

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2018] NZERA Auckland 241
3022714

BETWEEN NUSAIBA ALI ABDULLAH
AL DALHAMI
Applicant

AND MEDINA TRADING LIMITED
Respondent

Member of Authority: Jenni-Maree Trotman

Representatives: Ronald Jones, Advocate for the Applicant
Respondent in person

Investigation Meeting: 30 July 2018

Determination: 31 July 2018

DETERMINATION OF THE AUTHORITY

- A. Nusaiba Ali Abdullah Al-Dalhami did not suffer a disadvantage to her conditions of employment with Medina Trading Limited.**
- B. Medina Trading Limited did not constructively dismiss Nusaiba Ali Abdullah Al-Dalhami.**
- C. Costs are reserved.**

Employment Relationship Problem

[1] Medina Trading Limited (Medina) is the owner of Hotel DeBretts situated in Auckland City. It purchased this business on 30 November 2015, taking over all existing staff including Nusaiba Ali Abdullah Al-Dalhami. Ms Al-Dalhami was employed by Medina as its Front Office Manager.

[2] In May 2016 Ms Al-Dalhami took time away from work on maternity leave. Upon her return, Ms Al-Dalhami alleges she suffered various unjustified disadvantages to her employment. She alleges this led to her resignation on 19 July

2017. She claims she was constructively dismissed and seeks an award for lost wages and compensation under s123(1)(c)(i). Ms Al-Dalhami's allegations are denied by Medina.

[3] As permitted by 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made but has not recorded all evidence and submissions received.

The issues

[4] The issues requiring investigation and determination were:

- a) Did Ms Al-Dalhami suffer an unjustified disadvantage to one or more of her conditions of employment?
- b) Was Ms Al-Dalhami constructively dismissed? If so, was this justified?
- c) If Ms Al-Dalhami suffered an unjustifiable disadvantage, or was unjustifiably dismissed, what remedies should be awarded?
- d) If any remedies are awarded, should they be reduced, under s124 of the Act, for blameworthy conduct by Ms Al-Dalhami that contributed to the situation giving rise to her grievance?
- e) Should either party contribute to the costs of representation of the other party?

Background against which issues are to be determined

[5] Hotel DeBretts is a boutique hotel. It has 25 hotel rooms and employs approximately 40 staff which includes those employed to work in its restaurant.

[6] The terms of Ms Al-Dalhami's employment with Medina were recorded in a written individual employment agreement (IEA) dated 27 November 2015. This agreement was identical to previous IEAs signed by Ms Al-Dalhami with the previous owners of DeBretts in March 2014 and September 2014.

[7] Ms Al-Dalhami's days and hours of work were:

Hours of Work

- 3.1 Your hours of work are specified in Schedule A. You must devote the whole of your time during normal business hours to the duties of your position and such additional hours (including weekends) as are necessary to enable you to perform your duties effectively. Your remuneration has been set in anticipation that additional hours may be required.

Schedule A:

Days and Hours of work: As per roster (average 50 hours per week).

[8] In accordance with her IEA, Ms Al-Dalhami worked 45-50 hours per week prior to going on maternity leave. This was on a rostered basis that primarily involved her doing mid shifts from 8 or 9 am to 5 or 6 pm and Senior Manager Shifts one or two days per week from 2 pm to 11 pm.

[9] On 7 May 2016 Ms Al-Dalhami commenced a one year period of maternity leave.

15 March 2017

[10] On 15 March 2017 the parties met to discuss Ms Al-Dalhami's return to work. Present at this meeting were Ms Al-Dalhami and Sheronika Chandra, the Hotel's General Manager. The events of this meeting are partially in dispute. Having heard from the parties, and viewed email correspondence from Ms Chandra to Medina's lawyers following this meeting, I am satisfied the following matters were discussed:

- a) Ms Chandra asked Ms Al-Dalhami what her expectations were when she returned to work. Ms Al-Dalhami told her that she had been unable to find full-time care for her child to fit in with her job. She asked Ms Chandra to provide her with early shifts only from Monday to Friday. Early shifts were from 7 am to 3 pm.
- b) Ms Chandra told her this was not possible. She explained that the Acting Front Office Manager was doing a combination of early and mid-shifts. Medina was willing to do the same for Ms Al-Dalhami but she would have to work some weekends and other times to cover for staff leave and sickness. She told her there was no longer a requirement to do Senior Manager

shifts or late shifts (3 pm to 11 pm) unless it was to cover for Ms Al-Dalhami's team.

