

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

AA 170/08  
5093103

BETWEEN                      LARRY SWANN  
   Applicant  
  
AND                                TAMAKI TOURS LIMITED  
   Respondent

Member of Authority:        R A Monaghan  
  
Representatives:              D Smyth, counsel for Applicant  
   D Tamaki and M Meads, advocates for Respondent  
  
Investigation Meeting:        14 April 2008 at Rotorua  
  
Submissions received:        21 April 2008 from Applicant  
   24 April 2008 from Respondent  
  
Determination:                07 May 2008

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1]     Larry Swann says his former employer, Tamaki Tours Limited (“Tamaki Tours”) dismissed him unjustifiably on the ground of redundancy.

[2]     Mr Swann does not accept that the reason given, namely a seasonal downturn in business, is the real reason and says he was dismissed because of his union activities. He says, too, that a last on – first off rule applies so that he should not have been selected for redundancy.

[3]     Tamaki Tours says Mr Swann was one of a group of employees engaged on a seasonal basis, and his employment ended in association with the expected seasonal downturn. It denies that Mr Swann’s union activities had anything to do with the termination of his employment.

## **The employment relationship**

[4] Tamaki Tours operates in the tourism industry. It offers a Maori cultural experience at two venues in Rotorua. Visitors are collected from their accommodation by bus and taken to the first of the venues for a short tour, then transported by bus to the second venue. Following a tour of that venue, which includes a concert and a hāngī meal, they are returned by bus to their accommodation.

[5] The high season occurs over the summer period, and there is a drop off in visitor numbers in winter. During the high season, and depending on visitor numbers, there are two 'shows' (tours including concert and meal) per day, dropping to one per day in the winter season. Accordingly Tamaki Tours retains a small core of permanent staff members, and employs additional staff for the high season only.

[6] Early in 2006 Mr Swann was seeking a position as a bus driver. At the suggestion of one of the companies to which he had applied, he approached Tamaki Tours regarding a possible position there. In or about April 2006 he spoke to Florence Ngaira, who was then acting as manager of Tamaki Tours' driver/guides. An employment form completed at the time recorded that Mr Swann would be engaged on an on-call basis as a driver/guide. It was common ground that Mr Swann was to undergo a brief training period, then would be called into work if required over the winter period. It was also common ground that Mr Swann was not called in over the winter. Mr Swann takes no issue with that.

[7] Nevertheless Mr Swann maintained contact with Ms Ngaira regarding the availability of work. Ms Ngaira said he was persistent, which I accept. She also said in evidence that she had been recruiting staff for the high season only, but that if a member of the permanent staff left she would replace that person with a seasonal worker. One of the members of the permanent staff, Ngata Eapara, left in or about July 2006. Mr Swann happened to make another approach to Ms Ngaira after that, and Ms Ngaira said she told him he could have Mr Eapara's job. Mr Swann started full time work in or about September 2006.

[8] There was no written employment agreement, and no further documentation regarding this arrangement.

[9] In or about April 2007 the seasonal downturn started, although the seasonal guides and driver/guides were not laid off immediately.

[10] In or about mid May 2007 Mr Tamaki approached Mr Swann to point out that winter was approaching and business was beginning to slow down. He then approached Mr Swann's then-supervisor about implementing the termination of Mr Swann's employment. The approach was apparently communicated to Mr Swann because Mr Swann said he 'confronted' Mr Tamaki about the matter. He told Mr Tamaki he would like to stay on, but Mr Tamaki advised him he was 'surplus to requirements'.

[11] There were discussions about the possibility of Mr Swann working shorter hours, although it is not clear when these occurred.

[12] For unrelated reasons Mr Tamaki had suggested a reduction in hours earlier in the year, but Mr Swann continued to work full time hours. It seems there was a second conversation about hours of work in association with the downturn and the possible termination of Mr Swann's employment. Mr Swann said in evidence he was told the other drivers 'were reduced to part time'. I consider it more likely he was told that core staff had in the past agreed to reductions in their hours over the winter. Mr Swann went on to say he 'agreed to continue at least for part time work'. It is probably more accurate to say he made a suggestion to that effect. Mr Tamaki accepted Mr Swann may have indicated a willingness to work part time, but did not remember the conversation. Thus while the matter was at least raised, no arrangement was concluded in respect of it.

