Determination Number: AA 102/06
File Number: AEA 1237/05

Under the Employment Relations Act 2000

BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE

BETWEEN	Moritz Muck (Applicant)
AND	Palace Casino Limited (Respondent)
REPRESENTATIVES	Robert Muck advocate for applicant Kelly Rowell, counsel for respondent
MEMBER OF AUTHORITY	Alastair Dumbleton
INVESTIGATION MEETING	22 March 2006
FINAL SUBMISSIONS RECEIVED	30 March 2006
DATE OF DETERMINATION	3 April 2006

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant Mr Moritz Muck has raised several complaints about the way his employment agreement with Palace Casino Ltd (PCL) was performed by the company and also the way the employment relationship ended. To resolve his problem Mr Muck seeks orders against PCL requiring the company to pay him $8,875 in wages and holiday pay, and $10,000 in compensation.

[2] At the investigation meeting the Authority took evidence from Mr Muck and his father Mr Robert Muck, and also from Mr Dean Rangihuna, managing director of PCL, and Ms Larissa Akehurst the company's general manager. From this evidence I am able to find as follows.

Was the employment full time or part time?

[3] I find that Mr Muck got his job with PCL by answering an internet advertisement and going to an interview with Mr Rangihuna. The advertisement was put on the internet by the NZ Herald which had published it in the Herald newspaper of 13 January 2005. The paper advertisement was for a Duty Manager of an inner city bar "for 24 hours per week." I find it improbable that in the internet advertisement the Herald did not repeat exactly the same information, including the number of weekly hours.

[4] Mr Muck was interviewed by Mr Rangihuna on or about 19 January 2005. I find that no representation was made by the latter that Mr Muck would be employed full time for 40 hours each week. What I accept Mr Rangihuna did say was that Mr Muck would have regular opportunities to take his weekly hours above 24, whenever other bar staff were absent because of sickness, annual

leave or other reason. This is what happened for the first five weeks of the employment, when Mr Muck was able to work 40 hours or more.

[5] Although to begin with there was only an oral employment agreement, the written agreement that was eventually executed by Mr Muck and PCL specified that the job was "part-time" for "24 hours per week." The complaint that Mr Muck was employed to work full time but only given part time hours has no basis. I find that from the start of his employment he was contractually entitled to no more than 24 hours a week, although he was given extra hours when they were available.

Job location

[6] Mr Muck complained that although he had been employed as a duty manager at the Palace Casino bar on the corner of Victoria and Federal Streets, he was subsequently asked to work one shift per week at the Edinburgh Castle bar on the corner of Symonds Street and Newton Road, about two kilometres distant. I find he has no grounds for complaint in this regard either, and in any event he has sought no remedy for it. When it was eventually produced and executed the written employment agreement specified the place of work as "Palace Casino Ltd," implying that the location was anywhere the company performed its business within inner city Auckland.

[7] The only disadvantage to Mr Muck in working at the Edinburgh Castle was that the location did not allow the employer to provide him the off street parking it gave him free at the Palace Casino. To his advantage however, work at the Edinburgh Castle did enable Mr Muck to increase his hours. This particular complaint is groundless.

Written employment agreement

[8] PCL breached the Employment Relations Act 2000, I find, by not giving Mr Muck a copy of the employment agreement before he commenced the job. I accept that he knew of this legal requirement and that he asked Ms Akehurst several times for a written agreement. He says it was not given to him until about one month after he started, whereas Ms Akehurst says it was only one week later. I find it unlikely that she dragged her feet for a month while Mr Muck asked her "continuously" for it. Ms Akehurst had the Hotel Association of New Zealand (HANZ) form of agreement stored on computer. It seems to me more likely that she was simply too occupied and distracted by many other tasks for a few days until she finally printed a copy off and gave it to Mr Muck to look at and sign.

[9] I accept Ms Akehurst's evidence that Mr Muck was given the employment agreement about one week after 24 January, the date he commenced work after having a trial shift on 21 January. In his grievance statement dated 5 June 2005 he said it was "sometime at the end of January" that he had been finally presented with a written contract. He repeated this in his updated statement dated 10 November 2005 and has only recently sought to correct the month to "February" in that later statement. It seems to me that the June 2005 statement, made only a few months after the employment began, was more likely to be the correct one. After considering the agreement and its provisions he signed the document, although he says he now regrets doing so.