- c) Ms Al-Dalhami said she was willing to help cover shifts where employees were sick or any other unexpected leave within her department.
- d) Ms Chandra advised Ms Al-Dalhami that she would be required to carry out some additional tasks as part of her role. These involved accounts receivable and weekly/monthly reporting. These tasks had been allocated to the Acting Front Office Manager during Ms Al-Dalhami's absence and would now become her responsibility.
- e) Ms Al-Dalhami asked for a pay review and a promotion to show her career progression.
- f) Ms Chandra offered to change Ms Al-Dalhami's role title to Front Office and Revenue Manager to reflect the responsibilities she was already carrying out.
- g) Ms Chandra told Ms Al-Dalhami she would need to discuss all of these matters with Medina's owners, Ingrid Jaques and Wayne Tomlinson, and would organise another meeting to discuss.

24 March 2017 meeting

[11] On 24 March 2017 a second return to work meeting was held. Present at this meeting were Ms Al-Dalhami, Ms Chandra, Wayne Tomlinson (Medina's director) and Ingrid Jaques (Mr Tomlinson's partner). At this meeting the parties discussed Ms Al-Dalhami's childcare difficulties as well as her hours of work, her salary and her job title.

[12] It was explained to Ms Al-Dalhami that Medina could not agree to her only working 7 am to 3 pm, Monday to Friday. Medina told Ms Al-Dalhami that it was however willing to allow her a period of two months to settle back into the role. During this period she would only be required to work the early shift. It was made

clear that after this period she would be expected to return to a normal roster that included a combination of early and mid-shifts (9 am to 7 pm). Ms Al-Dalhami did not raise any objection to this offer.

[13] It was also explained to Ms Al-Dalhami that Medina would not provide her with a pay increase as the amount it was paying to her accorded with market rates. It did not consider a change to her title was a promotion and considered the additional responsibilities she was being asked to undertake were not onerous or beyond the duties already recorded in her IEA. Ms Al-Dalhami did not raise any concerns about this decision.

[14] On 28 March 2017 Ms Chandra emailed Ms Al-Dalhami recording the matters discussed on 24 March 2017. This email accords with the events that I have found transpired at the meeting on that day. The email also offered to delay Ms Al-Dalhami's return date by an additional week to enable her to find childcare. In terms of her working days and hours the email stated:

We understand that it could take a couple of months for you and Adam to settle into his daycare schedule and for you to settle back into work mode. We're happy to be flexible during this period to allow for an easy and smooth transition for you both. Going forward we will be looking at a similar arrangement to the one we have now with Roberta, with a few early shifts and 1-2 mid shifts per week, an average of about 45 hours per week.

[15] Ms Al-Dalhami responded on 3 April 2017 advising:

Thanks for your email. I'll take the extra week please, this would take my start date to the 22 May. Things aren't looking that promising with daycares so far.

Return to work

[16] Ms Al-Dalhami returned to work on 22 May 2017. As per the parties' agreement she was rostered to work early shifts only i.e. from 7 am to 3 pm on a Monday to Friday. She continued to be paid her full salary despite the reduction in her hours to 40 hours per week.

[17] On 9 June 2017 Ms Chandra emailed her about rostering matters. Her email stated:

I know we said that we'd give you flexibility for the first couple of months with only early shifts. However looking at the leave schedule in place, this will put pressure on the rest of the team members by making them do back to

back midshifts. Can you look at your schedule and work out days you can do mid shifts. This will need to happen before Victor goes on leave as we'll end up 2 short.

[18] Ms Al-Dalhami did not respond.

Early July 2017 discussion

[19] In early July 2017 Ms Chandra met with Ms Al-Dalhami to discuss her availability to undertake mid-shifts while one of the Front of House staff members, Victor, was on leave.