[13] At the end of the conversation about whether Mr Swann's employment would continue, Mr Tamaki handed Mr Swann a letter dated 1 June 2007, saying Mr Swann's employment would end on 10 June 2007. The stated reason was:

“Due to the seasonal nature of the tourism industry we find ourselves over resourced heading into the quieter winter season and need to adjust our staffing levels accordingly.”

[14] In total 8 guides and driver/guides lost their employment at the end of the summer. The departures were staggered, commencing at the end of April. The last person was recorded as leaving in early July, although the last date on which that person worked was probably considerably earlier.

[15] Mr Swann was next to last to leave. One of the reasons why he does not accept the genuineness of the reason for his dismissal is that he believes two replacement appointments were made after the dismissal.

[16] The first appointment of concern to him was that of Mr Eapara. Mr Eapara had returned to Tamaki Tours in January 2007, and the company wished to retain him as he was a long-serving and valued employee. He was described as ‘one of our top people’ and ‘an exceptional host’. A letter of termination was prepared for him in May 2007, but the letter was not acted on. Mr Eapara eventually lost his job as a driver in August 2007 for reasons not related to redundancy, and was transferred to non-driving duties. The second employee had been associated with the company since 1999. He was dismissed for misconduct, but was reinstated shortly afterwards. Both employees were considered part of the core staff of permanent employees.

[17] I do not accept that these circumstances amount to replacement appointments so that Mr Swann’s position was not truly superfluous.

[18] Mr Swann also believes that, if there were to be redundancies, his position should have been safe because he was the first person to be engaged for the 2006-2007 season. He believes a last on – first off rule applied. In turn he believes that he was ‘senior’ to the two employees just mentioned, and they should have been dismissed before he was. However there was no last on – first off provision in an applicable employment agreement, and Tamaki Tours was not under any obligation to apply such a rule. The question is whether the retention of those two employees in preference to Mr Swann was adequately explained, and I find that it was.

**Relevance of union activities**

[19] In or about November 2006 Mr Swann and his colleagues attended a meeting with a delegate from the Rail and Maritime Transport Union. Mr Swann said in evidence that the meeting was to obtain advice about matters including how a new union could be formed, but it is more accurate to say the meeting was for the purpose of assessing whether to join that union. Mr Tamaki also met with the union delegate. In or about January 2007 he called a meeting of Mr Swann and his colleagues and suggested that the staff negotiate a 'collective' employment agreement directly with him. They agreed to do so, and Mr Swann was nominated as their representative.

[20] The staff began planning their collective agreement and held some preliminary meetings with Mr Tamaki. They said in evidence they were 'making headway'. However progress stalled between about February and April because Mr Tamaki was attending to the opening of a new cultural experience facility in Christchurch. The staff members were aware of the resulting drains on his time, but became increasingly concerned about an associated inability to progress the negotiations. It transpired that their non-specific allegations about Mr Tamaki's broken promises centred on their unsuccessful efforts to arrange meetings with him during this period.

[21] No agreement was concluded. In or about October 2007 the National Distribution Union gained a presence on-site, and Mr Tamaki has been negotiating with it since then.

[22] I have not found any connection, beyond possibly a temporal one, between the discussions about a 'collective' agreement and Mr Swann's dismissal. Nothing in the evidence I heard indicates that the real reason for Mr Swann's dismissal was his union - or bargaining - activities.

**Justification for the dismissal**

[23] I accept that Tamaki Tours experienced a seasonal downturn in business every year, and 2007 was no different. Whatever its overall financial position may have been, it was not obliged to retain staff when it had little or no work to offer them. It

was entitled to decide not to retain staff in those circumstances. I accept that the seasonal downturn and resulting drop in visitor numbers was the reason why Mr Swann and the others had their employment terminated in May and June 2007.

