

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH OFFICE**

BETWEEN William Henry Allen (Applicant)
AND Otago Peninsula Trust (Respondent)
REPRESENTATIVES William Henry Allen In person
Nadine Fraser, Advocate for Respondent
MEMBER OF AUTHORITY James Crichton
INVESTIGATION MEETING 18 May 2005
DATE OF DETERMINATION 14 July 2005

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant (Mr Allen) alleges he has suffered a disadvantage by an unjustifiable action of the respondent (“the Trust”) when the Trust reduced Mr Allen’s access to rostered work during the six month “low season”. He seeks monetary compensation for that loss.

[2] The Trust acknowledges that it made changes to the rostering arrangements but says that it did that as part of its management prerogative after a proper period of consultation and so it denies that any disadvantage which Mr Allen may have suffered was the result of an unjustifiable action.

[3] The Trust is responsible for the operation of the Royal Albatross Centre at Taieri Head on the Otago Peninsula and it is in that facility that Mr Allen has worked. There is a continuing employment relationship and it is for that reason that, after hearing the evidence, I asked the parties to endeavour to resolve their differences by agreement but they were unsuccessful in that regard.

[4] Mr Allen commenced employment as a permanent part-time rostered employee on 9 March 1995 and on and from the winter from 1996, Mr Allen has been part of a core group of staff who have traditionally worked for the Trust during the winter. There had been a long standing policy of allocating the “low season” winter work to the 12 longest serving tour guides who wished to work that low season.

[5] That policy was reduced to writing in 1999 and a copy of that was produced to me during my investigation meeting. Those arrangements continued until the winter of 2004 when the Trust implemented changes which had the effect of depriving Mr Allen of the work he had previously enjoyed over the preceding eight years. It is this change which is the nub of the dispute between the parties.

[6] For its part, the Trust undertook a review of the historical arrangements which resulted in a change to those arrangements for the winter of 2004. It was not a situation where there was an arbitrary change but rather a measured approach was taken and the Trust evidence was that there was an extensive period of consultation.

[7] Of course, the Trust had obligations not just to Mr Allen but to all his work colleagues and there was clearly real difficulty in the Trust engaging with an appropriate group of employees who were truly representative of the employees as a whole.

[8] One of the complicating factors was that there were wage negotiations going on at the same time and the consultation process involving the winter roster seems to have got somewhat tangled with the wage negotiations.

[9] Mr Allen was involved as a representative of the employees in the wage negotiations and the Trust seems to have believed that by raising issues to do with the roster during the course of those discussions, it was fulfilling its obligations.

[10] One particular difficulty is the Trust's uncertainty about the attitude of the staff in general to the winter roster. There was some suggestion in the evidence that the winter roster issue was reviewed by the Trust because of complaints from some of Mr Allen's work colleagues although Mr Allen in his evidence denied that there was any difference between the employees on the matter and the Trust did not seem anxious to press the point.

[11] Whether because it was raised by disgruntled colleagues of Mr Allen or whether it simply arose as a consequence of the normal management preserve of reviewing the structure and operational efficacy of the organisation, the fact was that the Trust determined to review the old historical policy and having gone through a process of consultation which it regarded as satisfactory, the Trust promulgated new arrangements.

[12] The effect of these new arrangements was that whereas in the previous roster the length of service of the employee was effectively the sole determinant of priority for work, under the new arrangement, three factors were considered. The first of these was the hours worked by the employee for the previous season, the second was the skills that the employee brought to the role (including any extra training and ability that the employee was perceived to have) and the third issue was the length of service by years.

[13] Under the terms of that new policy, Mr Allen was not offered the work which he would have expected to be offered in previous years apparently it seems because he was "marked down" in the skills area and also perhaps because the hours that he worked in the previous season were not as great as had been in the past.

Issues

[14] The issues which the Authority needs to decide are as follows:

- (a) What are the terms of Mr Allen's employment agreement;
- (b) What are Mr Allen's legitimate expectations;
- (c) Can the Trust restructure the roster;
- (d) If the Trust restructures the roster does it have any obligation to Mr Allen by way of compensation for loss?

The terms of Mr Allen's employment agreement

[15] Mr Allen is employed on an individual employment agreement. That agreement contains two relevant provisions. The first is clause 4 on hours of work and the relevant provisions are as follows:

4.1 Guides are employed as permanent, part time workers and it is recognised by the parties that the amount of work the Employer is able to make available to the Employee will vary according to the season and the public demand for the services provided by the Employee. The Employee's hours of work shall be as determined by the Employer, provided that:

...

(c) If the public demand for the services provided by the employee is lower than anticipated by the employer, the employer may cancel any period of work of the employee or reduce the hours of it. ...