[20] At this meeting Ms Al-Dalhami told Ms Chandra that she could not start doing mid-shifts prior to the agreed 2 months ending. Ms Chandra asked her to think about this further and reminded her of her earlier agreement to cover other shifts where one of the staff in her department was on leave.

Email exchanges from 14 July 2017

[21] On 14 July 2017, the week prior to the 2 month period ending, Ms Chandra emailed Ms Al-Dalhami:

As per our discussion last week, what is your availability to start doing mid shifts? We've known leave dates for Victor (and we know when Alan will be away) so can you please make arrangements to do some mid shifts. We need to be fair on how we distribute the extra hours when staff are on leave. It's not fair for the rest of the team to have to pick up all the extra hours. And given lower revenues at the moment, we have to watch hours and total wage costs.

[22] Ms Al-Dalhami did not respond.

[23] Later that day Ms Chandra emailed Ms Al-Dalhami again. As well as addressing other rostering issues, she stated:

You still have not addressed the issue of you doing mid shifts. You were aware of our expectation before you came back from maternity leave. We expect HODs to be doing around 45 hours spread over different periods of the day. Let's discuss this again next week.

[24] On 17 July 2017 Ms Al-Dalhami responded. She advised:

As we discussed before I can't do mid shifts, day care isn't open late and I have no one to look after Adam. I am happy to preorganise one offs to cover when needed and step in obviously, sick leaves or shortages as much as I can but I cannot permanently do mid shifts every week.

...

When it comes to my roster I feel singled out, targeted and the same flexibility extended to other managers isn't extended to me. We have department heads on set shifts most the time, working the same hours and others on am shifts and on part time basis as well.

[25] Ms Chandra replied:

We were very clear about our expectations from the beginning that you would have to do mid-shifts. We offered to be flexible for the first couple of months to allow you and Adam to settle down into a new routine. However we had made it clear that after that, you would have to do mid shifts.

In terms of other managers I'm assuming you mean Monika & Anna. Each department in the hotel operates differently therefore each department manager has to work according to their department requirements and cannot compare to how another department is run. Front office is a 24/7 operation. Therefore we want you as the department manager to be able to work a combination of different shifts to keep an eye on how the department is performing at different times of day/week. Sticking to a Monday to Friday, 7 am – 3 pm shift means that you don't really see the issues that come up in the evening shifts and over weekends.

I understand that daycare arrangements are hard but maybe you and Sylvester need to work out a routine where you can do a 1 or 2 of mid-shifts per week as per our agreement from the beginning.

I suggest we have a meeting with Wayne and Ingrid this week to discuss this further.

[26] On 19 July 2017 Ms Al-Dalhami gave written notice of her resignation. Her last day of employment was 15 August 2017.

Issue 1: Unjustified Disadvantage

[27] Under s 103(1)(b) an employee may commence a personal grievance claim while still employed or after the employment has terminated, if one or more of the conditions of employment has been affected to the employee's disadvantage by an unjustifiable action by the employer.

[28] The onus will initially be with the employee to establish that their employment condition(s) have been affected to their disadvantage. The burden then shifts to the employer under s 103A to establish that their actions, and how they acted, were what a fair and reasonable employer could have done in all the circumstances at the time the action occurred. This will usually involve establishing that there was good cause

for the employee's condition(s) of employment being affected, and that it was handled in a procedurally fair manner.

[29] Ms Al-Dalhami claims she suffered an unjustified disadvantage to her conditions of employment by Medina:

- a. Refusing to allow her to only work Monday to Friday from 7 am to 3 pm;
- b. By increasing her duties without increasing her remuneration;
- c. By placing unreasonable deadlines on her for completion of her work;
- d. By Mr Tomlinson making inappropriate remarks in front of her about other staff.

Respondent's refusal to allow the Applicant to work permanently on a Monday to Friday from 7 am to 3 pm

[30] I do not accept that Ms Al-Dalhami's conditions of employment were affected to her disadvantage by Medina's refusal to allow her to only work on a Monday to Friday from 7 am to 3 pm.

