

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2018] NZERA Christchurch 41
3014552

BETWEEN LINDA ANDERSON
 Applicant

A N D BLUE STAR TAXIS
 (CHRISTCHURCH) SOCIETY
 Respondent

Member of Authority: Peter van Keulen

Representatives: Anna Oberndorfer, Advocate for Applicant
 Michael McDonald, Advocate for Respondent

Investigation Meeting: 16 November 2017 at Christchurch

Submissions Received: 8 December 2017 and 20 December 2017 for Applicant
 8 December 2017 for Respondent

Date of Determination: 4 April 2018

DETERMINATION OF THE AUTHORITY

- A. In the course of consulting over a proposed change to Linda Anderson's hours of work, Blue Star Taxis (Christchurch) Society acted in an unjustifiable manner that caused disadvantage to Ms Anderson's employment.**
- B. In changing Ms Anderson's hours of work Blue Star Taxis (Christchurch) Society acted in an unjustifiable manner that caused disadvantage to Ms**

Anderson's employment and breached Ms Anderson's employment agreement

- C. In satisfaction of Ms Anderson's personal grievance for unjustified action causing disadvantage, Blue Star Taxis (Christchurch) Society must pay Ms Anderson \$15,000.00 for compensation pursuant to s 123(1)(c)(i) of the Employment Relations Act 2000**
- D. Blue Star Taxis (Christchurch) Society must comply with the terms of Ms Anderson's employment agreement and allow her to work her normal hours of work as specified in that agreement.**
- E. There is no basis to impose penalties against Blue Star Taxis (Christchurch) Society for breaches of the duty of good faith and Ms Anderson's employment agreement.**
- F. I reserve costs with a timetable set for submissions if required.**

Employment relationship problem

[1] Blue Star Taxis employs Linda Anderson as a call centre operator. Ms Anderson's terms of employment state that she works Monday to Friday from 7:00 am until 3:00 pm.

[2] In March 2017, Blue Star commenced a process by which it sought to change Ms Anderson's hours of work. Blue Star says Ms Anderson accepted the proposed changes and it put the agreed hours into effect from 3 April 2017.

[3] Ms Anderson says she never agreed to change her hours and the subsequent imposition of the new hours was an unjustified action that caused disadvantage to her employment. Ms Anderson raised a personal grievance. She also alleges that Blue Star's actions are a breach of her employment agreement. Ms Anderson wants to be reinstated to her previous hours of work and she seeks remedies for the losses she has suffered.

[4] Ms Anderson also claims Blue Star's actions justify the imposition of penalties against it for breaching her employment agreement and breaching the duty of good faith.

[5] In order to resolve this employment relationship problem I need to consider the following:

- (a) What are the actions Ms Anderson complains of and did they occur?
- (b) Were these actions a breach of the terms of Ms Anderson's employment agreement; and/or
- (c) Do these actions give rise to a personal grievance, that is:
 - i. Did these actions cause disadvantage to Ms Anderson's employment or a condition of her employment; and
 - ii. If so, were Blue Star's actions justified?
- (d) If Blue Star has breached Ms Anderson's employment agreement and/or its actions give rise to a personal grievance, what remedies should I award Ms Anderson?
- (e) Do the actions amount to breaches of Ms Anderson's employment agreement and/or the duty of good faith such that I should impose penalties against Blue Star?

Actions complained of

[6] The actions complained of are that Blue Star changed Ms Anderson's hours of work without her consent and the manner in which it did this.

[7] Blue Star changed Ms Anderson's hours of work, as set out in her employment agreement, from Monday to Friday 7:00 am to 3:00 pm (i.e. a day shift pattern of work) to Monday to Friday 3:00 pm to 11:00 pm (i.e. a late shift pattern of work) except for every second Friday being 7:00 am to 3:00 pm. This change was set out in rosters for the week commencing 3 April 2017.

[8] However the issue that arises is whether this change was made with Ms Anderson's consent or not. Ms Anderson's employment agreement, setting out the terms agreed on 22 September 2016, not only records her normal working hours (as set out above) but it also records that any changes to these hours could only be made through consultation and then by "mutual agreement".

[9] So I must consider the process by which the change in hours was implemented and establish whether there was consultation over the proposed change and agreement to the change.

