

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2013] NZERA Auckland 423
5399608

BETWEEN DONALD PHILLIPS
Applicant

A N D CROFT POLE
DISTRIBUTORS LIMITED
Respondent

Member of Authority: James Crichton

Representatives: Gregory Bennett, Advocate for Applicant
Murray Broadbelt, Advocate for Respondent

Investigation Meeting: 20 August 2013 at Whangarei

Date of Determination: 18 September 2013

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant (Mr Phillips) alleges that he has been unjustifiably dismissed from his employment by the respondent (Croft) and Croft resists that claim.

[2] Mr Phillips was employed by Croft initially as a steam plant operator on 8 March 2011. The employment was subject to an individual employment agreement and required shift work on a four-on/four-off pattern with two employees working day shifts and two working night shifts. Mr Phillips was a day shift operator.

[3] Subsequently the position of supervisor of the steam plant operation became available and Mr Phillips applied for and was appointed to the position of supervisor. His employment as supervisor took effect on 4 August 2011.

[4] After the Christmas shutdown of 2011, there were a number of discussions between Croft and various of the steam plant operators about the current shift pattern.

The evidence the Authority heard was that effectively some of Mr Phillips' colleagues were complaining about the shift pattern.

[5] Those complaints seemed to fall into three different categories, viz the equity between day and night shifts, the lack of contact that the night shift had with all other staff employed by Croft and the difficulty that the shift pattern created for accessing training opportunities.

[6] Croft entered into a lengthy period of consultation with the purpose of changing the shift pattern. There were several meetings. At those meetings, Croft management made it clear that the present shift roster was unlikely to remain and at a meeting on 17 April 2012, Mr Phillips made it clear that he did not wish to work night shift.

[7] By letter dated 1 September 2012, Mr Phillips sought to resign his position as supervisor but to remain as a day shift operator.

[8] There were extensive discussions between Mr Phillips and Croft following on from that letter, and within the next 10 days, there were two subsequent communications from Mr Phillips to Croft each seeking to reiterate the basic position he adopted that he wished to cease being the supervisor but wanted to continue in the employment but only working day shifts.

[9] On Friday, 7 September 2012, Croft sought to give Mr Phillips the opportunity to withdraw his resignation as supervisor. Mr Phillips was told by Croft that there were no other positions in the organisation and in particular that there were no vacant positions as ordinary steam plant operators.

[10] Croft says that Mr Phillips was reluctant to meet with it to discuss matters and on two occasions had to be followed up by Croft management to enable the parties to meet. Mr Phillips maintained that he had said all he wanted to say and that nothing had changed.

[11] In the result, Croft issued a letter dated 11 September 2012 confirming acceptance of Mr Phillips' resignation and thus the end of his employment.

Issues

[12] The Authority will need to consider the following questions:

- (a) Did Mr Phillips resign his employment;
- (b) Did Croft act appropriately?

Did Mr Phillips resign his employment?

[13] The Authority is satisfied that, in a narrow sense, Mr Phillips' plain intention was to convey to Croft that he no longer wished to be the supervisor of the boiler operation and that he wished to revert to the position which he claimed he had been hired for, that of a boiler plant operator. It is evident that there are two parts to this proposition and the Authority needs to consider each in turn.

[14] Mr Phillips wrote three separate communications to Croft on this subject commencing with his initial letter of 1 September 2012. That first letter begins with the following sentences:

I Don Phillips no longer care to supervise the staff of the boiler house, and feel it isn't working for myself or for Crofts. So as of today, the 1.9.12 I resign as the boiler plant supervisor. A fair pay reduction is expected. ... I will continue to work a four on four off day shift as I was hired to do.

[15] On the face of it then, that quotation seeks to have Mr Phillips removed of the supervisory responsibility but to continue as an ordinary boiler plant operator on day shift.

[16] A second communication on 6 September 2012 sought to make the same point. The second and third sentences of the 6 September 2012 communication are relevant and are in the following terms:

My intentions were not to resign from employment altogether, but only as supervisor and to continue working the four on four off day shift as I was hired to do. I am therefore willing to continue working as I stated in my letter [presumably the letter of 1 September 2012].

[17] Again, Mr Phillips is at pains to emphasise that he seeks to be relieved of the supervisory responsibilities but to revert to an ordinary boiler operator on day shift.

[18] The third and final communication was on 7 September 2012 and the relevant provisions for present purposes are as follows:

I have tried to have this resolved by resigning as supervisor and continuing to work the four on four off days as I have been doing, at a fair reduced wage. Dave [Mr Watson, Croft's general manager] has made it known that they cannot guarantee any other position for employment within the company if I resign as the steam plant supervisor. ... I have to either do the supervisor's position or resign ... I feel I am being forced to resign because I do not want to work under those conditions.

