

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

CA 80/08
5095033

BETWEEN DAVID DAVIES
 Applicant

AND SOUTH PACIFIC MEATS
 LIMITED
 Respondent

Member of Authority: James Crichton

Representatives: Robert Thompson, Advocate for Applicant
 Graeme Malone, Counsel for Respondent

Investigation Meeting: 5 June 2008 at Christchurch

Determination: 10 June 2008

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant (Mr Davies) claims to have a personal grievance by reason of having suffered a disadvantage as a consequence of unjustifiable actions by his employer, South Pacific Meats Limited, the respondent (SPM).

[2] SPM denies that Mr Davies has been unjustifiably disadvantaged in his employment with it.

[3] Mr Davies says that he was employed by SPM's predecessor as a shepherd. He says that he commenced his employment on 22 November 2004 and from that date down to July 2006, Mr Davies was exclusively engaged in shepherding duties at a small meat processing plant at Malvern.

[4] During that period, Mr Davies felt that he was doing work for which he was specifically engaged, which he enjoyed, and which gave him an acceptable income.

His evidence was that he worked an average of 50 to 60 hours a week which, by its very nature, included significant overtime.

[5] In July 2006, Mr Davies says that he was asked to do another job in the *chiller* while a workmate was on annual leave and that Mr Davies expected to be returned to his shepherd duties thereafter.

[6] In fact, what happened was that after Mr Davies' workmate returned from annual leave, Mr Davies was directed to a new job again, stunning sheep as part of the preparation for those animals to be slaughtered.

[7] Mr Davies says that he complained about the change in his duties because he felt he had been engaged as a shepherd and he wanted to return to that role, particularly as the income derived from that position was significantly greater than the income derived from the alternative positions he had been directed to fulfil since mid-July 2006.

[8] No such return to his shepherd duties was agreed to by his then employer, and indeed his then employer confirmed that Mr Davies would not be returning to his duties as a shepherd and would continue to be deployed in other roles within the processing plant.

[9] Mr Davies' evidence is that during the period from about August 2006 onwards, he regularly protested to his then employer about this change in his duties which Mr Davies regarded as a unilateral one.

[10] On 1 October 2006, SPM took over the Malvern plant from Mr Davies' previous employer. It is common ground that from the point at which SPM became Mr Davies' employer, Mr Davies was not working as a shepherd but was deployed in other roles within the plant.

[11] However, Mr Davies continued to be concerned about his circumstances and accordingly wrote to SPM by letter dated 3 October 2006 protesting his situation and in particular drawing attention to the drop in his income as a consequence of the change in duties and the perceived unilateral nature of that change.

[12] There was no answer to that letter from SPM. Mr Davies then sought professional advice and by letter dated 24 October 2006, his advocate raised a personal grievance in respect of the matters complained of by Mr Davies.

[13] SPM says that that grievance is out of time, it having been raised more than 90 days after the events complained of. SPM further says that it did not consent to the raising of that grievance out of time.

[14] Mr Davies further contends that his employment rights were breached in the transfer from the original employer to SPM in that nobody spoke to him at all during the transfer of ownership and it literally took him by surprise when it happened.

[15] For the sake of completeness, I note that after Mr Davies ceased his work as a shepherd and took on the other less remunerative roles within the enterprise, he suffered a work accident and was then paid earnings-related compensation but he notes that, by virtue of the significantly less money his later roles attracted, he lost income in that connection as well.

Issues

[16] It will be useful to consider first just what the terms and conditions of Mr Davies' employment actually were.

[17] The next question for the Authority to decide is whether in fact Mr Davies raised his grievance in time.

[18] Thirdly, the Authority must decide, if there are disadvantages suffered by Mr Davies as a consequence of any unjustified action by SPM.

[19] Finally, the Authority needs to deal with a preliminary issue raised by Mr Davies alleging bad faith on the part of SPM.

