr Black sent an email to Ms Milne. Mr Black said it had been reported to him that Ms Milne did not intend “taking up this offer of employment”. He asked Ms Milne to confirm this as he had been holding “a role” for her, subject to her obtaining a COA.

[41] Ms Milne replied on 16 March 2022. Ms Milne acknowledged the offer “for a relief position” but queried the reason for not holding her full-time position open. Ms Milne said that she would appreciate more planning certainly and noted that Mr Gutschlag had discussed a six-month roster in advance for her to review the following week.

[42] Mr Black responded on 17 March 2022. He set out his view that AIL could not offer Ms Milne a contract as she did not have a COA. AIL was now able to offer the “10th person” position because Ms Milne had secured her COA and would offer a “team role” if one comes up. Mr Black foreshadowed that a “team role” may become available in the “near future”. He

asked Ms Milne to advise when she was available so AIL could start preparing a long-term roster for her to review.

[43] Mr Black sent a further email on 20 March 2022. He asked Ms Milne to advise him before 4.00 pm on Wednesday (23 March 2022) when she would “join the team”, failing which AIL would have to withdraw its employment offer. Ms Milne replied promptly to say that she would return on 27 May 2022 as her parental leave ended on 26 May 2022. Mr Black responded that he would send “employment details” during the week.

[44] Mr Black sent a “LETTER OF OFFER” as a “Proposed Role Relief Officer working each week covering leave for staff and days off” with an employment agreement on 22 March 2022. Ms Milne was asked to sign and return the letter within three business days to accept the “offer of employment”. The offer was expressed to lapse “Beyond 5.00pm on Friday January14th” and AIL would accept “you” wish to remain employed on the terms and conditions and remuneration as under the “attached SCS”.

[45] Ms Milne queried the offer of the “new starter hourly rate”. Mr Black sought information about Ms Milne’s experience and Ms Milne provided that. Mr Black then increased the rate being offered to \$28.00 per hour, which Ms Milne acknowledged.

[46] Ms Milne instructed a lawyer who on 31 March 2022 sought from AIL a copy of Ms Milne’s file, her previous employment agreement and the proposed agreement. Mr Black responded to the request on 5 April 2022 to say that SCS had not provided AIL with a copy of Ms Milne’s agreement. Mr Black followed that with:

At this stage Kristy has not become an employee but we are hoping she will be willing to accept the offer of employment we have made to her.
I will follow that up this week and see if she is going to.

[47] Meantime, on 4 April 2022 Mr Gutschlag had emailed Ms Milne to advise that an employee was leaving, they were looking at “current team changes” and to ask her to provide her earliest possible starting date and preferred crew.

[48] Ms Milne’s lawyer wrote to AIL on 7 April 2022 to raise her personal grievance claim of unjustified dismissal. The claim was that Ms Milne was dismissed on 10 March 2022. AIL’s

claim that her employment ended because she did not have a COA was also disputed. Compensation was sought, together with accrued holiday pay.

[49] Ms Milne replied to Mr Gutschlag on 8 April 2022, acknowledged the offer but set out her view that she could not trust working for Mr Black, given her exchanges with him.

[50] I find that AIL's failure to respect Ms Milne's election to transfer to it on the terms and conditions applicable between her and SCS amounts to a termination of Ms Milne's employment. Alternatively, the same failure would amount to a personal grievance as defined at s 103(1)(g) of the Employment Relations Act 2000.

Were AIL's actions and how it acted those of a fair and reasonable employer?

[51] AIL's action were in breach of s 49 of the Parental Leave and Employment Protection Act 1987.

[52] Section 49(1)(c) of that Act states that no employer shall terminate the employment of any employee during the employee's absence on parental leave. There are several special defences available to an employer who terminates an employee's employment during their absence on parental leave, but those defences do not arise here.

[53] No fair and reasonable employer could dismiss an employee where to do so would be a breach of the PLEP Act.

[54] AIL did not advance an argument based on meeting the test of justification in accordance with the Employment Relations Act 2000 in any event.

[55] I find that Ms Milne was unjustifiably dismissed and has a personal grievance against AIL.

What remedies should be ordered?

[56] There is a claim for lost remuneration.

[57] The Authority has power to order the reimbursement of a sum equal to the whole or any part of the wages lost as a result of the grievance.⁴ If I determine that Ms Milne has lost remuneration as a result of the personal grievance, I must order AIL to pay the lesser of the sum equal to that lost remuneration or 3 months' ordinary time remuneration.⁵ By effect of s 128(3) of the Employment Relations Act 2000, I have a discretion to order AIL to pay a greater sum than the amount that I am required to order under s 128(2), to reimburse loss.

