

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON OFFICE**

BETWEEN Phiona Baskett (Applicant)
AND B&M Entertainment Limited (Respondent)
REPRESENTATIVES Ross Jamieson for Applicant
John Chow for Respondent
MEMBER OF AUTHORITY G J Wood
INVESTIGATION Wellington
MEETING 1 March 2007
DATE OF 13 March 2007
DETERMINATION

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

1. The respondent, B&M Entertainment Limited (“B&M”), runs a number of brothels, amongst other business outlets. The applicant, Ms Phiona Baskett, started working for it on 16 August 2005 at one of its brothels, the Splash Club, working 60 hours per week. A month later her employment became permanent and she also became the manager of the Splash Club.
2. Around the same time B&M, which is run by Messrs John and Michael Chow, was establishing a new brothel called Il-Bordello. Mr John Chow is responsible primarily for financial and strategic matters, while Mr Michael Chow takes responsibility for the day to day operations of B&M.
3. The initial manager of Il-Bordello resigned before it opened and Ms Baskett was subsequently appointed as manager. The Splash Club went back into the management of her predecessor, Ms Lisa Anderson, who had left without notice.

4. Ms Baskett is an experienced manager who is very ambitious and career minded. She had experience in a wide range of management functions, and in particular human resources. At her initiative the Chows decided to restructure the operations of B&M so that the two brothels would be run by a group manager, who was to be supported by an operations manager. Other management positions covered the areas of sales and shift supervision.
5. Ms Baskett was responsible for developing and implementing the restructuring, which was completed in a clear, comprehensive and documented manner, involving the publishing of a proposal, consultation and an open internal selection process for all positions.
6. As a result of the restructuring Ms Baskett applied for the group manager position, which she was successful in obtaining. After missing out on the group manager position, Ms Anderson again left without notice. No appointment was made to the operations manager position.
7. Because the restructuring had just commenced and there was no one to support Ms Baskett she spent the next eight days working even longer hours than she was used to. I accept her evidence that she was required to work up to or more than 80 hours per week. She was not getting enough sleep and was under pressure from Mr Michael Chow to fix all sorts of teething problems, together with the usual issues that arose in running B&M.
8. On the evening of 28 May Mr Michael Chow rang Ms Baskett about work she had not completed, but Ms Baskett was trying to get to sleep and declined to meet with him until the next morning.
9. Ms Baskett complained about not having enough time to do all the work that was required of her when they met the next day. Mr Michael Chow made it clear that he was her boss and that he expected her to action all of his requirements. Soon after the meeting Mr Michael Chow emailed her with certain additional requirements of her position.

10. This was all too much for Ms Baskett, who decided on 30 May that she would resign. She gave one month's notice.
11. On 31 May Mr John Chow met with Ms Baskett to try and get her to withdraw her resignation. Ms Baskett declined, stating that her problems were with Michael Chow not him.
12. From that point both Michael and John Chow directly assisted Ms Baskett much more in running the businesses and also provided additional operational support to her. Mr Michael Chow was also trying to get Ms Baskett to stay on. In an email dated 3 June he wrote to her stating (verbatim):

"I have no problem at all, if you still want to continue stay working with us".

13. Ms Baskett made no commitment to return. At a meeting on 8 June, however, the first item on the agenda of the meeting between Mr Michael Chow and Ms Baskett was whether or not Ms Baskett was going to continue or not, as B&M "needed to know". I accept that as a result of the additional support given to Ms Baskett by B&M and the desire of the Chows for her continue working for them that Mr Michael Chow and Ms Baskett agreed at that meeting that she would continue. This can be seen from an email sent later that day by Mr Michael Chow which states (verbatim):

"Hi Phiona

Thanks for the meeting today, hope we can work together to drive the business into next level (sale up and cost are down and more girls, girls, and more girls), next week I like to take you out for dinner to get away from the work place and let me know which day is okay for you."

14. I do not accept Mr Michael Chow's evidence that the hope he expressed that they could work together related to exactly that, hoping to work together. I find that the tone of the email is very much that the relationship would be continuing, therefore dinner was suggested. Furthermore, it is stated that Mr Michael Chow hopes that he and Ms Baskett can work together to drive the business to the next level. In other words he hopes that them continuing to work together will be good for the business.
15. In determining this matter, where there can be no certainty about what occurred several months ago, I have been particularly assisted by the evidence of Mr Des Fell.

Mr Fell has acted as Ms Baskett's support person. He attended a later meeting on 21 June in that capacity and was the only one who took and kept notes. Mr Fell's minutes of the meeting have assisted greatly in determining this matter. Mr Fell is an experienced private sector manager in the transport industry and I have no reason to doubt his evidence that Mr Michael Chow conceded on the 21st of June that he had agreed that Ms Baskett would continue on and it had been agreed that her resignation had been withdrawn.