The employment agreement

[20] Mr Davies says that he was employed on a verbal individual employment agreement, the terms of which broadly conform to a brief memorandum dated 8 November 2006 under the hand of Mr Rod Joyce who is the person who managed the plant at the time that Mr Davies was employed and who was solely responsible for Mr Davies' engagement.

[21] SPM complains that that memorandum (which is attached to Mr Davies' brief of evidence filed in the Authority in anticipation of the investigation meeting) was not disclosed to it previously and that in consequence it is prejudiced by reliance being placed upon it. I do not accept that argument. SPM can have no real part in giving evidence about what happened when Mr Davies was engaged by his former employer, whether by way of documentary evidence or otherwise, as it was not then involved. Accordingly I am prepared to accept the memorandum as evidence for Mr Davies' understanding of the nature of the employment that he was undertaking.

[22] It is, nonetheless, important to note that the Authority's conclusions about this early stage in Mr Davies' employment relationship can only be provisional ones for the obvious reason that the Authority has not heard from Mr Davies' original employer. Mr Davies' claim is against his present employer, SPM. Any provisional views reached by the Authority in relation to the period before SPM were involved must, of necessity, be provisional and are only advanced in this determination to assist in making findings about the employment relationship problem between the present parties.

[23] At the point at which Mr Davies was engaged by his former employer, there was in place a collective employment agreement. The relevant law is contained in the Employment Relations Act 2000. Sections 62 and 63 are particularly relevant.

[24] Section.62 of the Act covers the present situation. Mr Davies' evidence is that when he was engaged by his former employer in October 2004, he was not a member of a union and he entered into an individual employment agreement with the then employer, which employer was a party to a collective agreement that covered the work done or to be done by the employees.

[25] In those circumstances, the law is that an employer is required to tell an employee that a collective employment agreement exists and that it covers the work done by the employee, that the employee may join the union and invite the employee to allow the employer to notify the union that the employee had been engaged on an individual employment agreement.

[26] Mr Davies claims that none of those obligations which s.62(2) of the Act casts on the employer, were ever fulfilled and so he was, he says, oblivious of the fact that, notwithstanding his engagement on what he understood to be an individual

employment agreement on particular terms and conditions, that there was a collective employment agreement, the terms of which actually governed his employment.

[27] Section 63 of the Act provides that the terms and conditions of workers employed on individual employment agreements where there is an overarching collective employment agreement in place are derived from the collective employment agreement and that after the first 30 days of such employment having been created, the parties may vary the terms of that individual employment agreement if they see fit, but not otherwise.

[28] Mr Davies says that no such variation was ever entered into.

[29] A perusal of the applicable collective employment agreement entitled *Malvern Abattoir Limited Collective Employees Agreement 2001-2002* makes clear that the work done by Mr Davies when he was employed is covered by the document. Further, the nature of the collective employment agreement is to create a generic set of employees with broad occupational duties, one of which would include the nature of all the work done by Mr Davies. Further, the remuneration for these generic positions would appear to be on all fours with the remuneration paid to Mr Davies.

[30] It follows that on the basis of Mr Davies' own evidence and an analysis of the law as it applies to the situation Mr Davies describes, Mr Davies is covered by the relevant collective employment agreement from which his individual terms and conditions of employment are derived, and it follows that an employer could direct Mr Davies to different areas of work within the plant as operational requirements dictated.

Was the grievance raised within time?

[31] There is no doubt that the grievance was raised by letter dated 24 October 2006 addressed to both Mr Davies' original employer and the present respondent.

[32] Mr Davies argues that he raised his grievance in an informal way at an earlier date with his original employer by constantly bringing to his manager's attention his (Mr Davies) unhappiness with the then applying arrangements. Mr Davies also contends that his letter of 3 October 2006 addressed exclusively to SPM also raised a personal grievance.

[33] The importance of these various claims is that SPM alleges that none of the communications prior to 24 October 2006 actually raise a personal grievance and that the communication on 24 October 2006 is out of time being more than 90 days after the events complained of first came to the notice of the employee.

[34] I agree with both of SPM's submissions in this regard.

