



**MERO**

**MASHANTUCKET EMPLOYMENT RIGHTS OFFICE**

**Final Claim Determination**

**For Claims under Title 33,  
the Mashantucket Pequot Tribal and Native American Preference Law**

<b>Case Name:</b> Yashica Kearsse v. Foxwoods Resort Casino (Norwich Spa at Foxwoods)	<b>Case Number:</b> 2016-33044
<b>Date of Claim Filing:</b> September 19, 2016	<b>Date of Determination:</b> November 18, 2016

Yashica Kearsse (“Claimant” or “Ms. Kearsse”) alleges in her Claim that she was denied two day advance notice of an open position and hire, promotion or transfer to the position of Spa Supervisor at the Norwich Spa at Foxwoods Resort Casino (hereinafter “Spa”) about January 28, 2016, in violation of the Tribal and Native American Preference Law (“Preference Law”), 33 M.P.T.L. ch. 1 § 5(a).<sup>1</sup>

All Tribal law and procedural prerequisites having been satisfied, the claim is properly before the MERO for hearing and decision.

A formal hearing was held on October 14, 2016,<sup>2</sup> pursuant to Title 33 and Title 40, during which both parties had full opportunity to present witnesses and evidence. Claimant was not represented by an attorney. Claimant testified on her own behalf and called witnesses Chasity Reels, a current Spa employee, and Marielaina Holzman, a former Spa employee. Respondent, represented by Jeffrey F. Buebendorf, Esq., called Norwich Inn & Spa general manager John O’Shaughnessy, Consultant Marie Mozzi, and Director of Tribal and Native American Relations Joshua Carter as witnesses. The parties waived post-hearing briefs. The Record was closed October 21 upon receipt of Respondent’s response to Claimant’s introduction of a job description unfamiliar to Respondent’s witnesses.

<sup>1</sup> As confirmed in Claimant’s testimony, the allegation relating to training that she presented to the Office of Native American Preference in the underlying complaint is not before the MERO. T-14 In addition, any claims of protected class discrimination raised by Claimant are not within the protections of the Preference Law or within the MERO’s jurisdiction, and are therefore not addressed herein. See, e.g. T-54-55

<sup>2</sup> All dates herein are in Calendar Year 2016 unless otherwise noted.

Final Claim Determination Case No. 2016-33044  
November 18, 2016  
MERO Form-33-1680  
(12-30-13)

## I. Findings of Fact

After careful review and consideration of the record, as well as an assessment of the credibility of the witnesses, the below facts relevant to this determination are found.

### A. *Norwich Spa at Foxwoods*

The Norwich Spa at Foxwoods is a department of the Mashantucket Pequot Gaming Enterprise. T-99<sup>3</sup> The Norwich Inn and Spa (NIS) is a “sister property” that is a limited liability company. T-99 John O’Shaughnessy is the General Manager of NIS. T-99 A Letter of Understanding dated November 5, 2009, provides, in part, “John O’Shaughnessy and key NIS employees of his choice will provide management guidance and other consultant services to the Norwich Spa at Foxwoods.” R-1 The “reorganization” was to take effect about January 2010. R-1

Under NIS guidance, the Spa’s management structure initially consisted of five (5) positions, which were reduced to four (4) positions after the operations were evaluated. T-101, 121 Additional changes were made over time, including changing the Salon Supervisor position to a Guest Services Supervisor position and re-assigning the salon responsibilities to the Assistant Manager. T-101-102 At relevant times, the management positions were Spa Director, Assistant Manager, Spa Supervisor and Guest Services Supervisor. T-104-105

In addition to their regular management duties, each Spa manager is required to serve as Manager on Duty (MOD).<sup>4</sup> T-109 The Spa is open from 8 a.m. to 9 p.m. T-110 Managers are assigned to either a 7:30 a.m. to 3:30 p.m. or 1:00 p.m. to 9:00 p.m. shift. T-147 Based on the managers’ work schedules, managers are assigned the MOD duties for particular days and shifts, with one present for opening and one present for closing. T-110, 147 The MOD functions include addressing guest service and employee issues that may arise, serving as a key holder, receiving deliveries and generally supporting the overall Spa operations. T-110, 150, 161

Prior to the end of January, the Spa Director was Stella Gustafsson. T-15-16 Upon Ms. Gustafsson’s unexpected departure and in anticipation of the Assistant Manager’s leave of absence for an indeterminate period, Marie Mozzi was retained as Spa Consultant. T-104, C-1, pg. 3 The Assistant Manager’s leave of absence was approximately 25 days. T-116.

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<sup>3</sup> Transcript pages are designated T-#; MERO exhibits are designated M-#; Claimant exhibits are designated C-#; Respondent exhibits are designated R-#; and Joint exhibits are designated J-#.