16. As a result of the agreement Ms Baskett therefore expected that her employment would simply carry on as if she had never resigned.
17. Furthermore, despite the fact that it was likely to take several months to replace someone in a senior position like Ms Baskett, it was acknowledged by the Chows that no advertisement was made for Ms Baskett's position at any time after she resigned. This was no doubt because B&M wanted to retain her and because, as discussed below, the Chows later intended to return to the old structure of a manager for each site, given the problems they had had in recruiting an operations manager and retaining their group manager.
18. The overall restructuring did not receive the ongoing approval of the Chows, particularly as B&M had lost its manager of the Splash Club and had no operations manager. Therefore they suggested in a meeting with Ms Baskett on 12 June that Ms Anderson return to the Splash Club and that Ms Baskett go back to managing Il-Bordello. I accept that it was agreed that the existing structure would continue for at least for another three weeks.
19. On 14 June Ms Baskett worked through until the evening and then was expecting to have the rest of the night off. She had felt unwell for several days and had an appointment to see the doctor that evening. Mr Michael Chow called her to try and arrange a meeting with her but she told him that she could not, because of her doctor's appointment and other commitments. Mr Michael Chow indicated that they would meet again the next day.
20. Ms Baskett's doctor told her that she had a very bad cold and that she needed to have other tests. The next morning Ms Baskett found out that Ms Anderson had returned

to the Splash Club as manager, despite the restructuring. She saw a notice on the Splash Club website stating:

“After a well deserved break our previous Manager is back to restore the high all round standard you expect from the Splash Club”.

21. Ms Baskett took exception to this initiative because it had happened without any consultation with her and in breach of the understanding that had been reached on 12 June. She did not know what that meant for her group manager position. She certainly had no intention of working with Ms Anderson because she had had left without notice on at least two occasions, which had created a lot of extra work for Ms Baskett. Ms Baskett also took exception to the statement that high standards needed restoring. She felt that standards had been maintained throughout her period as group manager.
22. Ms Baskett contacted Mr Michael Chow about this and he responded by offering her old position as manager of Il-Bordello. Ms Baskett was shocked, but merely told Mr Michael Chow that she had been told by her doctor to take three days off.
23. She later felt even worse and went back to the doctor, who told her to take a week off and stay away from work as work was clearly causing her a lot of stress.
24. As required in her employment agreement Ms Baskett raised her concerns about the changes at B&M in an email of 15 June. Mr Michael Chow tried to contact Ms Baskett over the next couple of days, but she declined to respond as per her doctor's advice, until emailing Mr John Chow on 17 June. She stated that she had lost her voice, which was not correct, as she was simply trying to avoid personal contact with the Chows due to her stressed and ill state. She also told Mr John Chow that she would never have applied for her old job back because she was not going to work with Ms Anderson again. She requested that any further communication take place by email. Ms Baskett also suggested that she be paid four weeks pay because her position had been disestablished overnight.

25. Mr John Chow responded on 17 June, stating that a meeting was required. He also stated (verbatim):

“I don’t see why I should pay. You are still the Group Manager and you still have the obligation to work for us until 27th June, as your email dated 30 May. Currently, there are not enough staff to work at Splash and Il-Bordello and Michael have to work to cover your ‘sudden’ one week sick leave. I felt your last three days performance is totally unprofessional”.

26. It was then agreed that the parties would meet on 21 June. At the meeting Mr John Chow found out for the first time that Mr Michael Chow had accepted the withdrawal of Ms Baskett’s resignation. With respect to the return of the previous manager, the Chows made it clear that they could change how B&M operated whenever they saw fit, as they were its owners. Ms Baskett agreed that they could change direction, but that she should have been given notice and that she did not want to return to being the manager of Il-Bordello.
27. Mr Michael Chow considered that she should go back to Il-Bordello but did not, when questioned, specify the detail of what her role would be. Ms Baskett noted her concerns about the item on the Splash website, and Mr John Chow responded that they could not control what Ms Anderson put on the website, but that Ms Baskett was good at her job and therefore had been chosen as group manager over Ms Anderson.
28. Mr John Chow accepted that one of reasons for the meeting was because of a lack of communication. He was, however, concerned that Ms Baskett had resigned only a week into the restructuring. Ms Baskett responded that she had been doing 80 hours or more that week and had little support. When asked specifically whether she would be coming back as group manager. Mr John Chow responded that they would have to talk to Ms Anderson about that, but that there could be no guarantee. Mr John Chow also noted that Mr Michael Chow was responsible for the day to day running of the business. It was therefore implicit that he would defer to his brother on such matters.
29. Ms Baskett then sought an adjournment. When she returned she stated that she had applied for the group manager’s role in good faith and had worked diligently in it,

and was not prepared to go back to running Il-Bordello. She was also not prepared to work the same hours without support. Ms Baskett considered that the group manager's role had been disestablished without notice. She stated that she was not prepared to return without certainty as to the above matters.

