

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2015] NZERA Wellington 42
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5456181

BETWEEN	MICHAEL KERSE First Applicant
AND	MICHAEL WRIGHT Second Applicant
AND	COOK STRAIT DISTRIBUTORS LIMITED Respondent

Member of Authority:	Michele Ryan
Representatives:	Graeme Ogilvie, Advocate for the Applicants Kevin Chapman on behalf of the Respondent
Investigation Meeting:	1 April 2015 at Wellington
Submissions Received:	On the day of the investigation meeting on behalf of the Applicants No submissions from the Respondent
Determination:	21 April 2015

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicants, Mr Michael Kerse and Mr Michael Wright, each commenced employment with Cook Strait Distributors Limited (CSDL) on 4 February 2014.

[2] The precise circumstances that gives rise to their separate claims is individual to each of them but both applicants allege that their hours of work were unilaterally reduced and/or extinguished in breach of agreed weekly minimum hours of work, and CSDL's obligation to consult. Each applicant claims he was unjustifiably disadvantaged by CSDL's actions and seeks compensation and reimbursement of

wages plus associated holiday pay. In addition they seek penalties for breaches to their respective employment agreements and CSDL's failure to provide wage and time records.

[3] Mr Kerse and Mr Wright also allege that they were unjustifiably dismissed without due process. They accept that their respective individual employment agreements with CSDL contained a 90 day trial period provision but allege CSDL did not comply with its statutory obligation at s.63A(2)(c)¹ to provide a reasonable opportunity to seek independent advice about the intended agreement. They each say in these circumstances the trial period provisions have no effect and the claims of an unjustified dismissal against CSDL are not barred.

[4] Mr Kevin Chapman is the sole director and shareholder of CSDL. He denies CSDL engaged in unfair bargaining and says that both applicants were lawfully terminated pursuant to valid trial period provisions. He accepts that the hours of work offered to each of the applicants were either reduced or suspended but says each applicant, for differing reasons, was not able to work the hours CSDL requested and therefore work was not available for either of them.

The Authority's investigation and the issues to be determined

[5] Mr Kerse and Mr Wright lodged separate applications with the Authority on 23 June 2014. Initially the applicants sought remedies associated with claims for an unjustified disadvantage and unjustified dismissal.

[6] CSDL did not lodge a statement of reply (or file any statements)². However the parties were present at both case management conference calls and mediation.

[7] Approximately one month prior to the Authority's investigation meeting both Mr Kerse and Mr Wright amended their statements of problem to include claims for unfair bargaining³.

[8] At the Authority's meeting evidence was obtained from Mr Kerse, Mr Wright and Mr Chapman on behalf of CSDL with respect to all claims made by the applicants including the events surrounding their dismissals.

¹ Employment Relations Act 2000

² Despite the Authority's request for a statement in reply and timetabling for witness statements

³ On 3 March 2015

[9] This determination decides:

- whether CSDL complied with its statutory obligation at s.63A(2)(c) of the Employment Relations Act 2000 to give the applicants a reasonable opportunity to seek independent advice about its intended employment agreement;
- whether CSDL unjustifiably disadvantaged one or both applicants Wright by:
 - (i) reducing and/or extinguishing hours of work, and
 - (ii) failing to consult with the applicants about the roster change;
- if CSDL did not bargain fairly what should happen next;
- should remedies be awarded.

[10] The parties were advised at the investigation meeting that I would not be able to decide in this determination whether or not one or both of them had been unjustifiably dismissed and the rationale for that conclusion. I shall return to this matter later in this determination.

Relevant background information about the Applicants' respective offers and acceptances of employment

[11] Prior to commencing employment with CSDL, both Mr Kerse and Mr Wright had been employed by Pegasus Services Ltd, (PSL) for approximately six years at PSL's Service and Forecourt Station located in Paraparaumu.