Process of consultation

[10] Ms Anderson was called to a meeting with Sue Hill, her manager, and Andy Pimm, an Administrator at Blue Star, on Wednesday 8 March 2017. Ms Anderson was not told what the meeting was about beforehand nor was she provided any information before she was summonsed. Mr Pimm simply told her to go upstairs for a meeting.

[11] When Ms Anderson sat down in Ms Hill's office she was presented with a letter. That letter was dated 7 March 2017 and it stated:

This letter is to advise you that due to competitive pressures and upcoming legislative changes to the taxi industry and the effects these will have on our business we need to make changes to the staffing room shifts. This is being done for continuity and better management of the phone room shifts.

The proposed changes that effect you are as follows:

Query operator: Late shift 3pm to 11pm, Monday to Friday. Total of 40 weeks per week.

The ongoing service you are giving to Blue Star Taxis is greatly appreciated and valued.

The proposed changes will take effect form (sic) Monday 27 March 2017.

I would like to meet with you before 20 March 2017 to answer any questions you may have regarding these proposed changes.

[12] Ms Hill and Ms Anderson then discussed changing Ms Anderson's hours. Ms Hill says that after discussing various factors relating to the proposed change Ms Anderson agreed to trial the new shift pattern. Ms Anderson says that she never agreed to change her hours to the new shift pattern. She accepts there was discussion about doing the late shift pattern and how her circumstances had changed and the late shift pattern might now be a more acceptable shift pattern for her. She says that as part of that discussion Ms Hill mentioned her father's recent death referencing that she no longer had the care requirements she had previously. Ms Anderson was very upset by this.

[13] The result of the meeting was Ms Hill thought she had an agreement from Ms Anderson to change her shift pattern and Ms Anderson was unclear what was happening and felt she was being bullied into allowing the change to her shifts to be imposed.

[14] Two days later, on Friday 10 March 2017, Ms Anderson approached Ms Hill and told her that she had a contract and she was not changing her hours. Then on the following Monday, 13 March 2017, Ms Anderson approached Ms Hill and offered to compromise by working a pattern of split shifts varying between day shift and late shift. Ms Hill refused this offer on the basis that she believed Ms Anderson had accepted the proposed changes and could not withdraw her consent.

[15] Because of this refusal, Ms Anderson sought legal advice from her advocate. What followed was an exchange of correspondence between the parties' advocates. The result was the parties failed to reach agreement on the change in hours for Ms Anderson and Blue Star continued to assert that Ms Anderson had agreed to change her hours in the first meeting and changing her mind after that was too late.

[16] On Friday 31 March 2017 just before Ms Anderson finished her shift, she was told the rosters would be changed, in line with the proposed change, commencing on 3 April 2017. Ms Anderson was unable to cope with this and went to see her doctor who signed her off on sick leave for two weeks.

[17] Ms Anderson heard nothing further from Blue Star during her absence and returned to work on Tuesday, 18 April 2017 expecting to undertake a day shift. Ms Anderson was not rostered to work that shift and Ms Hill took her to one side and told her to leave work as she was stood down pending a meeting that she proposed for the next day, Wednesday 19 April.

[18] The parties and their advocates met the next day but were unable to resolve their differences. Blue Star maintained that Ms Anderson had agreed to change her shift pattern as proposed and could not now retract that agreement. It told Ms Anderson that her only option was to return to work on the new shift pattern. Ms Anderson has refused to work the new shift pattern.

[19] Ms Anderson has been off work since this time and has not worked the new shift pattern. There have been various attempts to resolve the impasse but there has been no resolution.

[20] Blue Star has not paid Ms Anderson during her absence.

Consultation and mutual agreement

[21] What constitutes proper consultation by Blue Star with Ms Anderson in these circumstances is informed by the requirements of the duty of good faith, the test for justification and the principles of bargaining for an employment agreement, all of which are contained in the Employment Relations Act 2000 (the Act).

[22] Blue Star should have provided Ms Anderson with an outline of the proposed change, given her an opportunity to consider the proposal including an opportunity to take legal advice if she wanted to and then discussed the proposal further to see if the changes could be agreed.

[23] Blue Star failed to do this and Ms Anderson's response to the consultation supports the conclusion that this was unfair and not to the necessary standard.

