

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
ER AUTHORITY AUCKLAND OFFICE**

BETWEEN Marilyn Griffiths
AND Wilding International Limited
REPRESENTATIVES John Peebles for the Applicant
Respondent in Person
MEMBER OF AUTHORITY Marija Urlich
INVESTIGATION MEETING 07/06/06
DATE OF DETERMINATION 18/07/2006

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Marilyn Griffiths was employed as a caregiver by Wilding International Limited at its Armourdene Rest Home in its hospice unit. She was dismissed from this position on 16 November 2004. Mrs Griffiths says her dismissal was unjustified and she seeks reimbursement of wages lost as a consequence of her dismissal, compensation for hurt and humiliation and costs and disbursements.

[2] Wilding International Limited says Mrs Griffiths' dismissal was justified in all the circumstances.

Issues

[3] Mrs Griffiths was an existing staff member of Armourdene Rest Home when it was sold to Wilding International Limited in early 2004. She was offered and accepted employment with the new owner. The terms of this employment were set out in a written employment agreement entered by the parties on 10 March 2004 and included:

"6. HOURS OF WORK

- (a) Ordinary hours of work shall be less than 80 per fortnight (Monday to Sunday) as determined by the employer and set out in the roster schedule which will be made available to the employee at least 2 weeks in advance. The roster includes every day of the week and year.

..."

[4] From March until August Mrs Griffiths was regularly rostered weekend duties in addition to her usual four week-day duties. Mrs Griffiths did not work those weekends because she was able to swap them with a co-worker who preferred weekend work. When that co-worker left Armourdene's employment the then nurse manager discussed weekend work with Mrs Griffiths and asked her to put in writing why she did not wish to work weekends, which Mrs Griffiths did, setting out her reasons and advising that she was "no longer available to work weekends". Mrs Griffiths did not receive a reply to this letter.

[5] In October Sandra Darbyshire was appointed nurse manager. The issue of weekend rostered duties was again raised with Mrs Griffiths. Barry Pohio, the respondent's Managing Director, asked Mrs Griffiths "where she was placed" with working weekends and she replied

that she "wasn't happy about it". Mr Pohio copied Mrs Griffiths the relevant clauses from the employment agreement and told her this enabled Armourdene to roster her on weekends.

[6] On 8 November Mrs Darbyshire posted a roster to begin on Sunday, 21 November. The roster was posted with two weeks notice as required under the employment agreement and included a rostered Sunday duty for Mrs Griffiths on 21 November.

[7] Mr Pohio said that the posted roster alerted staff, in most cases, to rostered duties they had already agreed to work. By "already agreed to work" I understood Mr Pohio to mean usual rostered duties, such as Mrs Griffiths four week-day duties. Once the roster was posted, Mr Pohio said, it was up to staff to arrange swaps to cover rostered shifts which they were unable to work, except in instances of approved leave, when Armourdene would organise cover.

[8] Upon seeing the posted 8 November roster Mrs Griffiths said she immediately wrote to Mrs Darbyshire raising her concerns about the rostered weekend duties. Mrs Darbyshire said she did not receive such a letter and Mrs Griffiths has not produced a copy of it. There is insufficient evidence to support Mrs Griffiths' claim that she raised her concerns about the roster in a letter to Mrs Darbyshire.

[9] Towards the end of that week Mrs Griffiths asked Mr Pohio to attend a meeting on Sunday 14 November at the local Cossie Club. She wanted to discuss concerns she and a co-worker had about the hospice unit in which they worked. Mr Pohio said he assumed the meeting was to discuss the weekend roster. Mrs Griffiths said this was not her intention.

[10] At the conclusion of the Sunday meeting, Mrs Griffiths' husband said to Mr Pohio that Mrs Griffiths would not work on weekends. Mrs Griffiths' added that she would be happy to work the occasional weekend if they were stuck with filling the roster. There was no further discussion of the issue. I find this was the first notice the respondent received that Mrs Griffiths would not work the rostered weekend duty.

[11] On 15 November, having taken advice, Mr Pohio and Mrs Darbyshire meet with Mrs Griffiths and asked her if she would work the rostered weekends. Mrs Griffiths said she probably would not work the weekend duty. Mr Pohio asked where to from here and Mrs Griffiths suggested the parties attend mediation. Mr Pohio then asked if that would help the situation and Mrs Griffiths said she did not think it would. Mr Pohio told Mrs Griffiths she could take the rest of the shift off to seek advice and that they would meet again the following day. Mr Pohio said he believed he told Mrs Griffiths that he had received advice that he could dismiss her if she would not agree to work the roster. Mrs Griffiths disputes that Mr Pohio told her position was in jeopardy.