[10] In all the circumstances I do not consider that a penalty should be imposed for the breach of s.62(2) of the Act. The terms of the written agreement were as had been represented orally by Mr Rangihuna and Ms Akehurst at the time of Mr Muck's engagement. In any event a remedy has not been sought by Mr Muck in relation to this complaint.

Reduction of hours of work

[11] Mr Muck was given seven days notice on Monday 30 May 2005 that his hours were going to be reduced by one shift, from 24 per week to 16. His consent to any change had not been given or even sought. In significantly decreasing Mr Muck's hours PCL says it relied on the following term of the employment agreement;

> *4.4 …… the hours and/or days of work of a part-time employee may be increased or decreased by the employer in order to meet variations and fluctuations in trading patterns and labour requirements.*

The clause goes on to provide that wherever reasonably practicable, seven days notice of any such change is to be given. There is no dispute that Mr Muck did receive notice of that length from Ms Akehurst.

[12] As clause 4.4 is capable of giving the employer considerable power, it is important that the ambit of the provision is not exceeded when it is invoked. The circumstances giving rise to this particular complaint by Mr Muck were as follows. Before he started with PCL a worker named Ete had relinquished his Wednesday shift at the Edinburgh Castle to enable him to try out a work opportunity Mr Rangihuna had available in another business. After he started Mr Muck was assigned what had previously been Ete's shift in addition to his other two regular shifts at the Palace Casino. When Ete chose not to permanently take up the other work he had been trialling, PCL wanted to restore his former shift to him by displacing Mr Muck from it. At the time of engagement Mr Muck was not made aware by Mr Rangihuna that this was a possibility.

[13] I find that PCL did not exceed its power under clause 4.4. I am satisfied that what happened did amount to a change of hours at the will of the employer and that this was for the purpose of accommodating a variation in labour requirements. Although the amount and kind of work to be done remained the same, there was a variation in the identity of the worker who was to perform that work – Ete instead of Mr Muck. The identity of the worker was as much a "labour requirement" as the volume and nature of work that was to be done. There is nothing in the provision requiring the meaning of "labour" to be confined to "labour force," or for it to be a reference to labour in a general and impersonal way only. "Labour" may mean a task, and the identity of the person who will perform that task in employment may become a matter of "requirement" by the employer.

[14] The only qualification necessarily to be implied into the provision is that the employer's requirement should be a genuine and reasonable one. I am satisfied that facilitating the return of a long serving and valued employee to his old shift pattern was genuinely motivated and was a reasonable ground for change to be made to Mr Muck's hours.

[15] I find that PCL did not breach the employment agreement when it reduced the hours of Mr Muck. The term of employment at clause 4.4 invoked by PCL may well operate to the disadvantage of an employee, particularly if the change is a reduction in hours, but there was no unjustified action by the employer in exercising that right. With that clause included as a term of the employment agreement there could be no guaranteed minimum hours, as Mr Rangihuna observed in his evidence. This is also stated in the agreement itself, at clause 2.2. This complaint is not upheld.

Stocktaking at the end of each shift

[16] Mr Muck's job description as Duty Manager, which was set out in Schedule C of the employment agreement, included among his tasks "Stock take at end of shift." He says that

because of the nature of his job it was necessary for him to carry out this work immediately after his shift ended at 11 pm. He seeks payment for the additional 15 minutes the stock taking took him on average, for each of the 98 shifts worked by him.

[17] Mr Muck says that although he raised this as an issue with Ms Akehurst he had not wanted to create a dispute about it and therefore did not pursue it. Ms Akehurst told him she expected that he would complete the stock take when his shift was nearing its end. She did not consider that it was necessary for him to leave the bar unattended for any significant period while he did so.

[18] In the circumstances I consider that by his continuing conduct Mr Muck affirmed the arrangement whereby, for his convenience, he did the stock take after his shift had ended in his own time and without any requirement to be paid. He did this for all of his employment without submitting any claim for additional hours worked and without challenging the hours shown as having been paid to him in the pay slips. I find that no claim has been made out in respect of this complaint.

