Determination Number: AA 369/05
File Number: AEA 364/05

Under the Employment Relations Act 2000

BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE

BETWEEN	David William Keene (Applicant)
AND	Parkfield Holdings Limited t/a Dispensary Bar (Respondent)
REPRESENTATIVES	David William Keene In person Paul Davey, for Respondent
MEMBER OF AUTHORITY	Marija Urlich
INVESTIGATION MEETING	9 August 2005
DATE OF DETERMINATION	20 September 2005

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] David Keene started work as a duty manager at the Dispensary Bar ("the Bar") in April 2004. The Bar was purchased by Parkfield Holdings Ltd ("PHL") in August 2004. Mr Keene did not receive a written employment agreement and continued to be rostered and work his usual shifts, Monday and Friday, 4pm to 12am, until December 2004 when Mr Keene volunteered to work full time hours until his return to university in February 2005. Mr Keene then sought to resume his usual Monday and Friday shifts. Mr Davey did not accommodate this request and Mr Keene was rostered on shifts which he was unable to work due to his university and sporting commitments. Mr Keene last worked at the Bar in the week ending 6 March 2005.

[2] Mr Keene says he was unjustifiably constructively dismissed by PHL because it failed to continue to roster him on his agreed shifts and rostered him on shifts which it knew he was unable to work due to his university and sporting commitments. He seeks remedies of reimbursement of wages lost as a consequence of his dismissal and compensation for hurt and humiliation caused as a consequence of his dismissal.

[3] PHL says there was never any agreement with Mr Keene to work permanent shifts or to roster Mr Keene shifts which would accommodate his university and sporting commitments.

[4] To resolve this employment relationship problem I must determine whether it was a term of Mr Keene's employment agreement that he would be permanently rostered on two shifts per week, Monday and Friday, 4pm to 12am and/or a term of his employment that he be rostered on shifts which accommodated his university and sporting commitments and if such a term existed whether it was breached to such a serious degree that Mr Keene could reasonably believe PHL no longer intended to be bound by the employment agreement between the parties.

Issues

(i) what did the parties agree?

[5] Mr Keene did not have a written employment agreement. Sensibly, he made repeated requests for an employment agreement during his employment but never received one. Mr Keene wrote to the Bar in November 2004 requesting a written employment agreement. Mr Keene said he worked two permanent Monday and Friday shifts when first employed at the Bar and when Mr Davey purchased the business he discussed his terms of employment with him and was told the status quo would be maintained.

[6] Mr Davey said he could not recall this discussion with Mr Keene. He said he had instructed his bar manager to give letters setting out an offer of employment and an individual employment agreement to each staff member. Mr Davey produced such a letter of offer addressed to Mr Keene. The letter includes:

> "This position is a part-time position. Hours of work will be flexible as decided by the employer. Set hours of work cannot be guaranteed."

[7] Mr Keene said he had never seen this document or the individual employment agreement before. Mr Davey did not have a letter signed by Mr Keene. He said he had left it up to his bar manager to distribute the offers of employment and he did not chase up Mr Keene to sign the offer of employment. Mr Davey said he did not recall receiving Mr Keene's November letter.

[8] There is no evidence the written offer of employment or the written employment agreement were accepted by Mr Keene. In such circumstances these documents cannot be said to bind the parties.

[9] Mr Keene said Mr Davey agreed to keep the status quo in relation to his employment. He understood from this that nothing about his work would change and this remained the case until December 2004 when Mr Keene volunteered to work more hours and his offer was accepted. Mr Keene made the offer because a full-time employee has recently resigned and it coincided with his university break.

[10] Mr Keene said he expressly discussed with Mr Davey returning to his set shifts upon resumption of the university year and that Mr Davey agreed to this. Mr Davey says he recalled him and Mr Keene agreeing that Mr Keene would go from 4 or 5 shifts per week to 2 shifts per week when university resumed. Mr Davey said Mr Keene did not ask for guaranteed shifts.

[11] On 24 November Mr Davey held a disciplinary meeting with Mr Keene regarding food and drinks he had given away. Mr Keene admitted giving the items away, offered to pay for them and apologised. Mr Davey said he did not take any disciplinary action against Mr Keene because of Mr Keene's attitude towards the situation.

[12] The week before university was due to resume Mr Keene arranged to take a week's annual leave. There was a misunderstanding as to when the leave would begin and another employee had to fill in for a shift Mr Keene had been mistakenly rostered in.

[13] Mr Keene returned to work at the Bar in the week ending 20 February. He was not rostered on the pre-Christmas Monday and Friday pattern and swapped shifts with co-workers to accommodate his study and sports commitments. Mr Keene raised the shifts with Mr Davey during the week ending 5 March when he rang in to say he was unable to work his rostered Sunday 10am to 4am shift. Mr Keene remembers telling Mr Davey he wanted to go back to the Monday and

Friday pattern. Mr Davey does not recall this part of the conversation.

