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THE ADVOCATE

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Righting a Wrong

Sometimes (well, relatively often actually) employers don't get their procedure quite right, whether it is during disciplinary proceedings or with other issues, such as changing an employee's hours of work. In a recent case ***Wray v. Averill Moore Investments Ltd t/a Amil Service*** [2015 NZERA Wgtn 38], the Employment Relations Authority examined a situation where an employee claimed she had been disadvantaged in her employment. She alleged that her employer, Amil Service altered her shift patterns, initially without consultation or agreement and then when there was consultation it was too late and not meaningful.

Ms Wray worked at a 24 hour Service Station in Hawkes Bay run by Amil Service. She indicated on her engagement form that she was able to be flexible as to which hours she worked as her family was not dependent on her being at home. However, she settled into a pattern of working 6 am to 2 pm, Tuesday to Saturday, with some additional 2 pm to 10 pm shifts to fill in for others. Her days of work later changed to Monday to Friday and this pattern continued for some months.

The relevant employment agreement stated:

"[9] . . .

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 [6.1] and [6.2*] of this Agreement, the Company may, at its sole discretion, change the roster."*

** [Clause references corrected – the actual agreement referred to incorrect clauses]*

The hours to be worked each week were usually posted by Amil Service on a Monday, effective the following Monday. The roster would sometimes vary to take account of availability of staff and changes sought by staff.

On 11 August a new roster was posted by the Site Leader, which made a number of significant changes to the usual hours of work of staff. Ms Wray came to work on 12 August and noticed the new roster, which had changed her hours to work the 2 pm to 10 pm shift, Tuesday to Saturday, to be effective 18 August. She was shocked at the change, as her partner worked shifts that conflicted with the new hours, and she now had sporting commitments on a Saturday morning for her son.

She asked the Site Leader what had happened with her hours. The Site Leader said she knew nothing, although in fact she had prepared the roster in conjunction with the Operations Manager.

Ms Wray was upset and went home, then contacted both the Operations Manager and Managing Director, who met with her and her partner. She explained she was shocked with the changes and why they would not work for her. The Amil Service representatives listened carefully to her concerns, but felt that due to the need for experienced sole charge staff on the 2 pm to 10 pm shift they could see no alternatives. They also indicated that she had no right to any particular shifts.

Ms Wray asked them to reconsider, and the next day the Managing Director wrote to her saying that the shifts would not be changed, although he did offer her the following Saturday off due to the sporting commitments. It also undertook to review the changes after one month.

Ms Wray considered that Amil Service wanted rid of her and left soon after, raising a personal grievance regarding the change in hours.

The Authority accepted that Amil Service did not want to get rid of Ms Wray and that instead it considered her a loyal and reliable worker. It went on to examine the obligations on the employer and accepted that Amil Service had a right to set up the rosters in a way that it felt best suited its business needs, provided that it "*followed due process*".

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- Resolving Personal Grievances and Workplace Disputes
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- Employment Relations Authority/Employment Court and Mediation Representation
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Disclaimer:

This newsletter is not intended as legal advice but is intended to alert you to current issues of interest. If you require further information or advice regarding matters covered or any other employment law matters, please contact **Neil McPhail**, **Raewyn Gibson**, or **Peter Zwart**.

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The Authority then referred to the duty of good faith:

"[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."

The Authority then stated:

"[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."

The fundamental issue was whether, having not initially consulted, Amil Service had done enough by meeting to discuss the changes and reconsidering. The Authority had earlier referred to some significant cases in this regard:

"[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."*

After considering the company's actions, the Authority held:

"[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."

While this case demonstrates that a flawed process may, in some circumstances, be corrected by reconsideration, it is obviously best to get it right first time to avoid litigation which has the potential to be costly. At MGZ we can assist with getting process matters right in the first instance.