

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2013] NZERA Christchurch 62
5392198

BETWEEN

CRAIG MARSH
Applicant

A N D

GENERAL DISTRIBUTORS
LIMITED T/D COUNTDOWN
CHURCH CORNER
Respondent

Member of Authority: P R Stapp

Representatives: Mr Marsh in person
Neil McPhail, Advocate for Respondent

Investigation meeting: 25 January 2013

Submissions Received: 25 January 2013

Date of Determination: 8 April 2013

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The employment relationship problem filed by Mr Marsh in the Employment Relations Authority involves historical matters in the employment relationship going back to 2008, and two live issues relating to a change of hours and counting cartons in his employment with General Distributors Limited (“Countdown”). Mr Marsh is refusing to work new hours prescribed and refusing to count cartons as requested by Countdown. He turns up for work on his usual hours.

[2] Countdown has requested the Authority to make declarations (amended statement in reply):

- (a) That Mr Marsh is required by the terms of his individual employment agreement and various directions from the respondent to observe hours

of work commencing 6pm and finishing 2am on Wednesday, Thursday and Friday each week; and

- (b) That Mr Marsh is required by his terms of employment to obey the respondent's lawful instructions to count cartons during the course of his normal duties.

[3] The parties have attended mediation, but it now rests with the Authority to provide a determination resolving the issues.

The Issues

[4] The issues for determination are whether Mr Marsh's employment relationship problem can be resolved by the Authority using remedies, including;

- (a) The historical matters;
- (b) Whether Mr Marsh is required to work the new hours requested by Countdown;
- (c) Whether Mr Marsh is required to count cartons in his employment with Countdown.

[5] It is common ground that the change of hours clause in Mr Marsh's individual employment agreement applies:

2.3 *Change or reduction to hours of work or duties*

Where the Company needs, for demonstrable commercial reasons to change or reduce specific hours or duties, the following process will apply:

No employee will be required to change duties unless they possess the relevant skills or are provided with training to obtain the skills (the details of which will be clearly explained to the employee prior to any agreed change).

1. *Where there is a proposed change or reduction in hours, the employee will be provided with all information relevant to the situation, including a clear initial summary of the demonstrable commercial factors motivating the change. The company should also clearly identify whether the proposed change is of a permanent or temporary nature.*

2. *Prior to proposing a change or reduction in hours, all other options will be explored by the parties. Every reasonable effort will be made to ensure that the total number of hours in the working week will not be reduced unless by mutual agreement.*
3. *A primary objective shall be to reach mutual agreement over any proposed change or reduction to hours of work or duties.*
4. *Where the proposed change or reduction to hours is necessary for demonstrable commercial reasons the employer shall at the first instance call for volunteers.*
5. *Where there are insufficient volunteers available, the Company will consult with the effected employees.*
6. *The Company shall consider on a case by case basis any requests for consideration of individual circumstances where an employee who is unable for demonstrable reasons to agree to an element of the proposal. Alternative options to avoid a change that employee(s) opposed shall be explored. Following consultation, due consideration and response to feedback, the Company may then issue no less than two weeks written notice to the effected employee(s).*
7. *Any change or reduction in hours will be spread as evenly as possible across the department.*
8. *The Employee has a right to involve a support person or a representative at any stage in the process.*

Right to seek a review

9. *If, having undergone the above process, an employee believes that the changes to hours worked are significant and create genuine hardship and/or seriously impede the ability to carry out caring responsibilities to dependants, the employee may request that the matter is escalated to the Area Manager for review. The Area Manager will review the request as well as the process set out in steps 1-7 above and consult with the employee where requested, to consider alternatives. If after reviewing the proposed change and the hardship to the employee, the Area Manager determines that either:*
 - (a) *the proposed change will proceed; or*
 - (b) *an alternative change will be implemented, following consultation with the effected employee about the alternative change, no less than two weeks' notice will be provided in addition to the notice prescribed in sub-clause 5 above.*

10. *Any employee effected by this clause shall have the first option to take up any additional hours when they become available.*
11. *Nothing within this clause shall prevent the employee raising an employment relationship problem under the provisions of clause 9.0 of this agreement.*

[6] I am also required to determine whether the historical matters raised by Mr Marsh have been properly raised as personal grievances under s.114 of the Employment Relations Act 2000. There is no application for any exceptional circumstances for any of the matters Mr Marsh has raised if they are outside the timeframe for properly raising a personal grievance. Otherwise, the matters are simply matters in the background of Mr Marsh's employment relationship problem and or breaches of good faith in his employment.