<sup>4</sup> The “Manager on Duty” is also referred to as the “Supervisor on Duty.” T-126-127

At the time of Ms. Gustafsson's departure, the Spa Director position was the only open position.<sup>5</sup> T-29, 146 The Guest Services Supervisor position was most recently open in about May, 2015. T-105, R-2 Due to the job responsibilities of overseeing the male locker room, the successful candidate was required to be male. T-135 The Spa Supervisor position was most recently open in about July, 2016. T-108, R-3 The qualifications for the Spa Supervisor position include maintaining a massage therapist license. R-3 Claimant did not apply for either of these openings. T-105, 109

### ***B. Secondary Spa Supervisors***

Periodically, the Spa experiences absences among the management team that cannot be covered by another regularly scheduled manager. T-109-111 In these instances, the Spa calls in a Secondary Spa Supervisor to cover for the absent management employee and serve as an MOD. T-111, 149-150 Due to the limited role, a Secondary Spa Supervisor is not required to hold a massage therapy license. T-149-150

The substance of the Secondary Spa Supervisor position description reads comparably to the Spa Supervisor position description. Compare, C-2 or C-3 and R-3. Claimant first saw the Secondary Spa Supervisor job description in about July. T-22. Mr. O'Shaughnessy testified that he had not seen a Secondary Spa Supervisor position description as of the hearing. T-118

At relevant times, Claimant and Lindsey Baah both provided management coverage on an "as-needed basis" as Secondary Spa Supervisors. T-112, 141 These work opportunities were considered secondary to other employment and the Spa generally would not ask either to work during periods that would conflict with their other employment. T-130-131

#### **1. Claimant**

It is undisputed that Claimant is a member in good standing of the Mashantucket Pequot Tribal Nation. T-12-13, M-3 Claimant was employed by the Spa full-time as a Salon Supervisor until she voluntarily quit in about November, 2013, for a full-time position with another department. T-17, 22-23, 71, M-3 When immediately asked to return to cover absences as a secondary on an as-needed basis, Claimant was drawn back by her love of the Spa. T-16-17, 27

Claimant testified that as a secondary, she worked for the Spa when contacted to cover for call outs, vacations, medical leaves or departures. T-19 At all relevant times, Claimant did not hold a massage therapy license. T-39 Her work as a secondary included helping the Spa Director "because she needed training." T-17 She also performed payroll. T 23, 35

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<sup>5</sup> Any efforts by Claimant to be considered for the Spa Director position are not at issue in the Claim before the MERO. See M-1, M-4

## **2. Lindsey Baah**

Ms. Baah's primary employment was as a part-time massage therapist at the Norwich Inn and Spa. T-113, 140-141 When Ms. Baah, who is not employed by Foxwoods, works as a Spa Supervisor at the Spa, she is compensated as a consultant under the agreement between the NIS and the Spa. T-141

Ms. Baah has served as a secondary at the Spa for about two (2) years. T-24, 85 Claimant recalled Ms. Baah covering for a period of time when Ms. Gustafsson was ill and on other days when Claimant was unable to work, as well as during the period that Ms. Mozzi was working at the Spa. T-24 Ms. Baah has conducted training at the Spa and has performed cash and credit card transactions at the Spa. T-78-79, 85 141

## **3. Work Opportunities**

Coverage for those management absences known in advance was generally added to the bi-weekly schedule. T-157, C-1, pg. 11 Coverage for last minute absences was arranged when the need became known. T-158

Under Ms. Gustafsson, Claimant typically received 6-18 hours per week of work at the Spa as a secondary, depending on the Spa's needs. T-21, 34 She received work opportunities when a member of management contacted her by phone call, text message or e-mail. T-19 Under Ms. Gustafsson, Claimant was offered available work opportunities before Ms. Baah. T-33, 132

Claimant testified that Ms. Mozzi offered Claimant only those work opportunities for which Ms. Baah was unavailable. T-38 Ms. Mozzi testified that she offered Claimant work opportunities prior to Ms. Baah if she received a timely response from Claimant that she was available. T-150, 159 In about June, Claimant ceased accepting secondary assignments due to her temporary personal circumstances.<sup>6</sup> T 43-44, C-1, pg. 9, M-3

Mr. Carter reviewed the number of hours worked by Ms. Baah and Claimant and found that each worked less than 160 hours in a one year period. T-173 The amount of Secondary Spa Supervisor work required by the Spa was considered insufficient to warrant another full-time position. T-119-120

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<sup>6</sup> Claimant testified that as of the hearing, she had not requested to resume receiving secondary assignments, because of her fear of retaliation for filing claims with ONAP. T-61-62 Claimant's Claim before the MERO does not include any claims of retaliation. See M-1 Retaliation claims may be filed with ONAP within 180 days of the event(s) believed to be retaliatory. 33 M.P.T.L. ch1 §9(a)(i)