[31] Even if they were, viewed objectively, Medina's action in requiring Ms Al-Dalhami to work 1-2 mid shifts per week, as opposed to only 7 am to 3 pm shifts Monday to Friday, was what a fair and reasonable employer could have done in all the circumstances at the time. I consider that to be the case because:

- a. Ms Al-Dalhami was the Front of House Manager. During her maternity leave, there had been a turnover of staff. This meant the front of house staff were very junior and needed more supervision than was previously the case. Check in commenced at 3 pm. It was important that Ms Al-Dalhami observed her staff during this period and was there to answer questions from staff and clientele. I accept that staff management and guest relations were a crucial part of her role that required attendances at the hotel, as opposed to remotely, after 3 pm.
- b. At all times prior to her maternity leave, Ms Al-Dalhami had worked a variety of shifts over a 7 day period. Ms Al-Dalhami agreed that she

usually worked from 8 or 9 am to 5 or 6 pm and one or two days per week from 2 pm to 11 pm.

- c. Before Ms Al-Dalhami returned to work she agreed that, within a couple of months, she would resume working 1-2 mid-shifts per week as well as working early shifts, an average of around 45 hours per week. In addition, she agreed to work other times to cover for staff leave and sickness.
- d. Consistent with this agreement Medina sent a number of emails, and spoke to Ms Al-Dalhami, asking her to work out days that suited her to do mid-shifts and to replace staff on leave. This consultation accorded with Medina's duty to be open and communicative with its employees.
- e. While other managers had been offered part-time hours following their return to work after maternity leave, this arrangement was with the previous owners of DeBretts and not Medina. Furthermore, the other managers worked in different departments, namely accounts and housekeeping, that had different operational needs to the Front of House which was operated 24 hours a day.

Increasing the Applicant's duties without increasing her remuneration

[32] Ms Al-Dalhami's said that she was disadvantaged by Medina increasing her duties without increasing her remuneration. The additional duties were Accounts receivable/monthly reporting and reception tasks.

- a. Accounts receivable/monthly reporting - there is no dispute that these tasks were already recorded in Ms Al-Dalhami's IEA and that she had been trained to undertake this work. However, prior to her going on maternity leave, the role had been undertaken by a third party. When this third party left, the Acting Front of House Manager had taken over the role whilst Medina found a replacement. Ms Al-Dalhami was told that she would need to attend to the Accounts receivables/monthly reporting until the replacement was trained.
- b. Reception duties - Ms Al-Dalhami was required to undertake the reception duties that would normally be undertaken by the person during the 7 am to

3 pm shift. She had previously assisted with check ins/outs and was therefore familiar with the reception tasks.

[33] I am satisfied Ms Al-Dalhami's employment was not disadvantaged by her being required to perform these additional duties but not being remunerated more.

- a. Ms Al-Dalhami agreed to the changes to her role, and to her remuneration remaining unchanged, following consultation with her. In the email from Ms Chandra to Ms Al-Dalhami dated 28 March 2017 she advised:

In regards to your request for a pay review, we have done our research and believe we are paying the market rate for this position for a hotel of our size. We would like to see a smooth handover (from Roberta to you) and transition back into Hotel DeBrett prior to any salary review.”

- b. Ms Al-Dalhami was only required to undertake the reception duties because of her insistence that she work the early shift.
- c. While Accounts receivable/monthly reporting and reception tasks did result in some additional work, Ms Al-Dalhami was in charge of developing and managing the front office rosters. This meant that she had the ability to roster more staff on to enable her to carry out these administration tasks. The rosters I have viewed show that this was done on several occasions.

Unreasonable deadlines for completion of Applicant's work

[34] Ms Al-Dalhami alleged that she was asked by Ms Chandra to complete more work in a shorter time-frame than was needed which created an unjustified disadvantage to her employment. Several examples were provided.

Rosters

[35] Firstly, Ms Al-Dalhami pointed to a requirement for rosters to be completed on a Thursday where as they had previously been completed by Friday morning. This change applied to each of the hotel's 7 departments not only the front of house. Ms Al-Dalhami said this put her under undue pressure.

