

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

AA 39/09  
5136230

BETWEEN VINCE FLEMING  
Applicant

AND AFFINITY SERVICES  
LIMITED  
Respondent

Member of Authority: Robin Arthur  
Representatives: Applicant in person  
Frank Tracey for Respondent  
Investigation Meeting: 3 February 2009 in Auckland  
Determination: 9 February 2009

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**DETERMINATION OF THE AUTHORITY**

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[1] Vince Fleming has worked as a support worker for Affinity Services Limited (ASL) since November 2006. From the start of his employment he has worked on only one day of the week – that is on a Saturday. Until recently he also had other employment elsewhere and only wanted to work for ASL on Saturdays.

[2] He has raised a personal grievance because he says ASL has pressured him to accept a variable roster so that his work day would not always be a Saturday. He says this change was sought by ASL only because he had made a number of complaints which included other staff “*bullying*” him. He says ASL has failed to properly deal with those complaints and its attempt to have him work on a changeable roster also amounts to bullying.

[3] ASL replies that it is entitled by the terms of Mr Fleming’s employment agreement to require him to work days other than Saturday. It says this is unrelated to

Mr Fleming's complaints which it has made extensive efforts to address through meetings with him and its formal complaints procedure.

### **Issues**

[4] The issues for resolution are:

- (i) Whether ASL is entitled to require Mr Fleming to work on days other than a Saturday; and
- (ii) In seeking to have Mr Fleming work on other days, has ASL acted as a fair and reasonable employer would (including consulting him about the change); and
- (iii) Has ASL acted as a fair and reasonable employer would in investigating Mr Fleming's complaints, including those of bullying by others; and
- (iv) If the answer to any of (i), (ii) and (iii) is no, what orders and remedies are required (if any)?

### **Investigation**

[5] Written witness statements were provided by Mr Fleming, Service and Food Workers Union advocate Russ Revell, ASL chief executive Frank Tracey, ASL service delivery manager Sonya Russell and ASL service leader Ann Sullivan. Each witness attended the meeting and, under oath, answered questions from the Authority. Mr Fleming and ASL had the opportunity to ask additional questions and provided oral closing submissions.

### **Is ASL entitled to roster Mr Fleming on days other than Saturday?**

[6] Key to determining the applicable terms of employment is the question of whether a copy of a position description provided in evidence by Mr Fleming forms part of his employment agreement.

[7] Mr Fleming signed an employment agreement with ASL to start his position on 1 November 2006. It stated his position was as "*Part time – Regional Support Worker*" and that he was to "*perform the duties specified in Schedule B*" of the agreement.

[8] Schedule A of the agreement is a summary of conditions and describes the classification of the position as “*part time – 8 hrs per week*”.

[9] In the copy of the agreement on ASL’s files there is no completed Schedule B. It is blank apart from a heading saying “*Position Description*” and a note – which is an instruction to the person preparing the specific agreement from a standard template or form used by ASL – saying: “*Ensure you specify hours and days of work if the staff member is not subject to rostering*”.

[10] However Mr Fleming has provided a copy of a position description which he believes he was given at the same time as his employment agreement. It refers to a residential relieving support worker at a specified residence run by ASL and gives the hours of work as “*permanent part-time Saturdays 8-10 hours (rostered shifts)*”. This copy has a footnote with the date 27 November 2006.

[11] Mr Fleming says this position description describes the job he began in November 2006.

[12] ASL does not have a copy of that document on its employment file for Mr Fleming. The human resources managers responsible for his documentation at the time no longer work for ASL.

[13] I accept it as more likely than not that the Position Description produced by Mr Fleming was given to him at or around the time of his employment. The employment agreement clearly contemplates one being given to him and there is nothing to suggest that ASL did not provide such descriptions. That ASL’s own present records do not contain a copy does not, I find, negate its applicability.

[14] Despite the wording of the position description, there are two other provisions of the employment agreement that may support ASL’s argument that it is entitled to change the day of work.

[15] A “*flexibility of position*” clause does expressly allow for changes of position, premises and “*hours*”. However I do not accept that the reference to “*hours*” also

means “*days*” in this context because other clauses expressly refer to “*hours and days*” showing both words have distinct meanings in this agreement (particularly in the important “rosters” clause). Put another way, the way both words are used suggests that a reference to changing the hours of work is not intended to mean changing the days of work.

[16] But the flexibility clause does allow for a change of “*position description*” provided this is done after consulting the worker. Arguably this allows ASL to change the day of work given in the position description on which Mr Fleming relies.