[24] Ms Anderson felt shocked by what was happening and felt she Blue Star was bullying her into allowing a change to happen when she did not agree with the proposal. She left the meeting upset and confused about what was happening.

[25] It was only after Ms Anderson had left the meeting that she was able to gather her thoughts, form a view and advise Ms Hill that the changes could not be imposed upon her and that she was willing to look at a compromise.

[26] It is clear to me that Blue Star failed to meet the requirements for consultation required by Ms Anderson's employment agreement.

[27] It is also clear to me that Blue Star did not have an agreement to change Ms Anderson's hours of work. This is based on the following:

- (a) I am not satisfied that there was clear acceptance of the proposal by Ms Anderson in the meeting. The evidence is equivocal.

I believe Ms Hill's view of the meeting was coloured by her desire to get an agreement and what I believe was a pre-informed view that she would get that agreement.

Ms Anderson's recollection of what was discussed is not clear other than she is adamant she did not agree to even trial the proposed changes. I believe Ms Anderson's memory is coloured by the fact she was upset by what was happening and by what was discussed and she was confused about what Blue Star was trying to do.

Mr Pimm's evidence of what occurred at the meeting does not assist at all. I find his evidence is unreliable. So, for example, his recollection is that the meeting ended amicably and Ms Anderson was not upset, yet Ms Hill, Ms Anderson and a colleague of Ms Anderson who saw her immediately after the meeting, all say she was upset and was crying.

(b) Ms Anderson's evidence, which I accept, is that she thought Blue Star was trying to bully her into accepting the changes – something she was not prepared to accept and something she made clear to Ms Hill on the Friday immediately after the first meeting.

(c) The letter provided to Ms Anderson at the first meeting was misleading and stated at the bottom that Blue Star wanted to meet to discuss the proposal further. Based on this it is entirely plausible that it appeared that Blue Star was not expecting Ms Anderson to agree to the changes in the meeting but rather it was going to give her an opportunity to do so after consideration and further discussion.

Given Ms Anderson's state of mind and emotion during the meeting and given what the letter stated about another meeting Blue Star could not reasonably have taken any comments from Ms Anderson in the meeting to amount to consent.

(d) Even if Blue Star did think it had Ms Anderson's agreement, it was made very clear to it subsequently that Ms Anderson did not agree and had not intended to agree. I do not accept that Blue Star could treat the subsequent statements of Ms Anderson as withdrawing her consent, rather I take it as her informing Blue Star she had not agreed and had not intended to agree. At that stage Blue Star should have either continued to negotiate over the proposal or considered the other options available to it if it could not get an agreement.

(e) Ms Anderson's employment agreement requires any variation to be in writing. Whilst this variation was recorded as a proposal in the letter it was not reduced to writing as a variation (including having that written variation signed by both parties as would be good practice) and the failure to have a written record of the variation supports my conclusion that there was no agreement.

[28] So by changing Ms Anderson's shift pattern on 3 April 2018 Blue Star did so without adequate consultation and without Ms Anderson's consent as required by Ms Anderson's employment agreement.

Breach of employment agreement

[29] Changing Ms Anderson's hours of work without consultation and by imposing the change upon her was clearly a breach of Ms Anderson's employment agreement.

Disadvantage to employment

[30] I am satisfied that changing Ms Anderson's hours of work from the day shift pattern to the late shift pattern without her consent caused a disadvantage to her employment. The day shift was a work pattern that Ms Anderson preferred for various reasons and she had ensured it could not be changed without her agreement by having this requirement inserted into her employment agreement in a number of places.

[31] The unilateral imposition of the new shift pattern did two things – it introduced a less favourable working pattern for Ms Anderson and it removed the protection she had specifically sought and obtained from Blue Star that her work pattern could not simply be changed without her agreement.

Was Blue Star's action justified?

[32] The unilateral change of hours was a breach of Ms Anderson's IEA and was not justifiable as it was neither substantively justified nor was it effected in a fair manner.

Conclusion

[33] I conclude that Blue Star has breached Ms Anderson's employment agreement and has carried out unjustified actions that have caused disadvantage to Ms Anderson's employment.

[34] I must now consider what remedies Ms Anderson is entitled to, if any and whether penalties should be imposed against Blue Star.