[36] Ms Chandra explained that the change was necessary because of staff complaints that they were receiving their rosters too late. The rosters were for the

week commencing on the Monday. She said that when the rosters were sent to her on a Friday she then had to review these before they were released to staff. This meant that staff only had a day or two notice of their shifts. By requiring the rosters to be to her by a Thursday, she was able to release them to staff on the Friday.

[37] I am satisfied that Ms Chandra's request to Ms Al-Dalhami to provide her with rosters on a Thursday morning was a reasonable request and was handled in a procedurally fair manner. It did not create a disadvantage to Ms Al-Dalhami's employment. If she felt she had insufficient time to prepare the rosters she could have rostered herself additional administration time.

Room re-configuration tasks

[38] Ms Al-Dalhami was involved in a project where two of De Brett's courtyard hotel rooms were re-configured. Ms Al-Dalhami was tasked with certain jobs. She alleged that Ms Chandra changed the deadline for completion of these tasks putting her under undue pressure. This was denied by Medina.

[39] I have reviewed email correspondence between Ms Al-Dalhami and Ms Chandra regarding these tasks. I have also reviewed a timeline for completion of tasks that was prepared by Ms Al-Dalhami in consultation with Ms Chandra. These documents show that Ms Al-Dalhami did not meet the timetable she had set for completion of tasks. She did not address this with Ms Chandra which led to Ms Chandra following up the work with her by email and asking her to complete the work by a certain date. Ultimately, when Ms Al-Dalhami failed to complete the work, Ms Chandra was required to do this.

[40] I am satisfied no conditions of Ms Al-Dalhami's employment were disadvantaged by Medina's actions.

Marketing description of rooms

[41] Ms Al-Dalhami alleged that Medina unreasonably required that she create marketing descriptions of the re-configured rooms. She said this was outside of her role and created unnecessary pressure. This is denied by Medina.

[42] Ms Chandra's uncontested evidence was that she asked Ms Al-Dalhami to write a description of the two re-configured courtyard rooms. She said this was a

brief two line description. She said when Ms Al-Dalhami refused to do this, she attended to it.

[43] I am satisfied no conditions of Ms Al-Dalhami's employment were disadvantaged by Medina's actions.

Inappropriate remarks in front of the Applicant

[44] Ms Al-Dalhami said Mr Tomlinson made several inappropriate racial remarks that she overheard and that made her feel uncomfortable. These comments were about a former staff member and about the lighting in the hotel. She said these comments were made between 12 June 2017 and 11 July 2017 and disadvantaged her.

[45] Mr Tomlinson explained what was said on those occasions and why. I found his account credible. Ms Al-Dalhami did not raise any concerns with Mr Tomlinson at the time about the comments she overheard. Nor did the person he actually spoke to or others that overheard the conversation. Had Ms Al-Dalhami raised this with Ms Tomlinson then the issue could have been addressed simply and easily by Mr Tomlinson providing her with the explanation provided to the Authority.

[46] I consider the comments made by Mr Tomlinson did not lead to unfairness. In any event there was no identified disadvantage to Ms Al-Dalhami.

Finding on Issue One

[47] Ms Al-Dalhami did not suffer an unjustified disadvantage to one or more of her conditions of employment. Her claims in this regard must fail.

Issue 2: Constructive Dismissal

The legal position

[48] The legal principles relating to constructive dismissal are well established and are not in dispute. Constructive dismissal includes, but is not limited to, cases where:¹

- a) An employer gives the employee the choice of resignation or dismissal;

¹ *Auckland Etc Shop Employees Etc IUOW v Woolworths (NZ) Limited (NZ) Ltd* [1985] 2 NZLR 372.

- b) An employer follows a course of conduct with the ‘deliberate and dominant purpose’ of coercing an employee to resign;
- c) A breach of duty by the employer leads an employee to resign.