[17] There is also an argument that the rosters clause of the agreement allows for such a change. It provides that Mr Fleming agrees to “*work the days and hours specified by [ASL] in rosters*”, with such rosters to be posted 10 days in advance.

[18] Mr Revell suggested in his evidence that Mr Fleming was not subject to rostering because he had a one-day-a-week, part-time position. However the position description on which Mr Fleming relies includes a note referring to “(*rostered shifts*)” after stating “*Saturdays 8-10 hours*” as being when he is to work, as he has done ever since. It might be that this mean the starting and finishing times for his 8 to 10 hours on a Saturday are subject to change by roster, or it could be read as suggesting the day of work itself is subject to change by notified roster.

[19] However there are two hurdles for ASL’s arguments – neither of which I find that it clears.

[20] Firstly, the undisputed evidence was that Mr Fleming was specifically employed by mutual agreement to work on Saturdays only and, in fact, has only worked Saturdays. While Mr Fleming argued this amounted to what he called “*custom and practice*”, I consider that the reference to Saturdays in the position description should rather be taken as a clearly expressed record of an underlying assumption of both parties at the time they entered the employment agreement and as such comprises an implied term as to when he was to work.<sup>1</sup> Neither does it offend the test of practical or business efficacy including, I find as a matter of construction,

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<sup>1</sup> *A-G v NZPPTA* [1992] 1 ERNZ 1163, 1167 (CA).

that it does not contradict any express term of the agreement. Variation of that implied term would require Mr Fleming's agreement.

[21] Secondly, to accept ASL's analysis of its ability to require a change of the day of the week on which Mr Fleming works would be inconsistent with the terms of his employment agreement as to how his employment may be terminated. The agreed clause allows ASL to terminate the employment agreement for medical reasons, misconduct, insolvency, breach of obligations by Mr Fleming, and redundancy.

[22] When ASL first sought to change the day of work Mr Fleming had other jobs elsewhere which meant he was unable to work on other days offered. The effect of the change would have the *de facto* effect of ending his employment with ASL. That however would have been outside the agreed reasons such a termination could take place. Accordingly it was inconsistent with the terms of the agreement.

[23] The net effect is that ASL cannot change Mr Fleming's day of work from Saturday without his agreement.

[24] However, as discussed with Mr Fleming during the investigation meeting, that does leave the risk that ASL may nevertheless legitimately seek to terminate his employment by reason of redundancy.

[25] His employment agreement has the conventional definition of redundancy as a situation where the worker's position is "*wholly or mainly ... superfluous to our needs*".

[26] The evidence of Mr Tracey and Ms Russell was that the attempt to change Mr Fleming's day of work was because a "*Saturday only*" job no longer fitted the requirements of ASL for flexible rostering of all its residential staff. This follows a major restructuring of its operations last year – which included redundancies of a number of managerial and administrative positions – and recruitment of more permanent full-time residential support staff who are required to work on a rotating roster. These changes were made following consultation with staff and included the introduction of a revised position description for residential support staff rostered over a seven day period covering 24-hour days and including sleepovers.

[27] As Ms Russell's evidence noted, ASL at that stage had a genuine business reason to consider making Mr Fleming's position redundant as being superfluous to its needs.

[28] Effectively ASL sought to avoid that decision by offering Mr Fleming alternatives of moving to a casual employment agreement or continuing on a part-time basis for which he was offered shifts on a variety of days during the week. Neither option was then acceptable to him.

[29] Whether ASL now returns to re-evaluate its options regarding redundancy of Mr Fleming's position is beyond what needs to be considered in this determination. Mr Fleming accepted during the investigation meeting that this might be an eventual outcome. ASL would, of course, be subject to follow whatever redundancy policy and procedure it may have in place and the general obligations regarding consultation and consideration of any redeployment options.

**Did ASL act fairly in seeking to change the day of work?**

[30] While I have now found that ASL sought to make a change of Mr Fleming's day of work in a way that it was not entitled to do, I do not find that it acted unfairly in how it went about seeking that change. Rather ASL representatives acted openly and were responsive and communicative in responding to Mr Fleming's concerns about proposed changes, including meeting and corresponding with him and his union representative on the issue. Throughout he has continued to work on Saturdays or been on paid leave while this matter has been in dispute.

**Has ASL properly considered Mr Fleming's complaints?**

[31] Mr Fleming made a number of complaints to ASL in early 2008 about what he saw as misconduct by other staff. He says he has since been bullied by other staff and ASL managers because of those and subsequent complaints.