[12] Mr Pohio contacted Mrs Griffiths the following day to set up a meeting. Mrs Griffiths said Mr Pohio told her the purpose of the meeting was to discuss an alternative but that he did not say what that alternative was. Mr Pohio denies he said this and that there was no alternative roster to discuss.

[13] Mrs Griffiths attended the meeting at the agreed time accompanied by her husband. Mrs Griffiths says that Mr Pohio said her employment was in jeopardy and handed her a letter advising her she was dismissed and told her to leave the premises immediately. Mr Pohio says he asked Mrs Griffiths if the situation had changed, that she confirmed it had not and so he handed her a letter advising she was dismissed and summarising the reasons for that dismissal. Mr Pohio said he recalled asking Mrs Griffiths to return all company property in her possession. Mrs Griffiths received two weeks paid notice of her dismissal.

Determination

[14] There is no dispute between the parties as to the meaning of the employment agreement; the parties understood that the rostered weekend duties were enabled under the employment agreement. Mrs Griffiths was on notice that her "no-weekend" arrangement could no longer be accommodated. Mrs Griffiths' view is that her employer should have continued to

accommodate her preference not to work the weekends because she was a good worker.

[15] The key factual dispute between the parties is whether Mrs Griffiths was put on notice that her refusal to agree to work the rostered weekends could result in her dismissal. Mr Pohio says that he believes he advised Mrs Griffiths that dismissal could be a possibility at the meeting on 15 November and again on 16 November. Mrs Griffiths said she received no such notice and that the advice that she was dismissed came as a shock.

[16] Having considered all the evidence I find it is more likely than not that Mrs Griffiths was not put on notice that her refusal could result in her dismissal. Mr Pohio's evidence as to this issue was uncertain and the 16 November dismissal letter and Mrs Darbyshire's letter of 24 November in reply to the lodging of the personal grievance do not refer to any such notice being given to Mrs Griffiths.

[17] The failure to advise Mrs Griffiths that her refusal to confirm she would work the Sunday duty could put her employment in jeopardy is more than a minor flaw in the dismissal process. A fair process requires that all relevant information is provided so that an employee may fairly consider the allegation and possible consequences if that allegation is upheld. This did not occur here. Mrs Griffiths could not reasonably infer from the circumstances that dismissal would be a consequence of her refusal to work the Sunday duty. In the past Mrs Griffiths had not been told her employment was in jeopardy and her preference, though questioned, had continued to be accommodated. For these reasons I find Mrs Griffiths' dismissal was unjustified.

Remedies

[18] Mrs Griffiths has established she has a personal grievance and is entitled to a consideration of the remedies she seeks.

[19] I am not satisfied that Mrs Griffiths has taken reasonable steps to find alternative employment and mitigate the lost wages she has suffered as a consequence of her dismissal. Taking into consideration the two weeks paid notice Mrs Griffiths received, she is entitled to a further two weeks pay at her usual rate.

[20] Wilding International Limited is ordered to pay Marilyn Griffiths two weeks wages, totalling \$672 (gross).

[21] Mrs Griffiths said she was devastated to lose a job she really loved, that she has 30 years experience in caregiving and had moved from maternity care, at the outset of her working life, to palliative care. I accept that the advice of her dismissal came as a shock, that she was not on notice at that this was a possibility and that this impacted on her

[22] Wilding International Limited is ordered to pay Marilyn Griffiths \$4000 compensation for hurt and humiliation pursuant to section 123(c)(i) of the Act.

[23] Section 124 requires that I consider any blameworthy conduct on the part of the applicant which may have contributed to the circumstances which resulted in her dismissal. I am of the view that Mrs Griffiths contributed to the circumstances which resulted in her dismissal in a blameworthy fashion; she refused to agree to work the rostered weekend work despite acknowledging that her employer was entitled to roster her in that manner, she did not give her employer timely or clear notice of her objection to the 8 November roster and she took no steps to swap the rostered shift with another employee, which was a permitted practice.

[24] All remedies awarded are to be reduced by 50% pursuant to section 124 of the Act and I so order.

Costs

[25] Costs are reserved. If the parties are unable to resolve this issue themselves, Mr Peebles may file a memorandum of costs within 21 days of the date of this determination. Mr Pohio has a further 14 days to file any memorandum in reply.

Marija Urlich
Member of Employment Relations Authority