

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

[2015] NZERA Wellington 38  
5514755

BETWEEN      KELLY WRAY  
Applicant

AND              AVERILL MOORE INVESTMENTS  
LIMITED trading as AMIL  
SERVICE  
Respondent

Member of Authority:      G J Wood

Representatives:            J Bates for Applicant  
   D McLeod for Respondent

Investigation Meeting:      3 February 2015 at Napier

Submissions Received:      3 February 2015

Determination:                10 April 2015

---

**DETERMINATION OF THE AUTHORITY**

---

**Employment relationship problem**

[1]      The applicant, Ms Kelly Wray, claims that her employment was affected to her disadvantage by an unjustifiable action by her employer (Amil). This was claimed to be because her shift pattern was altered without consultation or agreement with her and that when there was consultation it was too late and not meaningful.

[2]      Amil claims that there was no disadvantage to Ms Wray because Amil had the ability at its sole discretion to change rostered hours of work and that in any event it did consult genuinely with Ms Wray well in advance of the roster changes coming into effect.

[3] Ms Wray's claim that she was discriminated against on the grounds of age was withdrawn in advance of the investigation meeting.

### **Issues**

[4] The issues for determination are:

- (a) What consultation was required by Amil before changing an employee's hours of work;
- (b) To the extent that consultation was required, did Amil genuinely consult; and
- (c) What remedies, if any, should flow to Ms Wray?

[5] Amil is a company which operates eight service stations in Hawkes Bay on behalf of oil companies. Amil owns the dry stock and employs all the staff. All other matters are dealt with by the oil companies.

[6] Ms Wray was originally employed by Amil on 15 May 2012 as Customer Service/Sales Representative. In her job application she stated

*Although I have a family, I am in a position where they are not dependent on me being at home. Therefore I am more flexible than most on what hours I can work.*

[7] The site where Ms Wray worked was a 24 hour service station. However, from the commencement of her employment Ms Wray normally worked the morning shifts, ie 6am to 2pm. While she had worked for some period on regular days of Tuesday to Saturday, those hours were later changed by agreement to Monday to Friday 6am to 2pm. This shift pattern had continued for some months.

[8] Ms Wray, in addition to her stated ability to be flexible in her hours of work, also filled in when required on other shifts, particularly the 2pm to 10pm shift, either by working two shifts - or more often by substituting her morning shift for an afternoon shift. These changes were all made at Amil's request.

[9] The parties' employment agreement deals with hours of work. It states in relation to ordinary hours of work:

6.1 The **Employee** will work the hours and days (**roster**) agreed with the Site Leader and this can be by way of a written roster or verbally, by text or other form of communication used in the normal course of business.

6.2 If for any reason the **Employee** seeks to vary the **Employee's** agreed hours, the **Company's** approval must be sought in advance. Approval will generally only be given for good reasons considered sufficient by the **Company**.

6.3 Notwithstanding the provisions of clauses 21.1 and 21.2 of this **Agreement**, the **Company** may, at its sole discretion, change the **roster**.

[10] It was accepted on behalf of Ms Wray that the reference to clauses 22.1 and 22.2 should have been to clauses 6.1 and 6.2. Despite the need for agreement in clause 6.1, it is clear from clause 6.3 that the agreement provides Amil with the ability to be totally flexible over the days and hours employees are rostered on. As a result, and despite any hardship any changes may cause, employees can in reality have no certainty over any days or hours they are to be rostered on to work until the weekly roster is set.

[11] The roster relied on by the parties is usually posted on a Monday for commencement the following Monday. I accept that on occasions the roster could be varied so as to take account of an employee's availability to work the hours set in the roster, and on occasions to change hours to suit employees.

[12] After Ms Wray had finished work on 11 August the roster for the week commencing 18 August was posted by Ms Wray's Site Leader, who did not give evidence. It was Amil's evidence that that Site Leader made that decision without any discussion with Amil's Managing Director, Mr Cecil Averill.

[13] However, what was apparent was that there had been a number of significant changes in staff and their usual hours of work. I accept that this was due to the 2pm to 10pm shift being lacking in experienced staff. In addition the person designated for the 2pm to 10pm shift needed to be sole charge - hence the need for an experienced staff member rather than a new staff member.

[14] Ms Wray came into work on 12 August and observed the new roster because it had a bold heading. Usually she did not check the roster because her hours had been the same for so long. The new roster showed that Ms Wray was to now work the 2pm to 10pm shift. She was shocked to see that her hours of work had changed and that

she was being expected to work Tuesday to Saturday that week, if not continually. Despite the flexibility described in her job application and her willingness to take on extra shifts, her being placed regularly on the afternoon shifts would have caused her and her family great inconvenience. This was because her partner worked shift hours and she had a son at school, who had significant sporting commitments five days a week that Ms Wray was committed to assisting with. It would have been a great inconvenience to the family even if her involvement with her son's sporting activities ceased and she left him to his own devices after school.

[15] On asking the Site Leader what was happening with the rosters, she was told that she knew nothing. In fact the Site Leader had prepared the next week's roster in conjunction with the Operations Manager.

[16] Ms Wray was so upset that she could not continue working and she went home, where her partner observed that he had never seen her more upset before. Ms Wray left messages for the Operations Manager and Mr Averill that morning. They arranged to have a meeting with her that afternoon, which they attended along with Ms Wray and her partner.