[24] I do not accept the submissions that Tamaki Tours has acted in bad faith, and that it was well aware that Mr Swann had been engaged in a permanent position. Mr Tamaki and the company's financial controller, Merehini Meads, were not aware of such an appointment at the time, and considered it contrary to company policy when they found out about it. From their point of view, Mr Swann was engaged for the summer season and was not and should not have been engaged as part of the core permanent staff. I understood them to have acknowledged, however, that there were shortcomings in their documentation of the employment of staff and in some of their practices. Overall Tamaki Tours relied on an informal 'everyone knows' approach to the arrangements regarding seasonal work.

[25] Nevertheless Ms Ngaira was persuaded to and did offer Mr Swann a permanent position, even though she should not have done so. She had authority to manage the guides and driver/guides and had ostensible authority to offer Mr Swann the position she said she did. The company is bound by her actions in that respect.

[26] For his part Mr Swann knew of the seasonal downturns and that driver/guides were laid off at the end of the summer season. He believed he had obtained a more secure position. To the extent that the company is bound by Ms Ngaira's offer of a permanent position, that is the case.

[27] However even an offer of permanent employment did not mean Mr Swann was protected from the effects of a seasonal downturn. I have, in effect, accepted that positions disappeared as a result of the downturn. The staff who were employed for the summer season lost their positions. I have also accepted there was good reason to keep the two employees who retained their positions in preference to Mr Swann.

[28] As for the procedure used in implementing the dismissal, Mr Tamaki gave Mr Swann an indication of his view that the season was ending but said very little more.

Subsequently there was at least some discussion about the prospect of Mr Swann reducing his hours, but this amounted to only minimal consultation about Mr Swann's future. Particularly because he was a permanent employee, Mr Swann was entitled to receive sufficient information about the seasonal downturn and its possible effect on his employment to enable him to express a view about how the matter should be addressed. A fair process of consultation would also have included a discussion of the criteria being used to decide which employees would be retained. Mr Tamaki was obliged to keep an open mind regarding Mr Swann's responses, and take them into account - although not necessarily to act on them - in making a final decision.

[29] The reality was that the termination of Mr Swann's employment had been decided without taking into account Mr Swann's views, on the assumption that he was employed for the summer season only. Mr Swann was not consulted as he should have been, and the decision to dismiss him was predetermined.

[30] For those reasons the dismissal was unjustified.

### **Remedies**

[31] Mr Swann is entitled under s 123 of the Employment Relations Act 2000 to the reimbursement of remuneration lost as a result of his personal grievance. Here I have found that his grievance lies in the failure to consult with him, but accept that his position disappeared and his redundancy was genuine. That means he would have lost his job anyway, so the loss itself is not a result of his personal grievance and no remedy attaches to it. There is no evidence that Mr Swann lost any remuneration as a result of the failure to consult with him, and no grounds on which any order for reimbursement can be made.

[32] Mr Swann is also entitled to compensation for the injury to his feelings resulting from his personal grievance. Again the remedy attaches to the effect of the failure to consult, rather than the loss of employment. Mr Swann was upset about the circumstances of the loss. His statement of problem and statement of evidence emphasised heavily his concerns that two other employees retained their employment when he did not, and that he was dismissed as a result of his union activities. I infer

that the injury to his feelings which may attract a remedy is most closely associated with those concerns.

[33] Mr Swann's conclusions on these points were not well-founded. However I take into account that a proper process of consultation should have provided Mr Swann with the information necessary to address those views.

[34] Bearing in mind the limited scope of the matters for which Mr Swann can be compensated, Tamaki Tours is ordered to compensate him for injury to his feelings in the sum of \$4,000.

### **Costs**

[35] Costs are reserved.

[36] The parties are invited to reach agreement on the matter. If either seeks a determination of it from the Authority there shall be 28 days from the date of this determination in which to file and copy to the other party a written statement of the party's position on costs. If the other party wishes to reply, there shall be a further 7 days from the date of receipt of the statement in which to file and copy to the other party a written reply.

R A Monaghan

Member of the Employment Relations Authority