[32] The following illustrates the range (but not a full list) of the complaints Mr Fleming has made to ASL:

- (i) other staff used “*sexually explicit*” language in front of him and clients and some staff did not take sexual harassment training seriously;
- (ii) other staff left “*adult explicit literature*” in the workplace, one example given being *Truth* magazine;
- (iii) other staff pressured him not to follow ASL procedures such as not to sign for petty cash, not to lock office doors in the residences and to leave work early;
- (iv) he was sent to do shopping for clients at one residence but was given insufficient money to get all provisions needed and staff later reported that the residents blamed him for not getting all the provisions they needed;
- (v) he was not included in staff handover meetings;
- (vi) he had to clean up rubbish from a wheelie bin tipped over at a property he had cleaned up;
- (vii) ASL did not put in place “*written disciplinary directives to control bullying and misconduct*” that he considered necessary for other staff;
- (viii) ASL directed him to change his work location and hours of work after he had made complaints about what he considered to be staff misconduct;
- (ix) A female staff member stood too close to him and made “*inappropriate noises*”;
- (x) A staff member told him other staff “*couldn’t stand me*”;
- (xi) Work assessments of him by his managers suggested his work was below ASL standards when he considered it should show his work exceeded those standards;
- (xii) Mr Tracey commented in a meeting with Mr Fleming that too much time was being spent on dealing with his complaints;
- (xiii) Mr Tracey “*ignored*” him at ASL’s Christmas party.

[33] Throughout 2008 Mr Fleming’s concerns were the subject of at least four formal meetings between him and ASL representatives.

[34] Mr Fleming met twice with ASL’s residential service leader Ms Sullivan, with the second occasion also involving his team leader.

[35] A third meeting – on 4 July 2008 – was attended by Mr Tracey, Ms Russell and a union advocate, Jane Ballantyne.

[36] A fourth meeting – on 15 October 2008 – was attended by Mr Tracey and Mr Revell.

[37] Notes of both meetings show extensive canvassing of Mr Fleming's concerns and what could be done about them.

[38] Following the 4 July meeting Mr Tracey wrote to Mr Fleming on 31 July 2008 outlining action by ASL managers to address concerns he had raised. It also outlined a process of "*additional support*" for Mr Fleming allowing him to provide verbal and email feedback directly to his line manager or team leader either during or directly after his shift. Mr Fleming confirmed that he made use of that process.

[39] During the 15 October meeting Mr Fleming was encouraged to follow ASL's procedure for submitting written incident reports about his concerns.

[40] Some complaints he had raised had not been dealt with earlier because he had not followed that procedure. Since that meeting Mr Fleming has lodged two written complaint forms which have been investigated by ASL managers and any identified necessary action has been taken.

[41] Mr Revell's evidence was that – apart from the Saturday work issue – all other issues raised by Mr Fleming at the 15 October meeting were resolved and that Mr Fleming was "*okay with the outcome*". He also accepted, in response to a question, from his own observations during the meeting that ASL has listened to Mr Fleming's concerns and responded appropriately.

[42] I note that ASL support to Mr Fleming has included offering him access to free counselling through the Employee Assistance Programme.

[43] On the totality of the evidence available to me I find that Mr Fleming has not suffered any unjustified disadvantage from how ASL's has handled his complaints. ASL's actions in considering Mr Fleming's complaints and responding to them have

been what a fair and reasonable employer would have done in all the circumstances at the time. This has been difficult for ASL as Mr Fleming has – as Mr Tracey put it in his evidence – “*continually re-litigated issues even after previously reaching apparent resolution and agreement*”.

### **Summary of determination**

[44] I have found that ASL is not entitled to change Mr Fleming’s day of work under his present employment agreement and position description without first seeking and securing his agreement to such a change. To make such a change without his acceptance might effectively result in termination of his employment by a means other than that allowed for in his employment agreement. Permissible means of termination include by operation of the redundancy clause, a provision that Mr Fleming accepts remains open to ASL.

[45] I have found Mr Fleming has not been unjustifiably disadvantaged in how ASL has received, considered and acted on his complaints.

[46] I find no orders or remedies necessary.

### **Costs**

[47] Because Mr Fleming has been partly successful in his application he is entitled to reimbursement of his \$70 fee for lodging this matter in the Authority. ASL is to reimburse that amount to him within 14 days of the date of this determination.

Robin Arthur  
Member of the Employment Relations Authority