### ***C. Claimant's Allegations of Non-Compliance***

During her testimony, Claimant clarified the bases for her claims. Regarding the alleged failure to hire, promote or transfer, Claimant contends she was denied a full-time position as a supervisor. T-36 She asserts that upon Ms. Gustafsson's departure, the Spa should have combined Ms. Baah's role and Claimant's role to form an open supervisor position. T-38-41 Claimant's allegation that she failed to receive two (2) days advance notice of an open position is premised on her contention that an open supervisor position should have existed and was not posted. T-44-45, 56

With respect to her shift preference claim, Claimant contends that Tribal members are required to be offered available shifts before anyone else is offered the shifts. T-32 Claimant was not aware of the Spa ever conducting shift reassignments among management, "because everybody is in a different job code." T-76 No open supervisor position was posted in January. T-76 However, according to Claimant, after Ms. Gustafsson left employment, Ms. Baah was placed on a "normal schedule" and Claimant was only offered those work opportunities that Ms. Baah did not accept. T-33, 35, 37-39

## **II. Analysis and Conclusions of Law**

Jurisdiction over the parties and with respect to the Claim is undisputed and asserted. Claimant is a Tribal member who is in good standing with the Tribe. Claimant alleges she was denied the employment opportunity of Spa Supervisor at the Norwich Spa at Foxwoods about January 28, 2016. She further alleges denial of preference in shift assignments after January 28.

The Tribal Council has declared that a purpose of the Preference Law is "[t]o clearly set forth the requirements for all Employers within the jurisdiction of the Tribe to provide preference in Employment Opportunities for Tribal Members, Spouses of Tribal Members and Native Americans who meet the Minimum Necessary Qualifications of the job." 33 M.P.T.L. ch. 1 § 3(a). If an employment opportunity existed at the Spa for which Claimant asserted a right and was minimally qualified, as a Tribal member, Claimant was required to receive the highest level of preference.

### ***A. Alleged Failure to Post, Hire, Promote or Transfer***

Claimant is frustrated with what she believes to be a lack of opportunity for a full-time supervisory position for her with the Spa. Her prior position of Salon Supervisor no longer exists. Although Respondent pointed out that Claimant did not apply for the Guest Services Supervisor or Spa Supervisor positions when they were most recently open in 2015 and 2016, respectively, Claimant would not have been eligible for either, as the Guest Services Supervisor position was required to be filled with a male and the Spa Supervisor position required a massage therapist license that she does not possess.

Final Claim Determination Case No. 2016-33044  
November 18, 2016  
MERO Form-33-1680  
(12-30-13)

After Ms. Gustafsson departed in January, Claimant perceived that Ms. Baah was receiving regular work opportunities, while Claimant was receiving only those opportunities that Ms. Baah did not accept. Claimant asserts that at that point, the two (2) secondary positions filled by herself and Ms. Baah should have been combined, resulting in a full-time supervisor position that Claimant should have received. To the extent the secondary positions were categorized as “Spa Supervisor” positions, the responsibilities of the secondary positions did not require the credentials that would have disqualified Claimant as a candidate notwithstanding the Secondary Spa Supervisor job description. See *Sebastian v. MGM Grand at Foxwoods*, MERO Case No. 2009-33003, at 3 (January 15, 2010) (A position description is not necessarily determinative of the minimum necessary qualifications of a position.) Claimant’s theory assumes that combining the two secondary positions for which she was qualified would have yielded one full-time supervisor position for which she was qualified.

Within the Preference Law’s definition of employment opportunities for which preference is required to be afforded, the law specifically states, in part, “Employment Opportunities does not mean the creation of a position...” 33 M.P.T.L. ch. 1 § 4(c). In this case, the two (2) existing secondary positions were considered adequate for the Spa’s needs. Therefore, even assuming, without finding, that Claimant could establish factually that combining the two secondary positions would result in a full-time position for which she is qualified, the Preference Law does not require Respondent to do so.

The Record also contains no evidence to indicate that the Spa’s use of the secondary positions was designed to deny Claimant or other preference eligible individuals a full-time position in January.<sup>7</sup> Both secondary positions had been filled for at least two (2) years and the cumulative annual hours worked by Ms. Baah and Claimant were a fraction of a full-time position.

Based on the Record evidence, at relevant times, the Spa had no open Spa Supervisor position. Respondent did not violate the Preference Law about January 28, 2016, when the Spa did not post a Spa Supervisor position or hire, promote or transfer Claimant to a supervisor position.

