

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Michael O'Donnell & Anthony Power (Applicant)

AND Ports of Auckland Limited (Respondent)

REPRESENTATIVES Simon Mitchell, for Applicant
Phillip Skelton/Kirsti Laird, for Respondent

MEMBER OF AUTHORITY Vicki Campbell

INVESTIGATION MEETING 21 November 2005

DATE OF DETERMINATION 8 December 2005

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] On 22 February 2005 two electricians were dismissed from their employment with Ports of Auckland Limited ("POAL") when it was discovered they had been sleeping and drinking during their third shift duties in a hidden room inside the building in which they worked. Five other employees were issued warnings, including Mr Power and Mr O'Donnell.

[2] As a result of their dismissals, POAL was faced with gaps in the coverage of electricians on the third (night) shift on Monday 28 and Tuesday 1 March 2005. On Friday 25 February 2005, Mr Wayne Phillip, POAL's Operations Manager asked Mr Brendan McCormack, shift supervisor, to arrange for Mr Mike O'Donnell and Mr Tony Power to do the third shift for those days and advised him that the two men did not need to work on their usual first (day) shift on the Monday, Tuesday or Wednesday.

[3] While both employees initially indicated their preparedness to undertake the shifts, by Monday 28 February 2005 following contact with their union, Mr O'Donnell and Mr Power refused to do the shifts.

[4] Following an investigation and a disciplinary procedure, both Mr Power and Mr O'Donnell were issued with final written warnings for failing to comply with a lawful and reasonable instruction to provide cover for the third shift on Monday 28 February 2005. Mr O'Donnell and Mr Power say the final written warnings were an unjustifiable action on the part of POAL giving rise to a claim disadvantage for which they seek compensation.

[5] POAL says the final written warnings were justified for refusing to obey a lawful and reasonable instruction. The usual penalty for such a refusal is dismissal, however, POAL say it took into account the fact that the union had provided incorrect advice.

[6] It is well recognised that a warning can be found to be an unjustified disadvantage where it can be shown that the warning itself is unjustified (*Alliance Freezing Co (Southland) Limited v NZ Engineering etc IUOW* [1990] 1 NZLR 533).

[7] The key issue for determination is whether the final written warnings are justified in all the circumstances (s.103A, Employment Relations Act 2000). This requires considering whether the actions of POAL and how POAL acted was what a fair and reasonable employer would have done in the circumstances.

The final written warnings

[8] The applicable collective employment agreement at clause 3.2 allows POAL to require its electricians to work eight “extra” shifts per annum over and above the 219 shifts specified in the agreement. It is only after these eight extra shifts are worked that overtime payments become payable.

[9] Following the dismissal of Messrs Shucksmith and Rigby there was a reluctance on the part of staff to cover the shifts normally worked by the two dismissed employees. Mr Phillip had managed to obtain cover for the Thursday 24th to Sunday 27th when Mr King and Mr Lawton worked the third shift instead of their own shifts and had the shifts counted towards their eight required “extra” shifts.

[10] On Friday 25th, Mr Philips emailed Mr McCormack and asked him to get Mr O’Donnell and Mr Power to cover the third shift on Monday 28th and Tuesday 1 March. The email advised Mr McCormack that neither employee was required to work their usual first shift on Monday, Tuesday or Wednesday.

[11] Mr McCormack received the letter on the Saturday morning when he arrived at work. He set about discussing the content of the email with both Mr O’Donnell and Mr Power and provided a copy of the email to both employees. Neither employee committed to working the two third shifts at that point, rather they advised Mr McCormack they would let him know the following day.

[12] Between that discussion and Sunday morning, Mr Power and Mr O’Donnell sought advice from Mr Russell Mayne of the Union.

[13] The next day, Sunday 27th, Mr McCormack spoke again with Mr Power. Mr McCormack told me at the investigation meeting that he doesn’t recall speaking directly to Mr O’Donnell, but he was left with the impression from his discussion with Mr Power that they would both cover the third shift the following third.

[14] On Monday 28th both men worked their usual first shift. Mr McCormack, concerned that the two men were not intending to work the third shift commencing on that day, asked them if they intended to work that third. It is common ground that the indications were that the men would “probably” work the third shift.

[15] Following that conversation both employees sought further advice from the union. The union advised that they were free to decide for themselves whether or not they would work the shift. As a result, Mr Power and subsequently Mr O’Donnell advised Mr Philip that they would not work the third shift.