[12] In December 2013 CSDL reached an agreement with PSL that it would manage aspects of PSL's business at the Paraparaumu site.

[13] Although Mr Chapman had not yet prepared employment agreements, in mid-January 2014 he met separately with PSL staff, including Mr Kerse and Mr Wright, to discuss the possibility of future employment with CSDL. Mr Kerse says 90 trial periods were definitely not discussed. Mr Wright says when he met with Mr Chapman a 90 day trial period was confirmed. At the end of each meeting Mr

Chapman offered Mr Kerse and/or Mr Wright permanent employment with CSDL at the same number of hours each had been contracted to perform with PSL.

[14] CSDL took control of the Paraparaumu service station on Tuesday 4 February 2014. Prior to that event Mr Chapman says he delivered six separately named envelopes, each containing a letter of offer and two copies of an intended employment agreement, to the Paraparaumu site on 29 January 2014. He asked the PSL manager to place the envelopes in the staff room/office so that each named individual could collect his or her documents. Mr Chapman cannot recall whether he rang prospective employees before or after he visited the service station, but says he would have called each employee to advise that the employment agreements were in the office because this was the process he used.

[15] Mr Kerse strenuously denies that he received a phone call from Mr Chapman about the employment agreement or any other matter. He states that the first time he became aware of an employment agreement was at 11.45am (or thereabouts) on Friday, 31 January 2014. He says he was approached by the PSL manager, given an envelope and told to *“read it, sign it and return today if you want a job”*. He was informed that Mr Chapman was scheduled to collect employment agreements at 3pm that afternoon and told to sit in his car and read the agreement over his lunch break. Mr Kerse says he reviewed the document for approximately half an hour and signed it as instructed. When he returned the agreement to the PSL manager Mr Kerse says he attempted to engage in a discussion about the contents of the document but was advised that it had nothing to do with him [the manager] or his current employer.

[16] Mr Wright does not recall Mr Chapman calling to inform him that the intended employment agreement was available for him in the office. He says the PSL manager gave him the envelope (with the accompanying intended employment agreement) at about 3pm on 3 February 2014; the day before CSDL commenced managing the service station. He says he was told that if he did not sign the agreement by the time CSDL took over the business at midnight that night he would not be employed. He says he was told to *“just sign it and give it back”*.

[17] Mr Wright says he quickly looked over the employment agreement and signed it. He agrees he did not read it fully.

Did CSDL give Mr Kerse and/or Mr Wright a reasonable opportunity to seek independent advice about its intended employment agreement?

Discussion and analysis

[18] When bargaining for an individual employment agreement s.63(A)(2) of the Act requires an employer to provide an employee with a copy of the intended agreement, advise them of the right to seek independent advice, give them a reasonable opportunity to seek advice, and consider and respond to any issues raised by the employee.

[19] The Chief Judge of the Employment Court in *Blackmore v Honick Properties Limited*⁴ addressed (amongst other matters) the statutory obligation to give a prospective employee an opportunity to seek independent advice on an employment agreement, as follows:

*... the law also requires that an intending employee must have an opportunity to consider and take independent advice about an employment agreement before he or she enters into it. What that opportunity amounts to temporally will depend on the circumstances of the case. However realistically, an employer will not be entitled in law to insist upon immediate execution of a form of employment agreement after its presentation to a potential employee. Nor, probably, its signed return within less than a few days or even more, depending upon the circumstances (including the time of year, the whereabouts of the parties and the like), fulfil the employer's statutory obligations.*⁵

[20] Mr Chapman first points to the letter of offer that accompanied the intended employment agreements in the envelope each received. The letter of offer advised (amongst other things) the following:

You are encouraged to seek independent advice prior to confirming your acceptance of this offer of employment.

...

Should you wish to accept the offer please proceed to initial each page (lower right corner) and sign where indicated

...

Please return all documentation to the site Mobil Kapiti no later than 3pm Monday February 3 2014.

