

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2016] NZERA Auckland 75  
5539530

BETWEEN                      DEBORAH GALBRAITH  
   Applicant  
  
AND                                THE JELLCOE LIMITED  
   Respondent

Member of Authority:        Vicki Campbell  
  
Representatives:              Applicant in Person  
   Mark Beech and Amy Baker for Respondent  
  
Investigation Meeting:        25 January 2016  
  
Further Information            26 and 27 January 2016  
Received:  
  
Determination:                9 March 2016

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**DETERMINATION OF THE AUTHORITY**

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- A.        Ms Galbraith was not unjustifiably disadvantaged in her employment.**
- B.        Costs are reserved.**

**Employment relationship problem**

[1]        Ms Deborah Galbraith claims one or more conditions of her employment were affected to her disadvantage by the unjustified actions of her employer, The Jellicoe Limited ("TJL").

[2] TJL denies the claims and in its Statement in Reply raised a counter-claim against Ms Galbraith to enforce a provision of the employment agreement requiring the payment of 1 weeks' notice due to Ms Galbraith failing to provide the agreed notice. The counter-claim was withdrawn following a short adjournment during the investigation meeting.

[3] As permitted by section 174E of the Employment Relations Act 2000 ("the Act") this determination has not recorded all the evidence and submissions received from Ms Galbraith and TJL but has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter, and specific orders made as a result.

### **Background**

[4] Ms Galbraith started work for TJL on 2 August 2011 as a Kitchen Hand and received two pay increases during 2013.

[5] The first pay increase took Ms Galbraith's hourly rate from \$13.50 to \$13.75 and was applied to the first pay period in April 2013. This increase reflected an increase in the statutory minimum wage which was adjusted from \$13.50 per hour to \$13.75 per hour with effect from 1 April 2013.

[6] The second increase in Ms Galbraith's rate of pay was reflected in the pay period ending 26 May 2013. Ms Galbraith's hourly rate was increased to \$15.00 per hour.

[7] Ms Galbraith says the second increase was to recognise her appointment to the position of Sous Chef. Ms Suzanne Peat, Managing Director, says the increase was to recognise Ms Galbraith taking on additional duties with the departure of the Sous Chef, Ms Hannigan,

[8] On 17 June 2013 Mr Joga Singh commenced employment in the position of Assistant Chef. Mr Singh had completed training at a culinary school prior to his appointment. The duties and responsibilities set out in Mr Singh's employment agreement were the same as those undertaken by the previous Sous Chef.

[9] Mr Dilloway is the Head Chef and Ms Galbraith's partner. Mr Dilloway was absent on sick leave during December 2014, returning to work on 7 January 2015.

[10] On 5 January 2015 Ms Miriam Canty, the Bar Manager, made a formal complaint about Ms Galbraith's conduct on 1 January 2015 while Mr Dilloway was absent on sick leave. Ms Canty says she [Ms Canty] offered to leave the restaurant to purchase ice cream from a local supermarket to ensure a customer's order for desert could be filled. She says Ms Galbraith declined the offer. Ms Canty says that after the customer had changed their desert order and it had been completed Ms Galbraith arranged for another employee to leave the kitchen to purchase the ice cream. Ms Canty and Ms Galbraith then engaged in a heated discussion about the management of the staff in the kitchen. Ms Canty's complaint was that Ms Galbraith had yelled at her and had ordered her from the kitchen.

[11] On 6 January 2015 Ms Galbraith attended a meeting with Ms Peat to discuss the complaint. This was not a formal disciplinary meeting. The discussion included Ms Peat's advice to Ms Galbraith that Ms Canty, while not working in the kitchen, was Ms Galbraith's senior and instructions from Ms Canty were not to be ignored. In response Ms Galbraith asserted that the kitchen was under her control and she was the one to make decisions about the deployment of staff in the kitchen as she was the Sous Chef.

[12] Ms Galbraith continued to work as usual from 6 to 11 January 2015. On 12 January 2015 Ms Galbraith commenced a period of sick leave due to a chest infection. Despite returning to work on 26 and 27 January 2015, Ms Galbraith did not attend work again, and from 30 January 2015 to 18 February 2015 was on annual leave.

[13] During her absence on sick leave and on 18 January 2015 Ms Galbraith raised a personal grievance relating to the 6 January 2015 meeting and in particular claimed she had been demoted from Sous Chef to Kitchen Hand and that this demotion amounted to an unjustified action.

[14] Ms Peat responded to Ms Galbraith's letter on 20 January 2015 enclosing a copy of the notes of the meeting. In her response, Ms Peat denied that Ms Galbraith had ever been appointed to the role of Sous Chef.

[15] With the exception of 26 and 27 January 2015 (working a total of 7 hours) Ms Galbraith did not attend work again until after the parties had attended mediation on 11 March 2015. Ms Galbraith resigned from her employment on 19 March 2015. Ms Peat wrote to Ms Galbraith asking her to reconsider her resignation. Ms Galbraith did not reconsider and is no longer employed by TJL.

### **Issues**

[16] The issue for determination is whether one or more terms and conditions of Ms Galbraith's employment were affected to her disadvantage by unjustified actions of TJL and if so what, if any, remedies should be awarded.

### **Unjustified disadvantage**

[17] Ms Galbraith claims her employment was affected to her disadvantage when she was demoted from Sous Chef to Kitchen Hand on 6 January 2015 and the action of demoting her was unjustified.

[18] The test for determining whether an employer's actions were justifiable is that set out in section 103A(2) of the Act, namely whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the action occurred. That issue must be determined on an objective basis<sup>1</sup> and, in applying the test, the Authority must consider the factors listed in subsection (3) and any other factors it thinks appropriate.