Remedies

[35] Having determined that Ms Anderson has a personal grievance I may award any of the remedies provided for under s 123 of the Act, which includes compensation, reimbursement and reinstatement as sought by Ms Anderson. I will consider each of these in turn and then will consider whether any additional remedies should be awarded for the breach of contract.

Compensation

[36] Turning first to consider compensation for humiliation, loss of dignity and injury to feelings pursuant to s 123(1)(c) of the Act I record that Ms Anderson describes the effects of Blue Star's unjustified actions on her as:

- (a) Shaking and in tears as a result of the first "consultation" meeting;
- (b) Being upset and really annoyed that Blue Star would simply go ahead with the change to her hours despite the protection in her employment agreement;
- (c) Being distressed and belittled by the unilateral changes imposed and the way they were announced to her on 31 March 2017;
- (d) Being stressed, requiring her to visit her doctor who signed her off work for two weeks;
- (e) Losing a sense of purpose because of Blue Star's treatment of her and feeling a loss of pride over what she believes is the perception of her at work.

[37] In deciding the level of compensation Ms Anderson is entitled to, based upon the loss of dignity, humiliation and injury to feelings described above, I have considered the decision of Chief Judge Inglis in *Waikato District Health Board v Kathleen Ann Archibald*¹. I consider

¹ [2017] NZEmpC 132

it appropriate and helpful to assess compensation in the three bands described by Chief Judge Inglis, and although there has been no clear indication of levels of compensation to be attributed to each band, defining the middle of the middle band as \$20,000.00 is informative and instructive².

[38] I do not think the level of loss of dignity, humiliation and injury to feelings in Ms Anderson's case to be on a par with that considered by the Chief Judge. I do consider it to be in the middle range but in the lower half of that range.

[39] I assess the level of compensation to be \$15,000.00.

Reimbursement

[40] Ms Anderson seeks reimbursement for the earnings she has lost as a result of Blue Star's unjustified actions pursuant to s 123(1)(b) of the Act.

[41] Ms Anderson claims Blue Star has prevented her from attending her workplace. This arises because Blue Star says she can only return to work if she works the new shift pattern - i.e. if she works the late shift roster - and she will not work that shift pattern.

[42] Blue Star says that Ms Anderson's loss is based entirely upon her refusal to attend work. It says Ms Anderson could attend work doing the late shift roster whilst progressing her grievance (essentially working under protest). And by not doing this Ms Anderson has effectively elected to go on strike whilst the issue is resolved.

[43] There was no conclusive evidence from Ms Anderson that showed she was unable to work the late shift pattern, rather her preference was to work her normal day shift pattern. I accept that the late shift pattern was disadvantageous to her work but it was not impossible nor was she incapable of doing it – Ms Anderson could have undertaken the late shift pattern.

² I note also that the Authority has considered and applied *Archibald* in determinations and in doing so has analysed and suggested levels of compensation for band. Whilst these determinations are not binding I find the observations of my colleagues helpful in assessing quantum – see in particular *Adam Lloyd v Healthy Business Limited* [2017] NZERA Christchurch 188

[44] So, whilst it may seem that attending work on the late shift pattern merely gives Blue Star what they want and it benefits from its own wrongdoing, Ms Anderson could have attended work. That attendance could have been under protest with Ms Anderson preserving her rights to pursue her grievance and the remedies she seeks. Then that attendance would have only been on an interim basis pending the outcome of this matter.

[45] In addition, there is a duty on Ms Anderson to mitigate her loss. And the easiest way to mitigate that loss would be to undertake work on the late shift pattern on the terms outlined above.

[46] On this basis I find Ms Anderson has not mitigated her loss. Her actions mean the lost remuneration she claims flows from that failure to mitigate, i.e. her decision not to work the late shift pattern, and not from the unjustified action.

[47] I will not award Ms Anderson any lost remuneration under s 123(1)(b) of the Act.

Reinstatement

[48] Ms Anderson seeks reinstatement to her “contracted shifts”. This is based upon a finding of breach of the employment agreement.

[49] I will not treat this as an application for reinstatement under s 123(1)(a) of the act but rather it sounds as a request for an order for compliance with the employment agreement.