In the event you do not wish to accept the offer please notify me by telephone as soon as possible prior to Monday February 3rd.

[21] Mr Chapman's contact mobile phone number was recorded at the very bottom of the page.

⁴ [2011] NZEmpC 152

⁵ Ibid at [64]

[22] I accept that CSDL did advise each of the applicants, via the letter of offer, of his right to seek independent advice. However the supply of that information does not satisfy the requirement that the applicants be given a reasonable opportunity to obtain the independent advice. Nor do I accept that either of the applicants was able to negotiate an extension of the deadline by which to accept the offer of employment so as to obtain advice. There is nothing in the letter of offer to indicate Mr Chapman was available or open to discussion on any aspect of the intended employment agreement or timing of acceptance of the offer.

[23] Mr Chapman agreed during questioning that he could not specifically recall speaking to Mr Kerse or Mr Wright (on or about 29 January 2014) about where to collect the intended employment agreements. He accepted also that he could not be certain what was done with the envelopes after they were handed to the PSL manager or when the applicants individually received them.

[24] Given Mr Chapman's uncertainty as to when the applicants received the intended employment agreements, I prefer the evidence of both Mr Kerse and Mr Wright and that each became aware of an employment agreement when the intended employment agreement was given to them by the PSL Manager.

[25] It is clear that the Chief Judge in *Blackmore* does not define a precise time frame by which an employer must give an employee to obtain independent advice. I am however guided by the view that "*less than a few days*" may not fulfil the statutory obligation.

[26] Given that Mr Wright received the employment agreement at almost the exact time it was required to be executed, I find he had had no opportunity whatsoever to obtain independent advice.

[27] As regards Mr Kerse, he had been told by his then manager that the agreement needed to be signed by 3pm that day (29 January 2014). I find Mr Kerse had no reason to doubt his manager's instruction. CSDL is not able to avoid its obligations under s.63A on grounds that a third party advised a prospective employee incorrectly. In any event even if I ignore Mr Kerse's evidence about what he was told to do by his then manager I consider the time frame of a little over 24 hours to obtain and consider advice was inadequate in the circumstances.

[28] Finally and although not argued by Mr Chapman, I note both Mr Kerse and Mr Wright each placed their respective signatures underneath a declaration clause stating he had “*been provided with an opportunity to seek independent advice prior to entering this agreement*”. I have already found on the facts that there was either no opportunity to seek independent advice or the opportunity was insufficient. I am not satisfied that the signed statements accurately reflect the circumstances of Mr Kerse or Mr Wright at the time each executed his agreement and I discount that information as reliable evidence.

[29] CSDL had breached its obligation to give Mr Kerse and Mr Wright a reasonable opportunity to obtain independent advice about their respective employment agreements and as a consequence I find the bargaining was conducted unfairly.

Did CSDL act in a way that unjustifiably disadvantaged the applicants?

[30] Mr Kerse and Mr Wright both allege they were unjustifiably disadvantaged when CSDL reduced hours of work by omitting to allocate sufficient shifts on the roster and were further disadvantaged by CSDL’s failure to consult with each of them about the roster.

[31] The applicants’ employment agreements each advise under the “*Hours and location of work*” provisions, the following:

The employee’s usual hours of work are set out in Schedule 2.

The employer may alter those hours of work from time to time if this is required for business reasons, and following consultation with the employee.

Events in relation to Mr Kerse

[32] Mr Kerse’s employment agreement provided for a minimum of 32 hours per week of allocated work.

[33] Mr Chapman says he had drafted a roster plan for the week beginning 10 March 2014 and had placed Mr Kerse on a graveyard shift (11pm-7.30am) on 13 March and three afternoon shifts from 14-16 March.

