



More on 'Triangular' or 'Tripartite' Arrangements

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In issue 224 of The Advocate [*"The Third Party Effect"*] we reported on a case (**Hill v. Workforce Development Limited**), where there was a 'triangular' (or 'tripartite') arrangement between an employer, the employee and a third party where the employee was engaged to work at the third party's premises. In that case, the Employment Relations Authority held against the employer, Workforce Development Limited, for dismissing the employee, a tutor to prisoners, when the Corrections Department decided it no longer wanted her on its premises due to her breach of its rules regarding communication with prisoners.

The Employment Court subsequently examined that case on appeal, and found in favour of Workforce Developments Limited. Judge Inglis found *"that [the employee] had been given details of the complaint made against her and the opportunity, which she took up, of making submissions on her own behalf (with a support person) to Corrections in the course of its investigation. In the meantime, Mrs Hill had been suspended on full pay. Judge Inglis noted that it was Workforce's actions and omissions as employer that were relevant and she found that in the final analysis the company had provided information and support to Mrs Hill during the course of the Department's investigation and taken steps to ensure that it followed the process set out in the contract."*

Despite the ultimate success of the employer in that case, it remained clear that despite the presence of a third party in the relationship, it is the actual employer's action that will be examined as to whether they were reasonable in the circumstances of a dismissal effectively initiated by a third party.



Recently in **Allied Investments Limited v. Sharon Guise**, the Court again examined what it called in this case a 'tripartite' employment arrangement. The employee, Sharon Guise, was employed by a security company, Allied Investments, to be a security guard at CPIT in Christchurch.

Ms Guise was the subject of a complaint by CPIT after concerns it had regarding her actions during its staff Christmas party. It was alleged that she locked some people out of the building during the Christmas function. Her employer had a discussion about the alleged incident with her, then several days later advised her that she had been removed from the site. When it became clear to Ms Guise that she would have no work before Christmas, and then only casual work, and could not access her holiday pay, she resigned. Subsequently, she claimed constructive dismissal:

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This newsletter is not intended as legal advice but is intended to alert you to current issues of interest. If you require further information or advice regarding matters covered or any other employment law matters, please contact **Neil McPhail, Raewyn Gibson, or Peter Zwart**.

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"[46] Against that background, I now turn to consider the two questions posed by the Court of Appeal in Auckland Electric Power Board, namely, whether it can be said, after examining all the circumstances, that Ms Guise's resignation was caused by breach of duty on the part of Allied and, if so, whether, having regard to the seriousness of the breach, a substantial risk of resignation was reasonably foreseeable."

Regarding the nature of the relationship, the Court said:

"[50] As noted earlier, this case involves a tripartite employment relationship but it is equally important to note that this factor does not relieve an employer from its statutory obligations under the Act. Indeed, s 238 specifically prohibits any form of contracting out. Section 3(a) of the Act confirms the object of the Act is "to build productive employment relationships through the promotion of good faith in all aspects of the employment environment and of the employment relationship". Of particular relevance to the present case is s 3(a)(i) of the Act which recognises the employment relationship must be built on trust and confidence and good-faith behaviour and s 3(a)(ii) which confirms that the Act acknowledges and addresses the inherent inequality of power in the employment relationship. That inherent imbalance in an employment relationship is even more pronounced in a tripartite employment situation, such as the present, where the employer's client is able to exclude the employee from the workplace without any accountability to the employee. In such a situation, the Court must take appropriate steps whenever necessary to safeguard the objects of the Act so as to preserve their integrity."

The Court then went on to find that the employer had not sufficiently investigated the alleged incident:

"[60] I accept what Ms Guise told the Court about this matter. Mr Black stated in his evidence that the incident was investigated by Allied's Site Manager, Mr Bailey, but Mr Bailey was not called as a witness in the case and Mr Black sounded extremely vague about the nature of Mr Bailey's investigation and when it was carried out. There was no documentary evidence confirming that Mr Bailey had carried out any such investigation. In short, I do not accept that the incident was investigated by Mr Bailey nor do I accept that the matter was raised by Mr Black in his telephone conversation of 17 December 2012. I do not accept that Ms Guise was ever given proper opportunity to fully explain and present her side of the story."

"[76] I have concluded, for the reasons stated above, that Allied breached a number of duties it had towards Ms Guise in the way it dealt with her following the CPIT direction and that her resignation was caused by those breaches. I now turn to consider the second question posed by the Court of Appeal in the Auckland Electric Power Board case, namely, whether having regard to the seriousness of those breaches of duty, a substantial risk of Ms Guise's resignation was reasonably foreseeable."

The Court examined the evidence and considered that the employer ". . . must have foreseen that, as a result of its serious breaches of duty, it was virtually inevitable that Ms Guise was going to resign."

Ms Guise was awarded \$3,365 in lost wages and compensation of \$7,500, reduced by 20 percent due to Ms Guise's contribution to the situation.

The message from this case is clear. If the third party in a tripartite arrangement demands that an employee no longer work on site, the onus is still on the employer to justify the dismissal (or constructive dismissal in this case) of that employee, irrespective of the demands of the third party. This will require that the employer liaises with the third party and examines the decision-making of the third party, along with ensuring it carries out its own investigation as to its employee's alleged actions.