The request to take 12 July as a day off in lieu

[19] Mr Muck approached Ms Akehurst for approval to take 12 July 2005 as one of the days off in lieu he had accumulated from working on public holidays. The reason he gave was a pressing family commitment. Ms Akehurst declined, for the reason she gave him that coverage of Mr Muck's shift could not be found for 12 July, but she had no objection to him taking a day in lieu on a more convenient date. Both remained equally insistent on and entrenched in their respective positions, tension grew and relations deteriorated. If Ms Akehurst spoke impolitely to Mr Muck as he claims, that is hardly surprising given his show of defiance to her authority.

[20] Mr Muck went ahead anyway and despite Ms Akehurst having declined approval took 12 July off. He did so fully aware that some sort of disciplinary action would be a possible consequence.

[21] A disciplinary meeting was arranged by Ms Akehurst and Mr Rangihuna to review Mr Muck's conduct. He attended but deliberately remained mute. If Mr Rangihuna stiffly chided him during the meeting that is hardly surprising as his stubborn silence was likely to be regarded as mere churlishness. Arguably it was also a breach of the duty of good faith which requires parties to an employment relationship to be active, constructive, responsive and communicative. Section 4 (1A) of the Act imposes this requirement on all parties.

[22] On 25 July following the disciplinary meeting a first written warning was given to Mr Muck, but to last for 6 months only. This action of the employer I find in the circumstances was a perfectly justified response to Mr Muck's behaviour. There was nothing unfair or unreasonable about the employer's actions in connection with this particular matter.

Termination of employment

[23] The parties attended mediation on 19 August 2005 to try and resolve matters of difference between them existing at that stage in the employment relationship, which was then still a continuing one. The day before mediation in an updated list of complaints that presumably PCL was shown, Mr Muck stated;

> *We also strongly believe that the employer is relentlessly pursuing constructive dismissal strategies, for whatever reasons.*

Mediation took place but did not apparently resolve the problems. On 29 August a letter of

resignation was given to PCL by Mr Muck who wrote;

> *Due to unresolved employment relations matters, which could not be settled at the recent mediation, I still feel that I have been treated very unfairly and unlawfully considering the Employment Relations Act.*

The period of notice given was two weeks, which was in accordance with the employment agreement and which Mr Muck worked out.

[24] Upon receipt of the letter Ms Akehurst wrote immediately to Mr Muck to say she preferred that he not resign and that she thought the employment problems could be settled without his resignation.

[25] I find that that Mr Muck was not dismissed by PCL constructively or in any other way. He told the Authority he resigned because he had not managed to get the particular level of settlement he had wanted from the mediation. That is not a matter of coercion by the employer, as the investigation process in the Authority was available for him to fall back on without needing to leave his job. Amongst other things he could have asked the Authority to resolve a dispute about the meaning, application or operation of clause 4.4, and also his rights to have the day off on 12 July.

[26] Mr Muck said in evidence that before he left his job he had been briefly hospitalised with a nervous ailment and was advised by his doctors not to return to work. As he did not tell PCL of his medical problem, the employer could have no responsibility for decisions he made based on medical advice.

[27] I reject the contention of Mr Muck that PCL had plotted to get rid of him for some reason. I find that if there were any breaches of duty by PCL, such as public outbursts towards Mr Muck by Ms Akehurst, they were not breaches of sufficient seriousness to make it foreseeable to PCL that Mr Muck would leave because of them. The complaint of unjustified constructive dismissal is not upheld. I find that the employment ended with Mr Muck's resignation.

Determination

[28] I have found no basis for any of the complaints raised by Mr Muck. His employment relationship problem was not something PCL is to be held legally responsible for and therefore no orders are made against the company. This investigation is concluded accordingly.

Costs

[29] In principle PCL is entitled to have paid to it by Mr Muck a reasonable contribution towards the costs it has incurred in retaining legal counsel. If Ms Rowell and Mr Muck are unable to reach agreement on costs to be paid, written application can be made by the company to the Authority, asking for an order for costs. If there is any issue about the ability of Mr Muck to pay an award of costs I will require him, when he responds to any application made, to provide financial records and information to back up a claim of impecuniosity.

A Dumbleton
Member of Employment Relations Authority