[35] Mr Davies would have become aware of the reality of his employment situation certainly by the end of July or the beginning of August 2006. It follows that he would need to have taken steps to raise a grievance with his then employer before, say at the very latest, the end of September or the beginning of October 2006.

[36] Clearly, Mr Davies complained regularly about his circumstances, but nothing that I heard in the evidence satisfied me that those complaints amounted to the raising of a personal grievance. The whole point of raising a personal grievance with the employer is to give the employer an opportunity to resolve the grievance and in order for that opportunity to be a real one, there must be sufficient detail in the complaint and sufficient clarity in the seriousness of the resolve of the potential grievant as to put the employer on notice that the matter is being taken seriously and needs to be addressed. I do not think Mr Davies has satisfied that test, at least until 24 October 2006 by which point I hold that he is out of time.

[37] It follows that, in order for Mr Davies to be heard on his grievance, he must, of necessity, make an application to the Authority for leave to raise that grievance out of time.

Is there disadvantage by unjustifiable action?

[38] Given my finding that Mr Davies has not brought his grievance within time, the question whether there has been any disadvantage to Mr Davies as a consequence of an unjustifiable action is somewhat academic.

[39] However, it is appropriate that the Authority deals with the question whether Mr Davies can look to SPM at all in the event that he were to apply for and be granted leave. I am satisfied, on the balance of probabilities, that SPM has taken no steps which could potentially place it in the position of acting unjustifiably toward Mr Davies and thus potentially causing him disadvantage.

[40] At the point at which SPM took over the ownership of the business in which Mr Davies was employed, Mr Davies was already working in the less remunerative capacity that he objected to, and so SPM did not change his position disadvantageously, SPM was told by the vendors that all employees were aware of the situation of the transfer of ownership and it believed on reasonable grounds that all appropriate employment obligations had been met by the outgoing vendor.

[41] SPM believed (erroneously as it transpired) that all employees were unionised and so they were not drawn to engaging directly with Mr Davies. SPM were told by the outgoing vendors that all appropriate consultation with the workers had already taken place and I hold that it was reasonable for SPM to reach the conclusions that it did in reliance on the advices of the outgoing vendor.

[42] It is plain that by 3 October 2006 (the date of Mr Davies' letter to SPM) Mr Davies knew that his employer had changed yet the only matter raised in his letter is his unhappiness about his job; there was nothing about his complaint about lack of consultation until the Authority proceedings were launched.

Breach of good faith

[43] By Notice of Direction dated 28 November 2007, I directed the parties back to mediation and, in doing so, expressed the view that mediation *would be assisted* by the presence of the representatives.

[44] Mediation then proceeded without the presence of counsel for SPM and was unsuccessful.

[45] By letter dated 18 March 2008, the advocate for Mr Davies alleged that the failure of counsel for SPM to attend the second mediation was a breach of good faith. The letter sought a good faith report or that the alleged breach be reflected in costs. It was claimed, in particular, that the original date for the investigation meeting would not have been vacated if Mr Davies had known that counsel for SPM would not be present at the second mediation.

[46] The 18 March letter was responded to by counsel for SPM who denied a breach of good faith had occurred and denied a direction was made the he attend the second mediation on behalf of his client.

[47] I am satisfied that there has been no breach of good faith. There is no direction from the Authority that counsel for SPM be present at mediation only that mediation *would be assisted* if he were there. SPM, I am satisfied, was adequately represented at the mediation by its very experienced human resources manager.

[48] Mr Davies' representative contends that the original investigation meeting date was vacated by consent after telephone discussions with counsel for SPM and that such consent would never have been given if it had been clear to Mr Davies' representative that counsel for SPM was not going to attend.

[49] That contention may well be a statement of fact but if true, it can only have resulted from a misunderstanding; counsel for SPM is an able and experienced practitioner and I am satisfied would not deliberately mislead the opposing representative.

Determination

[50] For reasons enunciated above, Mr Davies' claim against SPM fails.

Costs

[51] Costs are reserved.

James Crichton
Member of the Employment Relations Authority