The facts

[7] Mr Marsh is employed with Countdown in the night-fill department and he works 22.5 hours per week. He started his employment at Countdown Church Corner, Christchurch on 17 October 2007 and at the time of the commencement of his employment was employed to work Wednesday – Saturday 11pm – 7am. Mr Marsh is covered by an individual employment agreement (that included clause 2.3 as outlined above), and he is paid an hourly rate of \$15 per hour.

[8] A consultation process was set in place by Countdown in regard to a proposed change of hours. The consultation process commenced on 10 April 2012 with the entire night-fill team. However, Mr Marsh and some other night-fill team members were not able to attend the initial meeting on 10 April. They were consulted individually.

[9] An initial discussion with Mr Marsh was not held until 18 April 2011 where Mr Shane Langton, store manager, provided Mr Marsh with the option of one week to consider the "business proposal" and provide feedback if he wished. The business proposal related to Countdown's desire to implement "best practice" principles to work the night-fill arrangements. Mr Marsh had the opportunity to participate in the process and provide feedback for consideration before a decision to proceed with the change was confirmed.

[10] Various meetings occurred between Mr Marsh and Mr Langton in regard to the proposals and Mr Marsh's personal circumstances. There was no agreement in regard to the proposed changes. Mr Marsh has been requested to work the changes and has now required by Countdown to work 6pm to 2am. However he has continued to work the hours he claims are the contract hours, which means starting earlier on the old terms.

[11] In addition, Countdown has requested Mr Marsh to count cartons. This is a process used in many stores which enables the store to track productivity rates of the team versus the company's goals.

[12] It is common ground that Mr Marsh has previously participated in the carton count process. The process is used to help address productivity rates with a view to investigating team members' training requirements, and to ultimately assist the team member to work towards achieving the business goals. The business target rate for cartons per hour is used for labour planning purposes.

[13] Mr Marsh's previous participation in the carton count process is confirmed by his appraisals from 2009, 2010 and 2011. There has been no disciplinary action taken by Countdown in regard to Mr Marsh's speed of work based on the information collected as part of the carton count process. Mr Marsh has indicated that he will not count cartons because of health and safety issues.

[14] Under the individual employment agreement there is a provision that Countdown relies upon to issue a lawful and reasonable instruction for the night-fill employees to count cartons. Countdown claims this is an express term of the employment agreement as follows:

2. *Carrying out instructions*

Employees must carry out instructions given by a person authorised to give such instructions but no employees should be required to do anything which might endanger any person.

Employees must apply themselves diligently to work during working hours and not undertake other activities without prior approval of their manager.

[15] Mr Marsh claims that the request to count cartons is a health and safety issue and to count them is distracting and stressful. Both parties disagree on the impact of the carton counting.

Determination

[16] Mr Marsh's historical employment relationship problem issues are simply that. He has made a number of allegations of harassment that relate to the period in 2008 relating to the company's managers and other staff. The issues are historical and have never been raised properly as personal grievances. As such they are out of time and I am not able to deal with them and resolve them as personal grievances.

[17] Going to the core of some of these problems has been a claim for legal fees. There is nothing in Mr Marsh's individual employment agreement with General Distributors Limited that requires Countdown to pay legal fees incurred during the course of employment and in the resolution of an employment relationship problem. It is a matter of public policy that such costs are incurred by the parties and as such there is no specific remedy to require an employer to pay legal costs for an ongoing employment relationship problem where such costs have been incurred by an employee.

[18] I acknowledge that Mr Marsh has been put to the cost, but it is a cost that he will have to bear given the principles that apply.