30. It was made clear that no such certainty could be provided. A stalemate seemed to have been reached. Mr Michael Chow then stated that Ms Baskett was to come to B&M's offices the next day at 4pm to return all her company property, including keys, phone, computer files and passwords. Ms Baskett said that once she had the all clear from her doctor she would work out any remaining notice. Mr Michael Chow said that that was not necessary and hence the arrangements to hand back all company property.
31. While Mr Fell was not sure what the result of the meeting in fact was, Ms Baskett took it that she had been dismissed. Messrs Michael and John Chow, by contrast, took it that Ms Baskett was simply confirming her previous resignation and that they had decided that she did not need to work out her remaining notice.
32. Ms Baskett returned all B&M's property the next day. On 23 June she emailed Mr John Chow asking to be paid up to 27 June, together with her holiday pay. She was told that even although she had decided not to continue to work for B&M she would be paid until 27 June, plus her holiday pay.
33. On 27 July Ms Baskett informed the Chows of a personal grievance, but she did not receive a reply. The claim was for unjustified dismissal because her position was disestablished without any notice. She sought 6-8 weeks pay as compensation for the period it would have taken to restructure the organisation properly.
34. Despite having been to mediation the problem remained unresolved and therefore it falls to the Authority to make a determination.

The Law

35. An offer of resignation can be withdrawn, but only with the agreement of the employer. Where an employer seeks to retain an employee who has resigned the

employee remains in their existing position unless there is an agreement that the worker is to stay on in a different position.

36. Where an employee is appointed to a particular position that employee is entitled to remain in that position unless that position is made redundant. Employers have a great deal of flexibility in terms of determining whether any particular position should be made redundant, as a worker does not have a right to continued employment if the business can be run more efficiently without them. Before changing an employee's position, however, consultation is mandatory (see *Simpson Farms Limited v. Aberhart*, unreported, Colgan CJ, AC52/06, 14 September 2006). Consultation must be genuine, so an employer must consult with an open mind and be ready to change at all times. It is a process that takes time.

Determination

37. On the facts of this case it is clear that Ms Baskett's resignation was withdrawn by agreement. She therefore remained as group manager. Subsequently, this did not suit B&M, so therefore it decided to simply try and revert to the old structure, no doubt for good practical business reasons at the time. In doing so, however, it confirmed to Ms Baskett that she would in effect lose her position as group manager and effectively be demoted to site manager. This was a substantial unilateral variation to her employment agreement and one which she did not have to agree to. As Ms Baskett noted, in the absence of proper process before restructuring again, she was in effect having her job changed overnight.
38. The restructuring exercise conducted by B&M that led to the appointment of Ms Baskett as group manager was an example of a restructuring process that was conducted fairly, involving as it did time and genuine consultation. The decision of the Chows to revert to the previous structure appeared to be conducted in quite the opposite manner, being done at short notice to cover for Ms Baskett's illness and the inability of B&M to recruit an operations manager. Furthermore, I have found that after 8 June the Chows were mistaken in their belief that they could continue to rely on Ms Baskett's resignation.

39. I therefore accept that Ms Baskett was correct in concluding at the end of the meeting on 21 June that she had effectively been dismissed. There can be no justification, because of the lack of consultation, as to the change in the role expected of her by B&M. She has therefore been unjustifiably dismissed.
40. On the other hand, I do not accept that B&M should be subject to a penalty for failing to provide Ms Baskett with a safe place of work. Ms Baskett was prepared to work at least 60 hours a week in her job. While that in itself is at the upper ends of the sorts of hours a week an employer could expect, and could be appropriately the subject of an investigation by OSH, Ms Baskett is an experienced manager who is trying to advance her career. She was prepared to work those hours.
41. I accept, however, that once appointed group manager Ms Baskett was required to work well in excess of the contracted hours and that she did not get immediate support when she asked for it. Those additional hours were only required of her for around one week and after she resigned she was given a substantial measure of additional support. This is therefore not the sort of case deserving of a penalty.

Remedies

42. I accept that it took Ms Baskett several months before she got another permanent job and that she has lost \$12,318 in earnings as a result. While it is true that B&M could have conducted a proper restructuring exercise over a month or two to return to the previous management structure, it is not Ms Baskett's fault that it did not. In any event, B&M chose not to give its new structure a decent bedding-in period and unilaterally changed the terms of her employment, meaning that she was not made redundant but rather unjustifiably dismissed. She is therefore entitled to be reimbursed for her full loss of remuneration.
43. Ms Baskett has also suffered a crisis of confidence as a result of the unfair treatment she received while in B&M's employment. In particular she has lost confidence in her ability as a manager. She was most upset to have her employment terminated while she was ill and to have the reasons for her leaving misrepresented to others. I accept her evidence on these points and consider that compensation in the sum of \$8,000 is appropriate.

44. There is no reason to reduce any of these remedies due to contributory actions, as Ms Baskett was not at all to blame for the situation that arose. I therefore order the respondent, B&M Entertainment Limited, to pay to the applicant, Ms Phiona Baskett, \$12,318 gross in lost remuneration and \$8,000 in compensation under s.123(1)(c)(i).

Costs

45. Costs are reserved.

G J Wood
Member of the Employment Relations Authority