[17] I accept that Ms Wray explained that she was shocked about the shift changes and gave her reasons as to why they would not work for her. I also accept that Amil's representatives listened carefully to her concerns. On the other hand, I conclude that it was made apparent at the meeting that Mr Averill could see no alternative, because of Amil's shift coverage requirements set out above. Mr Averill also made it clear that Ms Wray had no right to any particular shifts and that changes were being made to freshen the workplace. I find there is nothing to suggest, as Ms Wray believes, that Amil wanted rid of her. Indeed there is no claim for constructive dismissal even though Ms Wray resigned some short time later.

[18] While no doubt Ms Wray genuinely believes that Amil wanted her to leave, I accept Amil's witnesses' evidence that she was a loyal, reliable and good worker whose experience was needed on the later shift in the interests of the company.

[19] Amil was asked to reconsider its decision. The next day Mr Averill wrote to Ms Wray to say that the shifts would not be changed, although Ms Wray was given that Saturday off because of her son's sporting commitments.

[20] It was clear that despite Ms Wray's concerns about the new hours, Amil wanted, as is its right provided it followed due process, to set up the rosters in the way that it felt best met its business needs. It did, however, undertake to review the changes after a month.

[21] The parties have been to mediation but have been unable to resolve their differences. It therefore falls to the Authority to make a determination.

### **The law**

[22] The duty of good faith is an overarching duty under the employment relationship. It requires the parties to be active and constructive in establishing and maintaining a productive employment relationship in which the parties are, amongst other things, responsive and communicative. The duty of good faith does not apply only to decisions that are likely to have an adverse effect on the continuation of the employment of a party.

[23] *Rankin v Attorney-General* [2001] ERNZ 476 dealt with a personal grievance for disadvantage for failure to deal with a reappointment decision procedurally fairly. The State Services Commissioner in that case had failed to discuss with Ms Rankin and involve her in the process that resulted in a decision not to reappoint her, which was unjustifiable. However, after the States Services Commissioner had communicated his decision, he was asked on Ms Rankin's behalf to reconsider his decision, and agreed to do so. This gave Ms Rankin the opportunity to advance reasons why her appointment should be renewed.

[24] Amongst the requirements of procedural unfairness in that case was said to be that the State Services Commissioner had to put to Ms Rankin any factual matters that he was taking into account in order that these could be refuted by her. At p.527, the Court held:

*[132] ...It is well recognised that sometimes an invalid exercise of a power can later be validated by affording a right to be heard that had been inadvertently denied earlier. Likewise, a breach of contract can be put right before it has caused any damage. It seems to me that Mr Wintringham's agreement on the plaintiff's request to reconsider cured his earlier breach of duty under statute and under the contract. At this point the plaintiff could have sought, but apparently did not seek, an opportunity to make submissions in addition to such representations that were made on her behalf when Mr Quigg visited Mr Wintringham ... It is not seriously suggested that he did so otherwise and conscientiously or that he had failed to take into*

*account anything that was said to him on the plaintiff's behalf. No doubt if the plaintiff had asked to make formal written submissions, he would have taken them into account as well.*

*[133] In my judgment, his compliance with the plaintiff's request cured the earlier failure of procedural justice ...*

[25] More recently, in *Faapito v. The Chief Executive of the Department of Corrections* [2012] NZEmpC 206 the Court held in relation to procedure:

*[103] ...Initial procedural flaws can be rectified and negated by subsequent adherence to proper standards of fair and reasonable process.*

### **Determination**

[26] This case falls to be determined on the wording of the parties' employment agreement and the parties' duty of good faith to each other.

[27] In this case, there was a clear pattern going over many months whereby Ms Wray worked Monday to Friday 6am to 2pm. It appears, therefore, that the hours and days (roster) agreed with the Site Leader was, by way of default position, those set hours and days. Therefore, the only ways to change that arrangement were either by agreement, which was not done, or by Amil, at its sole discretion, changing the roster pursuant to its powers under clause 6.3 of the parties' employment agreement.

[28] I hold that it is implicit in the agreement (in that given that the default position is agreement, then a change of such magnitude should involve at least consultation) and is also required under the duty of good faith, that consultation can be expected over major changes to an employee's work patterns. It therefore follows that, at the least, consultation should have been entered into by Amil before significant changes were made to employees' rostered days and hours.

[29] The next issue for determination is whether or not what consultation Amil did enter into was sufficient and timely. The new roster was not to take effect until six days after the meeting agreed to by Amil once Ms Wray made her objections known to it. I accept that this consultation took place early enough, particularly given that it is clear from *Rankin* that where an employer has not properly followed a process it may do so later provided it is not too late. In this case it was not too late because the changes were not to come into effect for another six days and the roster system was a

weekly one and there was no minimum period of prior notice provided for in the agreement.

[30] In this case, I accept that Mr Averill did genuinely consider Ms Wray's concerns, but that he could not see a way beyond the new roster. This is backed up by the fact that Ms Wray was given leave for the next two rosters when she sought it and that a review was to be put in place a month later.

[31] I must therefore reject Ms Wray's evidence and Mr Bates' submission that the reconsideration in this case by Mr Averill was not genuine and that a fixed position had been adopted by Amil.

[32] Because this later reconsideration effectively cured the failure to consult by the Site Leader, Ms Wray's personal grievance must be dismissed.

#### **Costs**

[33] Costs are reserved.

**G J Wood**  
**Member of the Employment Relations Authority**