[58] Ms Milne was offered but declined a job as a dental assistant at about the time she would have returned to her role at Tiwai after her parental leave. However, Ms Milne took other steps to mitigate her loss of remuneration. Ms Milne obtained employment as a caregiver from early July 2022. I find that Ms Milne's lost remuneration as a result of the termination of her employment was approximately \$25,000.00 to March 2023. That figure is higher than it would have been if Ms Milne had taken up the dental assistant offer, but a substantial part of the loss was caused by the personal grievance, rather than Ms Milne's rejection of the offer.

[59] Ms Milne's salary with SCS was \$51,500.00 per annum, so 3 months' ordinary time remuneration would have been \$12,875.00. Ms Milne is entitled to recover that amount at least. Given the limited evidence of mitigation, I decline to order AIL to reimburse more than 3 months' ordinary time remuneration.

[60] There is a claim for compensation of \$40,000.00 for humiliation, loss of dignity and injury to feelings suffered by Ms Milne as a result of her personal grievance.

[61] Ms Milne's evidence is that she felt depressed, constantly tired and of low self-worth. Ms Milne suffered sleepless nights, anxiety and regular migraines. The lost income caused financial pressure and affected Ms Milne's stress levels and mental health. Ms Milne distanced herself from her partner as a result. Ms Milne's description of the harm is corroborated by her partner's evidence. There is no reason to doubt this evidence. However, there is no evidence that Ms Milne sought professional or medical intervention as a result.

⁴ Employment Relations Act 2000 s 123(1)(b).

⁵ Employment Relations Act 2000 s 128(2).

[62] The proven effects for Ms Milne are similar to those considered by the Employment Court in a recent case.⁶ In that case, the Court fix compensation at \$18,000.00. That sum would fully compensate Ms Milne for the proven harm.

[63] There is a submission that Ms Milne contributed in a blameworthy manner to the circumstances giving rise to the personal grievance so that the Authority must reduce remedies in accordance with s 124 of the ERA.

[64] AIL submits that Ms Milne actively worked for SCS without a COA. For present purposes, I will assume that is correct. However, Ms Milne was on parental leave and not actively working as a security guard when her personal grievance arose. Ms Milne took steps to resolve the difficulty, kept AIL advised of those steps and she obtained her COA soon after. These circumstances do not call for a reduction in remedies.

[65] AIL says that Ms Milne failed to communicate her distress about the situation or communicate in good faith prior to raising her personal grievance. The difficulty with the submission, even assuming some failing on Ms Milne's part, is that AIL in its exchanges with Ms Milne failed to acknowledge her entitlement to transfer to AIL and return to her position at the end of her parental leave. Any communication failure on Ms Milne's part did not contribute to that circumstance at all, much less in a blameworthy manner.

[66] The last point relied on is that Ms Milne did not take up the Dental Assistant position to mitigate her loss. I am referred to *NZ Nurses Union v United Healthcare*.⁷

[67] In that case, the Labour Court considered a submission that remedies under the Labour Relations Act 1987 should be reduced by reason of fault on the part of the workers pursuant to s 229(3) of that Act, and by reason of a failure to mitigate lost wages. The Labour Court held that the evidence had established "only suspicion" of fault "which is insufficient ground for any deduction under s 229(3). The Court had regard to mitigation when it assessed reimbursement under s 227(b) and s 229(1) and (2) of the 1987 Act, but it did not have regard to fault under s 229(3) of the Act.

⁶ *Pyne v Invacare New Zealand Limited* [2023] NZEmpC 179.

⁷ *NZ Nurses Union v United Healthcare* [1989] 3 NZILR 552.

[68] In summary, the judgment does not support AIL's argument about fault. Additionally, the current statute provides for reimbursement by s 123(1)(b) and s 128 of the ERA. Principles about mitigation are read into those provisions. Section 124 deals with the actions of the employee that contributed to the situation giving rise to the personal grievance. It is hard to see how mitigation conduct that post-dates the grievance could be considered a second time as conduct that contributed towards the situation that gave rise to the grievance.

[69] I find that Ms Milne did not contribute in a blameworthy manner to the circumstances giving rise to her personal grievance.

Summary and orders

[70] Ms Milne was unjustifiably dismissed by Allied Investments Limited and has a personal grievance.

[71] To settle that grievance, Allied Investments Limited t/a Allied Security to pay Kristy Milne the following amounts within 28 days of this determination:

- (a) Reimbursement of \$12,875.00 (gross); and
- (b) Compensation of \$18,000.00 (without deduction).

[72] Costs are reserved. A claim for costs may be made by lodging and serving supporting submissions within 14 days of this determination. The other party may lodge and serve submissions in reply within a further 14 days. I will then determine costs, with regard to those submissions in the context of the Authority's approach to costs.

Philip Cheyne
Member of the Employment Relations Authority