### ***B. Alleged Failure to Afford Preference in Shift Assignments***

The frequency and length of work opportunities offered Secondary Spa Supervisors are contingent on the coverage afforded by regular Spa staff members. It is undisputed that Secondary Spa Supervisors substitute for absent management employees due to vacation, sick and other leaves taken by managers or due to manager departures. Known management absences are accounted for when the bi-weekly schedule is developed by adding the Secondary Spa Supervisors to the

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<sup>7</sup> Whether a vacant Secondary Spa Supervisor position could permissibly be filled without affording preference is outside the scope of Claimant’s claim and not addressed herein.

schedule. Other work opportunities that arise due to unplanned absences are offered to the Secondary Spa Supervisors as they arise.

The Preference Law defines “shift assignments” as “those shift assignment opportunities resulting from an open position, or those opportunities to maintain a shift assignment during shift reassignments.” 33 M.P.T.L. ch. 1 § 4(n) By the nature of the Secondary Spa Supervisor position, there is no shift assignment associated with the position, and, therefore, there is no opportunity for shift reassignments.

The availability of the Secondary Spa Supervisors relative to the needs of the Spa determines the work opportunities. On any given day, the resulting work schedule may or may not correlate to, or be co-extensive with, a regularly scheduled shift. Under these circumstances, the Law’s shift assignment preference has no effect. To the extent the Spa has historically afforded preference to Claimant for work schedules or work opportunities, it has provided a preference benefit beyond the requirements of the Preference Law.

### **III. Disposition**

For all the foregoing reasons, Respondent is not in violation of the Preference Law as alleged in the Claim. The Claim is hereby dismissed in its entirety.

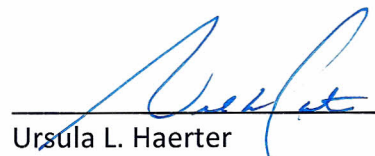
### **IV. Appeal Rights**

The parties are directed to the enclosed Notice of Appeal Rights. If no timely appeal is filed with the Tribal Court, this Final Claim Determination is final and binding upon the parties.

### **V. Notice of Publication**

This Final Claim Determination is available to the public through the MERO and subject to formal revision and publication by the MERO. Readers are encouraged to advise the MERO of any typographical or other formal errors so that corrections can be included in the published opinion.

Dated this 18<sup>th</sup> day of November, 2016

  
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Ursula L. Haerter  
MERO Director

Final Claim Determination Case No. 2016-33044  
November 18, 2016  
MERO Form-33-1680  
(12-30-13)



**MERO**

**MASHANTUCKET EMPLOYMENT RIGHTS OFFICE**

**Notice of Parties' Appeal Rights**

**For Claims under Title 33,  
the Mashantucket Pequot Tribal and Native American Preference Law**

**Case Name:**

Yashica Kearsse v. Foxwoods Resort Casino (Norwich Spa at Foxwoods)

**Case Number:**

2016-33044

**Date of Mailing of MERO Final Decision:**

November 18, 2016

Pursuant to Title 33, the Mashantucket Pequot Tribal and Native American Preference Law, as amended, the Preference Law Procedures Manual, and Title 40, the Administrative Procedure Act, the MERO has issued a Final Decision in the above-referenced case. A party dissatisfied with a Final Decision may appeal the MERO's final determination to the Mashantucket Pequot Tribal Court in accordance with 40 M.P.T.L. ch. 3.

**Form of Appeal:** An appeal must be in writing on a form available from the Tribal Court clerk. A copy of the MERO Final Decision from which an appeal is being taken must be submitted to the Tribal Court with the completed appeal form.

**Deadline for Filing Appeal:** To be timely filed, an appeal must be filed with the Tribal Court within thirty (30) days of the above Date of Mailing of MERO Final Decision.

**Appeal Hearings:** Appeal hearings in Tribal Court are conducted in accordance with 40 M.P.T.L. ch. 3 and the rules of the court.

**Representation in Court:** If a party wishes to be represented in Tribal Court by an attorney, it is that party's responsibility to find and retain an attorney at that party's cost. The MERO represents the MERO's decision in court and does not represent any employer or claimant.

**Contacting the Tribal Court Clerk:** Telephone Number: (860) 396-6115. Location: 101 Pequot Trail (Public Safety Building) Mailing Address: Mashantucket Pequot Tribal Court, Office of the Tribal Court Clerk, P.O. Box 3126 Mashantucket, CT 06338-3126.

If no timely appeal is filed, the MERO Final Decision is binding on the parties and may be enforced by the MERO in Tribal Court.

**Contact the clerk of the Mashantucket Pequot Tribal Court for an appeal form.  
Direct questions about Tribal Court appeal processes to the court.**

MERO Form-33-1690  
(06-09-14)



**CERTIFICATION:**

**The foregoing Final Claim Determination and Notice of Parties' Appeal Rights has been served via electronic and U.S. mail to the following parties or party representatives of record, this 18th day of November, 2016:**

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