



[4] Disadvantage alone is not prohibited by law. It must be a disadvantage that is unjustified. If TWL establishes justification for its disadvantageous actions, there is no grievance (see *McCosh v National Bank*, unreported, AC49/04, 13 September 2004).

[5] Finally, disadvantage is not identified narrowly and solely in terms of wages and conditions of employment. Rather it broadly considers effects on the total environment of the employee's employment. A claim for disadvantage depends upon an act or omission by an employer causing disadvantageous consequences, not merely an employee's subjective dissatisfaction at their circumstances. (see *NZ Storeworkers IUW v South Pacific Tyres (NZ) Ltd* [1990] 3 NZILR 452; *Bilkey v Imagepac Partners*, unreported, AC65/02, 7 October 2000)

[6] The basis for Mr Alshammary's claims that he has been disadvantaged is that he:

- is paid in wages rather than salary; and
- as a consequence is earning less than he should (by about \$100 per fortnight), including no longer receiving any incentive payment.

### **Disadvantage**

[7] In December 2006 Mr Alshammary agreed to change the employment agreement between himself and TWL to enable him to be paid wages over a busy period. At the time of the change Mr Alshammary was paid on the basis of a salary calculated on a nominal 88 hours per fortnight.

[8] A form dated 17 November 2006 shows that the move to wages was a temporary agreement which expired on 28 February 2007. An Employee Change of Details Form (Wages) signed by Mr Alshammary on 20 November 2006 reiterates that the temporary agreement was to expire on 28 February 2007.

[9] On 5 March 2007 a wage review was undertaken and Mr Alshammary was offered an increase in his hourly rate from \$13.61 to \$14.65. Ms Chris Gibson, Service Team Leader, met with Mr Alshammary and explained to him that if he agreed to the increased hourly rate, he would remain permanently on wages. Ms Gibson says Mr Alshammary agreed to the arrangement and his rate was increased accordingly.

[10] Mr Alshammary recalls that Ms Gibson said he was not entitled to the % increase but he did not recall specifically agreeing to remain on wages. I am satisfied it is more likely than not, that on 27 March 2007 Mr Alshammary did agree to continue being paid on the basis of wages and accepted as part of that deal, an increase in his rate to \$14.65 per hour.

[11] On 14 March 2007 by agreement, Mr Alshammary's days of work reduced to five days each week. Then on 23 July 2007 Mr Alshammary agreed to return to working on a four on, four off rotating roster. Documents verifying these agreed changes to his hours of work were signed by Mr Alshammary. It was at the time of this change that Mr Alshammary approached Ms Gibson and requested that he return to being paid by way of salary. A request which was declined by TWL.

[12] Prior to the agreement in November 2006 Mr Alshammary had worked on a four on, four off roster basis. A four on, four off work pattern will repeat itself every six weeks. During that six week period there are 11 paid working days. This will result in 88 hours being worked in the first fortnight, 77 in the second fortnight and 55 in the third fortnight. The undisputed evidence of TWL is that during his employment leading up to November 2006 Mr Alshammary was paid on a salary which was based on a notional 88 hours per fortnight.

[13] When he changed to wages, Mr Alshammary was paid for every hour he worked each fortnight and during the months December 2006 – July 2007 Mr Alshammary worked on average, more than 88 hours per fortnight.

[14] I am satisfied the method of calculating Mr Alshammary's remuneration was temporarily changed by agreement from salary to wages in November 2006. I am also satisfied that in March 2007 the arrangement for the payment of Mr Alshammary's remuneration by way of wages was made a permanent arrangement when Mr Alshammary agreed to receive the increase in his wages in exchange for him to remain being paid by way of wages.

[15] Mr Alshammary says that after July 2007 he was disadvantaged because he had returned to the four on four off roster, but was only being paid for the actual hours he worked and this did not equate to an average of 88 hours per fortnight.

[16] I understand Mr Alshammary's argument, however, I am satisfied that the changes to the employment agreement between Mr Alshammary and TWL relating to

the payment of his remuneration and his hours of work have, at all times, been subject to Mr Alshammary's agreement. I find Mr Alshammary has not been disadvantaged in his employment by an unjustifiable action of the employer. An employer acting fairly and reasonably in the circumstances of this case would have acted as TWL did when it sought Mr Alshammary's agreement prior to making any changes to his employment arrangements.

[17] For the sake of completeness, if I had found Mr Alshammary to have been unjustifiably disadvantaged in his employment, he has failed to demonstrate that he has suffered any loss and accordingly, there is no evidential basis for the awarding of any remedy.

### **Costs**

[18] Costs are reserved. In the event that costs are sought, the parties are encouraged to resolve that question between them. If the parties fail to reach agreement on the matter of costs, The Warehouse Limited may file and serve a memorandum as to costs within 28 days of the date of this determination. I will not consider any application outside that timeframe.

Vicki Campbell  
Member of Employment Relations Authority