[19] Again, the burden of Mr Phillips' communication is to convey the message that he wishes to remain employed but does not wish to continue in the supervisory role.

[20] In the narrow sense that the Authority spoke of earlier, it is plain then that Mr Phillips seeks only to be relieved of his supervisory responsibilities. His use of the word "resign" is plainly a misnomer; the message he is trying to convey is not an intention to resign his employment but rather an intention to be relieved of the additional responsibilities of the supervisory position.

[21] His proposal in all of those three communications just referred to by the Authority, is that he simply cease performing the supervisory function and go back to working as an ordinary operator but only on day shift.

[22] The difficulty with that proposal, for the Authority is satisfied that that is what it is, is that the evidence discloses that no matter how Croft tried to address the issue, it was unable to accommodate Mr Phillips' request. Plainly, the only basis on which the request Mr Phillips makes could be countenanced is on the footing that Croft could accommodate the request within the business.

[23] The evidence from Croft, which was as clear as could be, was that that request could not be contemplated and that for a number of reasons. First of all, at its most basic level, Mr Phillips was employed as a supervisor. His persistent contention in the correspondence that he was "hired" as a boiler operator on day shift is simply mistaken. It is true that he was originally hired in that capacity but he subsequently applied for and was appointed to the position of supervisor. That appointment took effect on 4 August 2011 so that was his position in Croft, not the former position which he had occupied prior to 4 August 2011. It is understandable that Croft would conclude that Mr Phillips' persistent attempts to "resign" as supervisor could be interpreted as a resignation from Croft per se, because the only position Mr Phillips had in the organisation after 4 August 2011 was as supervisor.

[24] Notwithstanding the attraction of making the connection just referred to, the Authority is satisfied that a proper construction of Mr Phillips' various communications was that rather than resigning his employment simpliciter, he was actually seeking to remain employed but to be relieved of the supervisory responsibilities.

[25] But it is not enough for Mr Phillips to simply assert that he wants to be relieved of those duties; that must be practicable from the point of view of the employer. The Authority is satisfied that the employer had a number of difficulties with what Mr Phillips was suggesting.

[26] The first is that by relinquishing his supervisory responsibilities, that left a vacancy as supervisor which Croft was immediately unable to fulfil. But of more moment was the fact that what Mr Phillips was proposing was that he revert to being a day shift operator when there was no vacancy for such an operator, and that he not be required to work nights.

[27] Both of those elements are important. Taking them one at a time, the first issue is whether there was a vacancy for a day shift operator. The Authority is satisfied on the evidence it heard that there was not such a vacancy.

[28] Even if there were, the evidence is as plain as can be that Croft sought to change the roster system fundamentally so that nobody would work only days or only nights. Croft had gone into an extensive period of consultation to try to find a new shift pattern which would give all staff some opportunity of working the more sociable daylight hours while requiring each staff member to make some contribution to the less attractive night time work.

[29] Mr Phillips's proposal would in effect have undone all of that work and reverted the business to the previous requirement of having day shift operators and night shift operators in circumstances where the majority of the other operators had indicated a preference for a change from the old rigid system to a more flexible shift pattern where each operator worked some days and some nights.

[30] Given the preference of the majority of the operators for the new flexible shift patterns and the commitment Croft had made to extensively consult with its staff on the changes, accepting Mr Phillips' proposal would have put all of that work in

jeopardy simply to accommodate his wish that the position that he had applied for and been appointed to, no longer met his needs.

[31] In all the circumstances, the Authority is satisfied that what Mr Phillips did by his course of correspondence was not seek to resign his employment but seek to relinquish the supervisory role and return to another position which simply was not available in the restructured organisation. Mr Phillips could not be held to have not been aware of the changes to the boiler operation; there had been extensive consultation following the 2011 Christmas shutdown and a variety of new shift patterns were trialled during that period of consultation. Mr Phillips was as involved as anyone in that consultation and knew full well that, notwithstanding his objection to working at night, and his apparent fixed view that the original shift pattern was appropriate, the majority of his colleagues had different views.

[32] Furthermore, Croft had made it plain during that consultation, both to Mr Phillips and more widely to the whole group of employees affected, that the existing shift pattern would be unlikely to survive the consultation process because it did not deliver the sorts of benefits which the majority of the affected staff wanted.