[14] In the week following this discussion Mr Keene was rostered on Saturday and Sunday 6pm to 12pm. Mr Davey said he needed Mr Keene to work the weekends because it was very busy. Mr Keene telephoned Mr Davey on the Friday evening to advise he was unable to work the Saturday night shift because it was his best friend's 21st birthday party that evening. Mr Keene accepts this was short notice of his unavailability. Mr Keene also accepts that he told Mr Davey he was only required to give two hours notice of unavailability. He said he was under the impression that was all the notice he was required to give. Mr Davey did not take this advice of short notice well and told Mr Keene that as a part-time employee he could not stipulate what shifts he worked. Mr Davey accepts that in the background of this discussion Mr Davey's brother was using offensive language. Mr Keene said he found this intimidating.

[15] From this time on Mr Davey did not roster Mr Keene to work alone as duty manager. The consequence of this decision was that Mr Keene had to be rostered on with a duty manager and these shifts were limited to the graveyard shift. He said he did this because Mr Keene had made his position clear when he said he only had to give two hours notice of unavailability. Mr Davey did not discuss this decision or its consequences with Mr Keene.

[16] On 17 March Mr Keene wrote to Mr Davey asserting the Monday and Friday 4pm to 12pm shifts as a term of his employment agreement and seeking to meet with him to discuss this issue.

[17] On 24 March Mr Keene attended a meeting with Mr Davey accompanied by his (Mr Keene's) mother. Mr Keene told Mr Davey that he could not understand the hours he had been rostered, that he had never been rostered those hours during term time before and asked Mr Davey if he could accommodate his study and sporting commitments. There was no resolution from the meeting.

[18] Mr Davies resumed rostering Mr Keene as duty manager. He said he did his best to try to accommodate Mr Keene's out of work commitments within parameters which he thought were reasonable given the needs of the business and his own experience of work and studying. Mr Keene did not provide, and Mr Davey did not request, copies of Mr Keene's university timetable or soccer draw. Mr Keene was unable to work any subsequent rostered shifts. He last worked at the Bar in the week ending 6 March.

[19] On 31 March 2005 Mr Keene wrote to Mr Davey raising a personal grievance and requesting the parties attended mediation. On 14 April Mr Keene filed an application in the Authority.

[20] On 20 May PHL's representative wrote to Mr Keene proposing a resolution to his personal grievance offering the following permanent rostered shifts; Friday 4pm, any time Saturday and Sunday. The parties subsequently attended mediation but were unable to resolve this employment relationship problem.

Determination

[21] Mr Keene forwent his Monday and Friday shifts in November to take up full-time hours or near to full-time hours available to him over the summer period. The evidence as to the agreement on resumption of the university term is disputed. I am not satisfied the parties agreed that Mr Keene would be guaranteed Monday and Friday shifts or that there was any agreement that the rostered shifts would accommodate Mr Keene's commitments outside work. Both parties recognised the need for flexibility around rostering in the Bar and no bar staff have guaranteed rostered shifts other than the bar manager. I find the extent of the parties' agreement was that Mr Keene would have two guaranteed shifts per week on the resumption of the university term.

[22] I accept Mr Davey's evidence that he made a genuine effort to accommodate Mr Keene's out of work commitments within boundaries which he thought were reasonable. It is unfortunate that the parties did not sit down and discuss Mr Keene's actual availability. This failure to communicate resulted in the parties' drawing conclusions which were unhelpful to their resolving this employment relationship problem themselves; Mr Keene thought Mr Davey was deliberately rostering him impossible shifts and Mr Davey thought Mr Keene was making unreasonable demands.

[23] Does this situation amount to a constructive dismissal? For the reasons set out above I have found the Monday and Friday shifts were not a term of Mr Keene's employment agreement. Mr Keene had not guarantee of shifts other than a minimum of two per week which was complied with other than the week ending 20 February when he was rostered on one shift. He is entitled to payment for that shift. Parties to employment relationship problems are required to communicate openly with one another. Important information was not required or sought and the failure rests with both parties. Mr Keene was unable to work the shifts rostered within the terms of his employment agreement because of his outside commitments. He was not constructively dismissed.

[24] **Parkfield Holdings Limited is ordered to pay David Keene wages equivalent to one shift.**

Costs

[25] **Mr Keene is entitled to be reimbursed by Parkfield Holdings Limited for the $70 filing fee incurred in bringing this application to the Authority and I so order.**

[26] If Mr Keene has incurred any legal costs in bringing this application and seeks a determination on costs then a memorandum as to costs should be filed within 14 days of the date of this determination. Parkfield Holdings Limited has a further 14 days from receiving the memorandum to file and serve any reply. However, I wish to indicate to the parties my preliminary view is that costs, additional to the filing fee, should lie where they fall.

Marija Urlich
Member of Employment Relations Authority