[49] In reference to the third category of case, the Court of Appeal in *Auckland Electric Power Board v Auckland Provincial District Local Authorities Officers IUOW Inc* stated:²

In such a case as this we consider that the first relevant question is whether the resignation has been caused by breach of duty on the part of the employer. To determine that question all the circumstances of the resignation have to be examined, not merely of course the terms of the notice or other communication whereby the employee has tendered the resignation. If that question of causation is answered in the affirmative, the next question is whether the breach of duty by the employer was of sufficient seriousness to make it reasonably foreseeable by the employer that the employee would not be prepared to work under the conditions prevailing: in other words, whether a substantial risk of resignation was reasonably foreseeable, having regard to the seriousness of the breach.

[50] In *Hamon v Coromandel Independent Living Trust* Judge Perkins confirmed that the duty of trust and confidence the Court of Appeal referred to in *Auckland Electric Power Board* is now encapsulated in s 4(1)(a) of the Act which requires the parties to an employment relationship to deal with each other in good faith.³

[51] Section 4(1A)(a) specifically provides that such a duty “is wider in scope than the implied mutual obligations of trust and confidence”. Section 4(1A)(b) requires the parties to an employment relationship to be active and constructive in establishing and maintaining a productive employment relationship in which the parties are, among other things, responsive and communicative.

[52] If, after applying the above principles, the Authority concludes that there has been a constructive dismissal, it must then determine objectively whether it was justifiable in terms of the statutory test of justification under s 103A of the Act. To this end, Medina must satisfy the Authority that its actions were what a fair and reasonable employer could have done in all the circumstances at the time.

² [1994] 1 ERNZ 168 (CA).

³ [2014] NZEmpC 54 at [49]

Was Ms Al-Dalhami constructively dismissed?

[53] Ms Al-Dalhami said she was constructively dismissed by reason of the second and the third categories of constructive dismissal. She said Medina made her “feel uncomfortable” by being inflexible with the hours it required her to work, increasing her duties without increasing her remuneration and placing unreasonable deadlines on her for completion of her work. She said she felt she had no choice but to resign because she could not find care for her child.

[54] I am satisfied that Medina did not follow a course of conduct with the deliberate and dominant purpose of coercing Ms Al-Dalhami to resign. Nor did it breach any duty owed to Ms Al-Dalhami.

[55] To the contrary, I find that at all material times Medina’s actions were what a fair and reasonable employer could have done in the circumstances at the time. Medina went out of its way to try and accommodate Ms Al-Dalhami when she returned to work following maternity leave. For example:

- a. It allowed her to extend her maternity leave beyond one year.
- b. It agreed to her working reduced hours for 2 months whilst paying her full salary.
- c. It agreed she could work early shifts, and work only 1-2 mid shifts per week. This was a significant concession for Medina to make in light of the operational requirements of its front office. Previously, Ms Al-Dalhami worked between 45-50 hours each week from 8 am or 9 am to 5 pm or 6 pm plus worked one-two late shifts from 2 pm to 11 pm.
- d. Medina offered to roster the mid-shifts based on Ms Al-Dalhami’s needs. Ms Chandra’s uncontested evidence was that she asked Ms Al-Dalhami to tell her which day suited her husband best for collecting their child from day care so that she could be rostered on a mid-shift that day.
- e. When Ms Al-Dalhami raised an objection to working the hours agreed, Medina offered to meet with her to discuss this. I have viewed two emails where this was offered before she resigned. Ms Al-Dalhami did not do so.

f. Medina did require Ms Al-Dalhami to undertake additional duties. However, it consulted with her before doing so and obtained her agreement. She was able to roster herself time off to attend to these administration tasks and did so.

Finding on Issue Two

[56] Ms Al-Dalhami was not constructively dismissed. Her claim in this regard is unsuccessful.

Issue Three: Costs

[57] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[58] If they are not able to do so and an Authority determination on costs is needed Medina may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of the written determination in this matter. From the date of service of that memorandum Ms Al-Dalhami will then have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted. All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

[59] The parties could expect the Authority to determine costs, if asked to do so, on its usual notional daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.⁴



Jenni-Maree Trotman
Member of the Employment Relations Authority

⁴ *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808, 819-820 and *Fagotti v Acme & Co Limited* [2015] NZEmpC 135 at [106]-[108].