[19] Section 103A(5) of the Act requires the Authority not to determine an action to be unjustified solely because the employer followed a defective process if the defects were minor and did not result in the employee being treated unfairly.

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<sup>1</sup> Employment Relations Act 2000 section 103A(1).

[20] In *Angus v Ports of Auckland Ltd (No 2)*,<sup>2</sup> the full Court held that the test means that there may be more than one possible justifiable outcome and more than one possible justifiable method adopted by employers to get to that outcome.<sup>3</sup> The Authority's function is to determine whether an action taken by an employer or the way it acted falls within the band of reasonable responses available and not to substitute its view for that of the employer.

[21] After Ms Hannigan had left TJJ Mr Dilloway discussed with Ms Galbraith the possibility of her becoming the next Sous Chef. Ms Galbraith was initially reluctant but eventually agreed when Mr Dilloway explained that she would also get a pay increase.

[22] Mr Dilloway met with Ms Peat where the two of them discussed what to do about replacing Ms Hannigan. Mr Dilloway suggested that Ms Galbraith would be a good replacement because she was doing a number of the duties in addition to her normal role. Mr Dilloway also advised Ms Peat that he believed Ms Galbraith was worthy of a pay increase. Ms Peat says it was her that initiated the suggestion that Ms Galbraith receive a pay increase and she did this to recognise that Ms Galbraith had stepped up and had taken on more duties following the departure of Ms Hannigan.

[23] Following the meeting, Ms Peat arranged for Ms Galbraith to receive a pay increase to \$15.00 per hour. Ms Galbraith's employment agreement was annotated to show the increase in her hourly rate, but no other changes to the employment agreement were made. Ms Galbraith's job title and duties as set out in the employment agreement remained unchanged.

[24] Ms Galbraith attributes the pay increase to her appointment as the Sous Chef. Mr Dilloway acknowledged at the investigation meeting that Ms Peat had never confirmed to him that Ms Galbraith would fill the role of Sous Chef but he assumed, when Ms Galbraith received the pay increase, that she had been appointed.

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<sup>2</sup> [2011] NZEmpC 160; [2011] ERNZ 466.

<sup>3</sup> Ibid at [22] and [23].

[25] It was Ms Peat's evidence that Ms Galbraith was not appointed Sous Chef. Mr Singh was appointed on 17 June 2013 to fill the role left vacant by Ms Hannigan albeit under the job title of "Assistant Chef". After Ms Hannigan had left her employment, Mr Dilloway approached Ms Peat to discuss employing Mr Singh. Mr Dilloway was aware Mr Singh had been to culinary school and he wanted to have an assistant chef working in the kitchen. Mr Dilloway told Ms Peat that he wanted to train Mr Singh to be a chef.

[26] While Mr Singh's employment agreement was amended in January 2015 to reflect a change in title to "Sous Chef" the duties set out in the agreement remained unchanged.

[27] Ms Galbraith said that Mr Singh was working as a Larder Chef and not as an Assistant Chef. This is not consistent with Mr Dilloway's evidence that throughout Ms Galbraith's employment there have been three Larder Chefs and that the people filling those roles are the same now as when Mr Singh was first employed, even though Mr Singh is now fully operating as a Sous Chef.

[28] During the investigation meeting I asked Ms Galbraith to identify from the list of duties set out in her employment agreement, those duties that she no longer undertook. Ms Galbraith confirmed she continued to undertake the duties set out in her agreement and had done so following her pay increase in May 2013.

[29] From 30 November 2014 until 7 January 2015 Mr Dilloway was absent on sick leave. During his absence he continued to write the rosters and provide instructions for the kitchen staff, which were delivered by Ms Galbraith. It was common ground that Mr Dilloway also continued to manage the ordering of stock for the kitchen during his absence. Kitchen staff, including Mr Singh, would make regular enquiries of Mr Dilloway through text messages.

[30] On 7 January 2015 Ms Peat met with Mr Dilloway ostensibly to ascertain whether Mr Dilloway was fit to return to work after his six week absence. During the meeting Mr Dilloway raised concerns about Mr Singh's ability to carry out the duties of Sous Chef. Ms Peat advised Mr Dilloway that if Mr Singh was failing in any way

he needed to be trained. Ms Peat advised Mr Dilloway that she had done this herself by engaging a consultant to assist Mr Singh in stock control, menu costing and ordering procedures. When Mr Dilloway asked about where that would leave Ms Galbraith, Ms Peat reiterated that Ms Galbraith's role was as Kitchen Hand. Ms Peat did acknowledge that Ms Galbraith did far more than her role suggested.

[31] I am satisfied it is more likely than not that Mr Singh was employed to fill the vacant Chef position whether as an Assistant Chef or a Sous Chef in June 2013, while Ms Galbraith took on some additional duties and responsibilities during Mr Dilloway's absence in December 2014 and until he returned to work on 7 January 2015.

[32] Ms Galbraith has not established to my satisfaction that she was appointed to the position of Sous Chef in 2013. She was therefore not demoted in January 2015. Ms Galbraith's claim for a personal grievance is dismissed and I can be of no further assistance to her.

### **Costs**

[33] Costs are reserved. The parties are invited to resolve the matter. If they are unable to do so TJJ shall have 28 days from the date of this determination in which to file and serve a memorandum on the matter. Ms Galbraith shall have a further 14 days in which to file and serve a memorandum in reply. All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

[34] The parties can expect the Authority to determine costs, if asked to do so, on its usual "daily tariff" basis unless particular circumstances or factors require an adjustment upwards or downwards.

Vicki Campbell  
Member of the Employment Relations Authority