[19] Furthermore, I am not satisfied that such costs should incur special damages as a matter of public policy, because the matter for which the costs were incurred related to Mr Marsh's choice to get representation during his on going employment. The Employment Relations Act makes provision for choice in regard to representation and the cost thereof. That is the very reason cheap quick access to mediation is offered through the Ministry of Business, Innovation and Employment (MBIE) (formerly the Department of Labour) mediation services. Also, the costs were incurred for matters that did not involve a formal filing of any employment relationship problem in the Authority at the relevant time.

[20] Next Mr Marsh has raised issues about being discriminated against regarding the issuance of a beanie and gloves and how he has been treated in his work. I am not convinced that he is able to establish this with the sufficient degree of proof to make an accurate finding. In addition, there is no remedy for that issue to be resolved,

given that there was never a personal grievance properly raised and it is now a matter in the past. The parties need to move on towards a productive relationship.

[21] Mr Marsh claims that his complaints about the beanie and gloves were not treated quickly enough and not investigated properly. Countdown denies the claim. I hold that Countdown did sufficient to investigate Mr Marsh's complaints, albeit there were some delays involved.

[22] Mr Marsh's complaints to different agencies have not established any discrimination or health and safety issues. Finally Mr Marsh has complained that one issue was never investigated. Given the historical nature of that matter, I hold if there was ever an employment relationship problem associated with it it needed to be dealt with more quickly at the time, but that since time has elapsed both parties need to move on in their relationship in a productive way for the future.

[23] I now turn to the matters of immediate significance as ongoing employment relationship problems between both parties.

(a) The change in the hours of work

[24] It is open to Countdown to propose changes in hours of work. It did so consulting the employees, I hold. Furthermore there is sufficient evidence to support that Countdown consulted Mr Marsh. Clause 2.3 enables Countdown to implement a change where there is no agreement. It is therefore open to Countdown to require Mr Marsh to work the new hours. Furthermore the right to seek a review by a regional manager existed under the terms of the individual employment agreement. Mr Marsh did not exercise the right to get a review. I am satisfied that sufficient attempts were made by Countdown to consider Mr Marsh's case, and seek alternatives, but without success before before a decision was made.

[25] On the matter of pay Mr Marsh made his own decision to turn up and work the extra hours contrary to his employer's instructions. As such he disentitled himself to the wages for the time involved, and is now relieved from such hours.

(b) Counting cartons

[26] It is open to Countdown to require Mr Marsh to count cartons. I note that the job description does not make provision for such a specific task, but it is, I hold, a task

that fits within the generic range of duties that could be expected of a night fill operator. Indeed I am supported by the following:

- That the law enables an employer to make a lawful and reasonable direction. In *New Zealand (with exceptions) Shipwrights etc Union v Honda New Zealand Limited* (1990) 3 NZELC 97,546 it was held that:

...The work to be carried out within the ambit of lawful and reasonable directions is the work which the employer requires to have done and not merely the work which the employee is prepared to do.

- That counting cartons falls within the terms of the employment agreement. I refer to “Carrying out instructions” as per the Work Rules at page 22:

3. *Carrying out instructions*

Employees must carry out instructions given by a person authorised to give such instructions but no employees should be required to do anything which might endanger any person.

Employees must apply themselves diligently to work during working hours and not undertake other activities without prior approval of their manager.

- That the above applies in the absence of an express term in the job description.

[27] I note that Mr Marsh has the opinion that the counting of cartons is a health and safety issue. There are other appropriate internal ways and external agencies to deal with that issue if the need arises. The avenues above have not been used yet. Until that has been done it is not appropriate for the Authority to intervene given the evidence of the background of the carton counting and the right for the employer to request night fill employees to carry out the instruction to count cartons.

Orders of the Authority

[28] Mr Marsh’s claims are dismissed.

[29] General Distributors Limited t/a Countdown Church Corner is within its rights to require Mr Marsh to work the hours requested, and to request Mr Marsh to count cartons. Mr Marsh is required to work the hours required by Countdown and Mr Marsh is required to count cartons.

Costs

[30] Costs are reserved.

P R Stapp
Member of the Employment Relations Authority