[34] The exact timing is unclear. However Mr Kerse says when became aware that he was rostered on a graveyard shift he approached Mr Chapman and advised he had

not worked that shift before (which was performed alone) and wanted training on activities he had not previously performed such as end of day cash register reconciliations and close-ups. He says Mr Chapman removed his name from scheduled graveyard shift but he was not provided an alternative shift. A copy of the roster reflects Mr Kerse was allocated three shifts (down from his usual four) that week⁶ and the following⁷, and one shift for the week beginning 24 March until his employment terminated on 27 March.

Events in relation to Mr Wright

[35] Mr Wright's employment agreement provided for a minimum of 8 hours per week.

[36] In the first three weeks of employment with CSDL Mr Wright worked between two to four shifts each week, comprising graveyard or afternoon work. In the next fortnight he worked two Friday morning shifts (7 and 14 March).

[37] Mr Wright says on 14 March he noticed his name was not included on the following week's roster. Later that day Mr Chapman inquired if he could do graveyard shifts. Mr Wright says he explained that in the short term future he was unable work graveyard shifts. He asked if he was "*back on the roster*". He says Mr Chapman responded by stating "*don't take anything for granted*". Mr Wright denies that there was any additional discussion with Mr Chapman about future shifts or that there was an agreement that he would contact Mr Chapman when he became available for the graveyard shift.

Findings

[38] Mr Chapman did not seriously challenge the separate accounts of Mr Kerse and Mr Wright. He says he was new to rostering shifts and that these initially proved difficult. He says he accepted Mr Kerse's explanation that further training was needed before undertaking a solo graveyard shift and withdrew his name from that shift. He does not recall whether he spoke to Mr Kerse about rostering him alternative shifts.

[39] Mr Chapman says Mr Wright had indicated in the first interview that his preference was for the graveyard shift. He says when he asked Mr Wright on 14

⁶ The week of 10 to 16 March 2014

⁷ The week of 17 to 23 March 2014

March to work graveyard shifts he was told that he was unable to work that particular pattern of shift work at that time. Mr Chapman advised the Authority that it is not “[CSDL’s] *problem if Mr Wright was not available for the work offered to him.*”

[40] It was unclear from Mr Chapman’s evidence as to whether CSDL was concurrently undertaking a restructure of its staffing operations, but it has been difficult not to form an impression that Mr Chapman simply reduced or removed the applicants from placement on the roster when neither of them immediately consented to the draft roster pattern he had devised.

[41] When Mr Kerse and Mr Wright separately notified Mr Chapman that there were difficulties with the roster, CSDL was obliged in accordance with its employment agreement to consult (and to discuss in good faith) any proposed alteration to hours of work with each individual. Although addressed in the context of restructuring, the Court in *Communication & Energy Workers Union Inc v Telecom NZ Ltd*⁸, listed a series of propositions to define what is required by an employer when consulting with employees⁹ including that consultation requires more than mere notification and that genuine efforts must be made to accommodate the views of the employees¹⁰.

[42] Had CSDL consulted with the applicants it may be that the parties could have reached a suitable compromise on the shifts going forward. Alternatively, and after consultation, CSDL may have been entitled to lawfully instruct either or both the applicants to perform the shifts for which each was tentatively rostered. CSDL was not, however, entitled to unilaterally reduce or extinguish either of the applicants’ rostered duties below that contractually agreed without first obtaining agreement from each individual. I find CSDL’s actions were not the actions of a fair and reasonable employer in all the circumstances.

[43] I accept that the applicants were each unjustifiably disadvantaged by CSDL’s action to reduce their respective hours of work and its failure to meaningfully consult with either applicant about the draft roster.

⁸ [1993] 2 ERNZ 429 at p455 and p456

⁹ The propositions were extracted from the Court of Appeal judgment; *Wellington International Airport v Air NZ* [1993] 1 NZLR 671

¹⁰ I have not listed all the propositions

Remedies

[44] Pursuant to s.123(b) and 123(c)(ii) the applicants are entitled to be reimbursed for wages and any lost benefit as a result of the grievance.