[33] So it follows that Mr Phillips knew or ought to have known that by seeking to relinquish his supervisory role and revert to the ranks as it were, he was taking a significant risk particularly when his proposal was not simply that he revert to whatever roster was ultimately decided upon but rather that he revert to daytime work only which Croft had already signalled some months before was a highly unlikely outcome of the change process.

[34] In the Authority's view then, while Mr Phillips did not intend to resign his employment in his correspondence with Croft, he did seek to be relieved of his responsibilities as supervisor and proposed that he continue in the employment on the basis of working as an operator but only doing day shifts. The practical reality was that if the employer could not accept the conditions effectively imposed on it by Mr Phillips then his resignation would have the same force and effect as if it were without conditions.

Did Croft act appropriately?

[35] The Authority is satisfied that Croft actively engaged with Mr Phillips on receipt of his first communication and subsequently and that it did everything in its power to see if there was a way of accommodating Mr Phillips' wishes.

[36] It is apparent on the evidence that Croft did not immediately seek to try to accept Mr Phillips' resignation but rather sought to engage with him to try to tease out what might be possible and what might not.

[37] Croft established early on that there were no alternative positions available for Mr Phillips particularly when it was plain that Mr Phillips was not flexible about working nights.

[38] Having tried to work through the options with Mr Phillips, Croft was left with the only conclusion it could make which was that the only solution to retaining Mr Phillips in the employment was to have him withdraw his request to be relieved of his supervisory role because that was the only way that Croft could see that Mr Phillips could remain in the employment. Having discussed the matter with Mr Phillips over a period of seven days in a number of different meetings, Croft was clear that Mr Phillips sought only to relinquish the supervisory position and not to leave the employment, but it was simply unable to accommodate that request, partly because there were no alternative positions available and partly because of Mr Phillips' implacable insistence that he would not work nights. This was a facility that worked 24 hours a day and it was simply impracticable for there to be one operator who would not participate in the night time work. That made a mockery of Croft's whole consultation process and change from a rigid roster involving some night operators and some day operators to a more flexible arrangement where all operators shared in the obligation to work unsociable hours.

[39] In the first meeting that Croft had with Mr Phillips on 4 September 2012, Mr Watson, Croft's general manager explained to Mr Phillips that he was employed as the supervisor and that by resigning as supervisor he was effectively resigning his employment unless Croft could accommodate his request. Croft undertook to hold any decision for seven days.

[40] Then, in order to be absolutely clear that the parties were not talking past each other, Croft insisted that Mr Phillips remain while a letter was prepared setting out

what Croft had conveyed to Mr Phillips in the 4 September 2012 meeting. Mr Watson went through that letter with Mr Phillips before allowing him to depart.

[41] The terms of that correspondence from Croft are before the Authority. It is headed “record of discussion” and effectively makes three points. The first is the point already referred to by the Authority, namely Croft’s position that resignation from the supervisory role is a resignation from the employment, the second refers to the changes to the shift roster that were then in consultation and trial, and the third relates to the responsibilities of the supervisory role.

[42] The communication concluded with the following three sentences:

This meeting was to advise Don of the implications of his letter and to give him an opportunity to reconsider and if required seek some advice on his position. Don asked if he could take some time off today to seek advice, which was agreed. Dave offered to hold the resignation letter until Friday 7th (September 2012) and agreed review Don’s position at that time.

[43] Mr Phillips then contacted Croft management on 6 September and asked for a meeting. At the 6 September meeting, Mr Phillips tabled his letter of that same date, which the Authority has already referred to, and advised that he had consulted with the Department of Labour. He made it clear that his position was unchanged.

[44] The meeting apparently traversed the same issues as had the previous one and took some two hours to conclude.

[45] Mr Phillips relies on the suggestion he made in his 6 September 2012 letter of a mediator from the Mediation Service being arranged to assist the parties. He says Croft acted precipitately in bringing the employment to an end when it should have engaged in mediation.

[46] Croft says that at the 6 September 2012 meeting, Mr Phillips had told it that on inquiry, a mediator would not be available for two weeks but notwithstanding that, Mr Phillips had acted precipitately to rearrange his own roster so as to require others to perform night shift obligations that he would normally have had to perform himself. Croft says that that action made it very clear that there was effectively nothing to mediate because Mr Phillips was implacable in his refusal to work any night shifts which put him at odds with his colleagues and with the employer itself.

[47] Put simply, Mr Watson said in his evidence to the Authority that he was doubtful about what mediation could achieve because of Mr Phillips' apparent conviction that he could simply avoid ever working at night. In effect, Mr Watson thought that what Mr Phillips was saying was that he did not want to do the job he was employed to do and he wanted Croft to find him another job.