[16] Mr O’Donnell and Mr Power then finished their first shift and left for home. Mr Philip proceeded to contact Mr O’Donnell at home and told him that someone was needed to work the third shift and Mr O’Donnell again agreed to work. He advised Mr Philip he would be there about 11.00pm. However, after a further conversation with the Union Mr O’Donnell contacted POAL and advised a shift supervisor that he would not work. Mr Philip once again made contact and advised Mr O’Donnell that he was required to work the third shift or disciplinary action would follow.

[17] Mr Philip then contacted Mr Power, who continued to refuse to work the third shift. Mr Philip told Mr Power that he was required to work the shift and that if he did not, disciplinary action would follow.

[18] Neither employee worked the required shift and both were subject to disciplinary action which resulted in final written warnings being issued. There is no dispute that the process used by POAL in issuing the warnings was a fair and reasonable process. Both employees were represented throughout and were aware of the possible consequences. Real, as opposed to nominal, opportunities were provided to allow both employees to answer the allegation that they had refused to obey a reasonable and lawful instruction. The final written warnings expired on 28 September 2005.

[19] During the course of the disciplinary process both employees argued that they were not being required to undertake an “extra” shift but were being asked to “change” their shift roster.

[20] It was common ground at the investigation meeting that POAL had the right to require its employees to work eight “extra” shifts in accordance with the collective agreement. It was also common ground that if POAL wished to change the shift roster of any of its employees consultation, followed by a reasonable period of notice was required (*Ports of Auckland Limited v New Zealand Waterfront Workers Union*, AA 346/02, 29 November 2002; (2003) 7 NZELC 96,960).

[21] I do not accept that Mr Power or Mr O’Donnell were being required to “change” their shift roster. Both men understood that such a “change” was a permanent change. What was being asked of them was to temporarily cover two third shifts. Following that they would revert back to their usual roster.

[22] Neither do I accept that the company were requiring Mr Power and Mr O'Donnell to work "extra" shifts in accordance with the collective agreement. To qualify as an extra shift the shift must be in addition to the 219 shifts usually worked. What POAL was proposing was to replace three first shifts with two third shifts. In answer to my questions at the investigation meeting Mr Philip told me that the men would be paid their usual weekly earnings (as if they had worked three shifts, having only worked two). There was nothing in Mr Philip's evidence that the two third shifts would be recorded against the eight extra shifts. Certainly the email of 25 February makes no reference to this as a possibility. Mr McCormack confirms my conclusions when he says in his evidence that he thought the men would work two shifts and be paid as if three were worked.

[23] In contrast, Mr King, who covered the third shift the previous week, received his usual pay and also received a credit against his "extra" eight shifts. At no stage has POAL discussed this possibility with either Mr Power or Mr O'Donnell.

[24] For an instruction to be lawful it must not be illegal, be within the scope of the agreement, and must not demand the performance of any impossible or dangerous task (*Wellington etc Clerical etc Workers IUOW v College Group Limited* [1984] ACJ 315).

[25] Mr Power and Mr O'Donnell could only be required to work the third shifts if the shifts were to form part of the "extras" required of them under the agreement. I have concluded that in this case they did not. If it was intended by POAL that the shifts would form part of the "extras", that needed to be made clear. I have found it was not. A fair and reasonable employer would not have issued a final written warning in those circumstances.

I find the final written warnings were unjustified.

Remedies

[26] The warnings expired on 28 September 2005. Both applicants have been exposed to a greater possibility of dismissal for the entire 6 month period.

[27] The Authority accepts that both Mr O'Donnell and Mr Power have suffered humiliation, loss of dignity and injury to feelings. Having regard to their evidence and the nature of the personal grievance and the circumstances overall, an award of \$5,000.00 for each applicant is appropriate.

[28] I am bound by section 124 of the Act to consider the extent to which the actions of both applicants contributed towards the situation that gave rise to the personal grievance, and if those actions so require, to reduce the remedies. I believe there was a strong view in the workplace that Messrs Shucksmith and Rigby should not have been dismissed and as a result there was a large reluctance on the part of electricians to fill

the vacant third shifts. I have formed the view, having seen and heard from the witnesses that Mr Power and Mr O'Donnell were of a similar mind. The reluctance of Mr Power and Mr O'Donnell to work the third shift has contributed to the situation giving rise to their grievance. The award of compensation will be reduced by 50%.

Ports of Auckland Limited is ordered to pay to Mr Power and Mr O'Donnell an amount of \$2,500 each pursuant to section 123(c)(i) of the Employment Relations Act 2003.

Costs

[29] Costs are reserved. The parties are encouraged to discuss and resolve the matter of costs between them. In the event that they are unable to do so they may lodge and serve memorandum in the Authority for consideration.

Vicki Campbell
Member of Employment Relations Authority