[45] Mr Kerse was short paid the sum equal to 14 hours of work for the fortnight beginning 10 March 2014. I am not satisfied that a pattern of working days was sufficiently established that it clear that Mr Kerse would have been rostered any particular shifts for the week beginning 24 March prior to his employment finishing midweek on 27 March 2014 and am unwilling to make an order to reflect that assumption. I also order compensation for loss of the benefit of holiday pay associated with the shortfall in hours of work.

[46] Mr Wright was not provided with any work for the seven weeks between 14 March 2014 and termination of his employment on 3 May 2014. Holiday pay associated with those lost wages is also ordered.

[47] Mr Kerse and Mr Wright both gave evidence on finding that they were no longer included on the roster and CSDL's failure to consult before those decisions were made. I accept each felt a moderate level of distress and humiliation as consequence of CSDL's unjustified action.

[48] Pursuant to s.123(1)(c)(i) I award the applicants a global figure of \$2,000 each for their claims of unjustified disadvantage. Neither of the applicants contributed to the situation that gave rise to the personal grievance in a way that can be characterised as blameworthy and their remedies are not impacted by s.124 considerations.

Where to from here?

[49] Where bargaining for an employment agreement is found to be unfair as I have done, s.69(1)(b) allows the Authority a discretion to make an order cancelling or varying terms contained in an employment agreement (s.69 (1)(b)) but it cannot do so until after the requirements of s.164, (including identification of the problem and a direction that the parties attempt in good faith to resolve the problem by using mediation) have been met.

[50] The problem that is identified from my finding is whether or not the trial period provision in each of the applicants' employment agreement is invalid and

unenforceable and claims of an unjustified dismissal are therefore not barred¹¹. The parties are directed to attend mediation and attempt in good faith to resolve the problem with 21 days of the date of this determination.

[51] If the parties are unable to resolve their problem in that forum, the parties are to provide submissions on whether the trial period provision should be struck out and whether the Authority should determine the claims for an unjustified dismissal. Timetabling for those events will occur after mediation and following an indication from the applicants that they wish to pursue this aspect of their claims.

Penalties

[52] The statement of problem for both applicants requested penalties for breaches of the employment agreement and failure to provide wage and time records.

[53] It was not clear if the requested penalties as regards breaches to the employment agreements related to the unjustified actions which have been remedied by reimbursement of wages and compensation, or some other action. Final submissions did not address that matter and I decline to make an order where the claim is uncertain.

[54] CSDL did not provide wage and time records that comply with s.130. Mr Chapman did, however, provide copies of rosters for the period of time in which the applicants physically attended work and payslips, which were of some assistance.

[55] I find Mr Chapman was mistaken in his view that those documents satisfied CSDL's statutory obligations with respect to records, but I do not find that the omission to be so deliberate and blameworthy that it should be met with punitive action. I decline to make an order for penalties.

Costs

[56] Costs are reserved.

¹¹ Pursuant to s.164(a)(i)

Orders

[57] Cook Strait Distributors Limited is ordered to:

- (a) reimburse Mr Kerse the sum of \$219.24 (gross)¹² for wages and the lost benefit of holiday pay and pay to him compensation of \$2,000;
- (b) reimburse Mr Wright the sum of \$904.37 (gross)¹³ for wages and the lost benefit of holiday pay and pay to him compensation of \$2,000.

[58] The parties are directed to attend mediation within 21 days of this determination and attempt in good faith to resolve whether or not the trial period provision in each of the applicants' employment agreement is invalid and unenforceable and their claims for unjustified dismissal are therefore not barred.

Michele Ryan
Member of the Employment Relations Authority

¹² 14 hours @ \$14.50 per hour = \$203.00 plus \$16.24 as 8% holiday pay = \$219.24

¹³ 57.75 hours @ \$14.50 per hour = \$837.38 plus \$66.99 as 8% holiday pay = \$904.37