[48] Again, Croft carefully recorded its position and provided another letter setting out its position which was effectively a reiteration of the position enunciated at the earlier meeting. It was agreed that Mr Phillips would advise if there was any change in his position by midday on the following day.

[49] Mr Phillips' response was to email a message to Croft which effectively conveyed the message that there had been no change to his position save that he was now alleging that he was being forced to resign and forced to work nights. Croft immediately sought a meeting with Mr Phillips who responded by email to indicate that he was not available. Croft was particularly concerned to meet with Mr Phillips at this juncture because he had used his supervisory position to require other operators to fill in night shift positions which, consistent with the roster then being worked, Mr Phillips should have performed himself.

[50] Croft's conclusion about the roster changes made by Mr Phillips is important. It considered that his use of the authority he had as supervisor to require other staff to perform all of his night shifts in the ensuing week was "a deliberate act" was "disruptive" to other staff and was an inappropriate use of his supervisory authority.

[51] Croft made a further attempt to try to get Mr Phillips to attend a meeting on 7 September 2012 by leaving a message on Mr Phillips' cellphone. That was responded to three days later by Mr Phillips on 10 September 2012. Mr Phillips again said he was not available and Mr Watson agreed to meet him at the beginning of his shift the following day. Again, Croft says that Mr Phillips did not attend the meeting and Mr Watson had to find him. Mr Watson confirmed to Mr Phillips that Croft was unable to accede to Mr Phillips' request and therefore was forced to accept his resignation. Even in those circumstances, Croft offered Mr Phillips the opportunity to take a break if he needed to but he indicated no break was required as "nothing had changed".

[52] The Authority is satisfied on the evidence it heard that Croft responded in a measured way to the situation it was confronted with. In particular, there is no suggestion of precipitate action or any attempt to accept the resignation at first blush. Indeed, Croft entered into an extensive period of consultation with Mr Phillips over a seven day period where it seems to have done everything in its power to both endeavour to meet his requirements but also give him the opportunity to seek advice about what he was doing and to change his position. The latter became particularly important as it was apparent, once it was clear there was no alternative position suitable for Mr Phillips, that the only way that he could remain employed by Croft was by withdrawing his objection to both the supervisory role per se and the ban on working night shifts.

[53] The Authority is satisfied on the evidence it heard that Croft properly investigated whether there were alternatives within the workplace that it could offer to Mr Phillips and found that there were not. In particular, the Authority is satisfied that a fair and reasonable employer was justified in not accepting Mr Phillips' back into the workplace on the terms and conditions that he required because a fair and reasonable employer could not conclude that it was appropriate to disadvantage other workers or the business itself in order to accommodate Mr Phillips' particular requirements. This is because not only was Mr Phillips seeking to relinquish the supervisory role but more particularly was also making the stipulation that he would not work nights. Given the new roster arrangements that were being trialled and that had been the subject of consultation with staff over the previous many months, Mr Phillips' stipulation was simply unrealistic and unreasonable and a fair and reasonable employer, having satisfied itself that there were no other positions within the employer's operation which Mr Phillips could fulfil with those stipulations, was able to conclude that the only proper course was to accept his resignation.

Determination

[54] The Authority is satisfied that what Mr Phillips did in his correspondence with Croft was to offer a conditional resignation, a resignation subject to the conditions that he relinquish his supervisory role and that he cease working nights. Both of these conditions were problematical for Croft, both were properly investigated by Croft and in the result, Croft concluded that it was unable to accept either condition and

therefore in the absence of any rethinking of his position by Mr Phillips, Croft was forced to accept Mr Phillips' resignation from the employment.

[55] The Authority is satisfied that Croft gave Mr Phillips ample opportunity to obtain advice and to rethink his position and equally satisfied that both of the conditions that Mr Phillips demanded were unreasonable because the effect of accepting them would have been to effectively disable the lengthy consultation process that Croft had undertaken to try to get a better roster system as well as create Mr Phillips as, in effect, a supernumerary, because there was no vacant position other than the position that he was employed, to fulfil.

[56] It follows from the foregoing conclusions that the Authority is satisfied that a fair and reasonable employer could accept Mr Phillips' conditional resignation having satisfied itself that it was unable to accommodate either of the conditions that he stipulated in his conditional resignation.

[57] It follows from the foregoing that Mr Phillips' claim fails in its entirety.

Costs

[58] Costs are reserved.

James Crichton
Member of the Employment Relations Authority