[16] The second relevant provision in the employment agreement is clause 19 concerning technological and operational change. That provision reads as follows:

Should the Employer intend to introduce significant technological or operational change, prior information of those changes will be discussed with those Employees affected and/or their representatives.

[17] In November 1999 a document was produced entitled "Staffing Policy" which amongst other things has a section entitled "Low Season". The relevant provisions under this section are as follows:

From approximately the end of April, the shifts will be given to the top 11 - 12 in the staff list. 11 guides will do 2 shifts and 1 guide will do 1 shift, when there are only 23 shifts in the week.

Shifts will be allocated relative to the number of shifts worked during the busy period. A minimum of 2 days will be allocated to each staff member, provided that the shifts are available. If there is an odd number of shifts, then the odd shift will be given to the next person on the list.

Any guide working in the off season who does not wish to work all or some of the off season period, may do so, at no penalty to their position on the list. These shifts to go to the next person down the list.

[18] The status of this last referred to document is controversial. Mr Allen says it is a record made by the Trust of the custom and practice around the rostering arrangements. The Trust appeared uncertain about the status of the document until the investigation meeting and, indeed, were inclined to the view that the document had been prepared by staff and not management and certainly had never been adopted by the Trust as a formal policy. That said, the Trust did acknowledge at the investigation meeting that, whatever its status, the document correctly recorded custom and practice in the workplace.

[19] Although Mr Allen does not refer to it particularly, it is important to note that clause 4.1 of his employment agreement gives the employer a general power to determine the hours of the employee

subject to conditions set out therein. I refer particularly to this provision because, although Mr Allen does not draw attention to it, the Trust does.

[20] Mr Allen says that the effect of these provisions is to provide him with permanent, part time work and that in respect to the winter roster, there has been a settled process which was recorded in the November 1999 document. Mr Allen acknowledges that the employer is able to change hours of work but considers that the relevant provision (clause 19 referred to above) requires discussion between the parties. Mr Allen's evidence essentially is that that consultation did not take place.

Mr Allen's legitimate expectations

[21] The Trust accepts that Mr Allen is a permanent part time employee, and that there has been a long standing practice of running the winter roster in a particular way, but argues that it is entitled to change the roster to meet the demands of the enterprise and that clause 19 of Mr Allen's employment agreement contemplates precisely that.

[22] Critically, the Trust deny Mr Allen's contention that there was no discussion between the parties prior to the change being implemented.

[23] The Trust says that with the appointment of a new general manager in January 2002, there was an indication to staff that there would be changes in the operation of the albatross centre and that regular meetings would be held so that staff were aware of what management were proposing.

[24] A critical meeting in this series of meetings held on 17 June 2003 at which the operations manager of the Trust, Shirley Thornbury, indicated to staff that the Trust intended to employ three to four full time guides as well as the part time guides.

[25] There has been extensive discussion and debate about precisely what Ms Thornbury actually said at that meeting. Evidence given on behalf of the applicant suggested that she had made a statement indicating that there would be no effect on the winter work of part time guides as the full time staff who were to be employed would be kept busy doing other things.

[26] Much was made of this evidence by Mr Allen particularly when it was effectively contradicted by Ms Thornbury's evidence. Her recollection of what she said at the meeting was simply that there would be winter work for the part time guides. She was certain that she had given no undertaking that exactly what had happened in the past in terms of winter work would continue in the future.

[27] Critically, in answer to a question from me, Ms Thornbury said that in making the statement that she remembers making (and she says that she repeated it at subsequent staff meetings in similar terms) she was expecting that the total number of hours worked by part time guides would be roughly the same under the new arrangements as they had been under the old. As a matter of fact she told me, that expectation had proved to be correct. However, she acknowledged that some part time staff might have got more work under the new arrangements than they had had previously but this was a consequence of the employer's decision to change the way in which the rostered work was allocated.

[28] Ms Thornbury also told me that she made up the roster as part of her normal duties. She said that the main reason that Mr Allen did not get the work that he might otherwise have expected under the new arrangements was because other staff had skills which Mr Allen did not have which were attractive to the employer in the delivery of the service required, and the years of service component no longer had the primacy that it had under the original system.

Can the Trust restructure the roster?

[29] In my opinion, notwithstanding the extensive evidence of custom and practice producing a particular means of determining the allocation of rostered work in the winter time, the Trust is able to change the roster if it fulfils the normal obligations of a good employer to engage with and consult affected staff and consider their representations before implementing any change. The good faith obligation of the Employment Relations Act 2000 would require nothing less and in any event, Mr Allen's employment agreement, as Mr Allen correctly points out, contains the provision (clause 19) which requires the employer to discuss information on significant operational change with affected employees.

[30] I think that in the circumstances of this particular employment relationship, the change to the roster can properly be considered to be significant operational change and I think that on the facts before me, the Trust did its best to consult with its affected employees.