[50] I am satisfied that in all of the circumstances a compliance order is reasonable and appropriate and should be granted. There has been a breach of Ms Anderson’s employment agreement by the unilateral change to her hours of work and the refusal to allow her to work her agreed pattern of day shifts. Unless Blue Star and Ms Anderson agree to change Ms Anderson’s work pattern as set out in her employment agreement it must comply with the employment agreement by offering and allowing Ms Anderson to work the day shift pattern.

Breach of contract

[51] There are no additional, separate remedies that Ms Anderson is entitled to for the breach of her employment agreement.

Contribution

[52] As I have awarded remedies I must consider whether Ms Anderson has contributed to the situation that gave rise to her grievance.³

[53] When assessing if Ms Anderson's actions contributed to the situation that gave rise to her grievance I am looking for a causal link between her actions and the situation that gave rise to the flawed process of consultation and the unilateral change to her hours of work. If I am satisfied that there is a link, then I must consider whether the behaviour was culpable or blameworthy, which would require a reduction in remedies.⁴

[54] I do not accept that Ms Anderson's actions contributed to the flawed consultation. Ms Anderson cannot be criticised for the consultation or her part in it, she was taken by surprise and was unable to constructively contribute in the consultation meeting and then she sought to make her position clear after the meeting within a reasonable period.

[55] The unilateral change to Ms Anderson's hours of work arose because Blue Star believed it had an agreement and Ms Anderson could not withdraw that agreement. Ms Anderson may have contributed to that belief by her actions in the consultation meeting – as I have stated the evidence is equivocal about what occurred in the meeting and there may have been some failure to be precise by Ms Anderson on her position at that time. In contrast, her actions after the meeting made her position clear and there is no link between those steps and the grievance.

³ Section 124 of the Act.

⁴ *Xtreme Dining Ltd v Dewar* [2016] NZEmpC 136

[56] So, there may be a possible link between Ms Anderson's conduct and Blue Star's belief which led to its unjustified actions. However, I cannot say with any certainty what those actions were and given the circumstances of that consultation meeting, whatever they were, Ms Anderson's actions cannot be culpable or blameworthy.

[57] I conclude there is no contributory conduct by Ms Anderson and no reduction in remedies.

Penalties

[58] The basis for the claimed penalties is the same fact pattern that founds the successful grievance and breach of contract claims. This fact pattern does not support penalties being imposed. Whilst the actions may have been unjustified and in breach of the employment agreement, I believe that Blue Star did genuinely think it had an agreement to vary Ms Anderson's hours. Further, whilst it should have taken notice of Ms Anderson's objection and acted accordingly, I find it did not act deliberately to breach the duty of good faith or Ms Anderson's employment agreement.

[59] I am not satisfied that there is a basis to impose penalties against Blue Star for its actions.

Determination

[60] This determination, reserved at the conclusion of a half day investigation meeting, has been issued outside the statutory period of three months after receiving the last submissions from one of the parties. I record that when I advised the Chief of the Authority that this would likely occur he decided, as he was permitted by s174C(4) of the Act to do, that exceptional circumstances existed for providing the written determination of the Authority's findings later than the latest date specified in s174C(3)(b) of the Act.

[61] In the course of consulting over a proposed change to Ms Anderson's hours of work, Blue Star acted in an unjustifiable manner that caused disadvantage to Ms Anderson's employment.

[62] In changing Ms Anderson's hours of work Blue Star acted in an unjustifiable manner that caused disadvantage to Ms Anderson's employment and breached Ms Anderson's employment agreement

[63] In satisfaction of Ms Anderson's personal grievance for unjustified action causing disadvantage, Blue Star must pay Ms Anderson \$15,000.00 for compensation pursuant to s 123(1)(c)(i) of the Employment Relations Act 2000

[64] Blue Star must comply with the terms of Ms Anderson's employment agreement and allow her to work her normal hours of work as specified in that agreement.

[65] There is no basis to impose penalties against Blue Star for breaches of the duty of good faith and Ms Anderson's employment agreement.

Costs

[66] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[67] If they are not able to do so and a determination on costs is needed, any party seeking an order for costs may lodge and serve a memorandum on costs within 28 days of the date of this determination. The other party will then have 14 days from the date of service of that memorandum to lodge and serve any reply memorandum.

Peter van Keulen
Member of the Employment Relations Authority