[31] The difficulty for both parties is that that consultation took place in the context of a wage negotiation and that fact seems to rather have muddied the waters.

[32] Mr Allen's evidence was that he and two other permanent part time staff members initiated wage and conditions bargaining negotiations on behalf of a total of 17 staff, and that the first of these discussions took place on 10 December 2003.

[33] There were a number of meetings between the employees negotiating group (including Mr Allen) and the Trust. During those negotiations, the employees negotiating team made it clear that their number one stipulation in respect to conditions was *the status quo* in respect to the roster system for the low season. In other words, the negotiating team (including Mr Allen) sought to negotiate a commitment from the employer that they would not change the system of rostering for winter work which had been documented in the so called *staffing policy November 1999*.

[34] Despite no doubt enthusiastic advocacy from Mr Allen and his colleagues, they were unable to make any progress in getting a commitment from the employer on this particular matter and indeed the Trust's evidence is that emerging from those negotiations came a proposal to vary the roster.

[35] The Trust's evidence is that the Trust made earnest efforts to get a response from the negotiating team about the new proposal but for whatever reason was ultimately unsuccessful.

[36] Then on 17 May 2004 the Trust was advised that the negotiating team had instructed the Service and Food Workers Union which of course meant that future contact between the Trust and the affected employees must, of necessity, go through the Union's advocate.

[37] On the critical point of the proposed change to the roster which had come out of the earlier discussions between the negotiating team and the Trust, the evidence of the Trust was that the Union advocate said that that matter was *up to management*.

[38] While it is clear that it is available to the Trust to alter the roster, it is less clear that the Trust has fulfilled its obligations to consult. This is certainly not because of an unwillingness on the part of the Trust to meet those obligations but rather because of the practical impediments to the process.

[39] Mr Allen's view was that there had been no consultation. He regarded the discussions that he was involved with on the wages and conditions bargaining as separate from and not related to the issue about the roster.

[40] The Trust, on the other hand, saw the issues as inextricably linked and regarded the bargaining forum as the obvious forum for consulting with affected employees (or their representatives) about possible changes to rostering arrangements.

[41] On the evidence before me, it seems that the Trust regarded itself as in a process of consultation through the regular discussions with the wages and conditions bargaining team (which included Mr Allen) whereas Mr Allen regarded those discussions as entirely separate and not part of any consultation obligation which the Trust had in respect to the conditions in his employment agreement and its overarching obligation to act in good faith.

[42] Having reflected on the matter and carefully reviewed all the evidence, I have reached the conclusion that the Trust was indeed undertaking a process of consultation through the bargaining discussions and it was not inappropriate for it to use that forum so to do. There is ample evidence that the Trust sought responses from the employees team about the proposed new roster arrangement and equally clear evidence that no response to those requests was forthcoming.

[43] Whatever the position prior to 17 May 2004, on and from that date the Trust had to deal with a new dynamic because from that date the Service and Food Workers Union became involved on behalf of the employees.

[44] The Service and Food Workers Union, as I mentioned above, effectively gave the Trust *carte blanche* to do as it pleased in relation to the roster. Of course the Trust was in no position to rely on that intelligence and ought to have satisfied itself that it had, in fact, conducted a proper period of consultation with affected staff.

[45] In carefully weighing the evidence before me, I am not satisfied that this happened although I hasten to make clear that in saying that, I do not attribute any bad motive to the Trust or its senior officers. I simply say that I think they should have been more rigorous in consulting with the affected staff directly rather than through the funnel of a negotiating process over a wide range of issues.

Does the Trust owe Mr Allen anything by way of compensation?

[46] As I have just indicated, I think the Trust's only failure was in not adopting a rigorous enough process of consultation with staff affected by the proposed change to the roster arrangements.

[47] I think it perfectly clear that the Trust is absolutely entitled to change the roster provided it undergoes a proper period of consultation with affected staff.

[48] Mr Allen is not entitled to receive a straightforward arithmetical calculation of what he might have earned had the roster not been changed. His entitlement is some compensation for the failure of the Trust to properly consult with him in respect the proposed new roster and in my opinion, the amount of that compensation cannot appropriately equal what Mr Allen might have been capable of earning under the old roster.

Determination

[49] I have decided that the Trust is able to change the winter roster provided it undertakes a proper period of consultation with Mr Allen and that because that consultation has not been as adequate as I believe is required, Mr Allen has suffered a disadvantage by an unjustifiable action of the Trust.

[50] As compensation for that unjustifiable action I order that the Trust pay to Mr Allen the sum of \$500 free of tax pursuant to section 123 (c)(i) of the Employment Relations Act 2000.

[51] Costs are reserved.

James Crichton
Member of Employment Relations Authority