

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

WA 88/08  
5111160

BETWEEN MICHELLE WILSON  
Applicant

AND BEARE HAVEN  
INVESTMENTS LIMITED  
Respondents

Member of Authority: P R Stapp

Representatives: Alan Cressey for the Applicant  
Gerard Dewar for the Respondent

Investigation Meeting: 19 June 2008 at Wellington

Determination: 27 June 2008

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**DETERMINATION OF THE AUTHORITY**

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**The Employment Relationship Problem**

[1] The applicant has claimed that her employer, Beare Haven Investments Limited (the employer or Pak N Save) unjustifiably employed another worker in her position as the assistant delicatessen manager while she was recovering from back surgery. Ms Wilson has complained that she was not consulted and not communicated with over this action. She says her employer refused to reinstate her when she was cleared to return to work.

[2] The respondent denied the claim.

**The Issues**

[3] The issues are:

- Was a letter dated 7 May 2007 sufficient to put Ms Wilson on notice that the assistant delicatessen manager position could be filled by someone else permanently while Ms Wilson was injured?
- Was there consultation and communication with Ms Wilson on the decision taken to permanently fill her assistant delicatessen manager position?
- What is the nature of the personal grievance claim?
- Was it sufficient for the employer to rely upon believing Ms Wilson understood what was happening and why another employee was being trained in the assistant delicatessen manager role?
- Did Ms Wilson complain and accept what she was offered?

### **The Facts**

[4] Michelle Wilson was employed as an assistant delicatessen manager at the employer's Pak N Save supermarket in Lower Hutt on 21 February 2006. There does not appear to be a signed off employment agreement for this period of Ms Wilson's employment.

[5] On 23 February 2006 Ms Wilson reported that she had injured her back.

[6] On 27 November 2006 Ms Wilson had spinal surgery and had to take six months off work. She applied successfully for ACC.

[7] On 13 March 2007 and 7 May 2007 Ms Wilson was advised by her employer that her position had been temporarily filled by Tara O'Sullivan, the daughter of the owner Mr Kieran O'Sullivan. Ms Wilson was requested to inform Mr O'Sullivan of her likely return to work date. In particular Ms Wilson was advised of the following:

*7 May 2007*

*Dear Michelle*

*Thank you for your medical certificate dated 03/05/2007, also thank you for keeping Deanna informed of your rehabilitation to date.*

*It has now been over six months since your very serious back injury caused you to give up work. I know you have a strong desire to return*

*to work but the seriousness of this injury and your rehabilitation precludes this.*

*For ourselves, you will be aware that we have not employed a replacement in the hope that your return to work is imminent. Tara has been filling in while you have been away. However, the situation for us will change in September, when Tara is away for two months. I will need either yourself back with us or very likely have to employ another 2IC.*

*To this end, I am hoping you can give me an indication of when we might have you working with us once more.*

*You have made a valuable contribution in the past and we need you back as soon as possible in order for the deli to function normally.*

*Can you make contact with Deanna so that she knows when we might expect your return. I believe you are probably very frustrated by your situation and if we can get you back working with us in the near future that will take a large amount of pressure off Tara and Gerda. [Gerda is the applicant's manager]*

[8] A rehabilitation plan was developed and reduced to writing dated 31 May 2007. The duties were available from Monday 11 June 2007 subject to a medical clearance.

[9] On 7 June 2007 the applicant's medical certificate cleared her to return to work for three hours per day Monday-Friday *and then increase as tolerated*. Ms Wilson returned to work in the delicatessen for fewer hours on light duties. Pak n Save accepted the plan.

[10] Between 7 June and September 2007 Ms Wilson's hours gradually increased up to five hours per day Monday-Friday in the deli.

[11] In September 2007 Ms Wilson asked her delicatessen manager for more hours. The request was declined until Ms Wilson provided a medical clearance. In the meantime the duties of Ms Wilson's assistant delicatessen manager role were passed to another employee who was being trained for that role. This involved no consultation with Ms Wilson. At this point Mr O'Sullivan and his daughter went on holiday to the Rugby World Cup.

[12] In early October 2007 Ms Wilson says she noticed the other employee wearing an *Assistant Delicatessen Manager* badge and made an inquiry about what was happening. She says she learnt that this employee had been appointed to her role. Mr O'Sullivan and Ms Deanna Mene, personnel manager, say that Ms Wilson understood

what was happening and given her health did not want to return to her role so long as she had hours and work available.

[13] On 11 October 2007 Ms Wilson was cleared for work and to return to full time duties from 15 October 2007 by her surgeon. She says at this point she asked Ms Mene for her job back, but this was declined.

[14] Upon Mr O'Sullivan returning from overseas he met with Ms Wilson and Ms Mene and Mr O'Sullivan informed Ms Wilson that she could not be reinstated because her role had been filled by another employee.

[15] Mr O'Sullivan then obtained permission from Ms Wilson to approach her doctor and surgeon for further advice about her medical clearance. Mr O'Sullivan says that he did not think that Ms Wilson would be able to resume her full duties. He did not think she looked well and did not think it was realistic for her to be lifting stock. He says that Ms Wilson thought this too. Advice was then received that Ms Wilson's ACC was due to cease on 12 November 2007. As a consequence Mr O'Sullivan offered to make up Ms Wilson's hours and although he tried to dissuade Ms Wilson from using her annual leave entitlement this was used for a week and he offered Ms Wilson two food vouchers. After some consideration she accepted the offer of the food vouchers.

[16] Arrangements were then made for Ms Wilson to work part time in the hardware position, and further arrangements were made for her to work at the cold shelf and the deli to make up her hours for the equivalent full time job, and be paid the same wages. Ms Mene says Ms Wilson agreed and indeed asked to work in the hardware position. Ms Wilson denied this and says she was prepared to try it, although she wanted one full time position and not the three she was being offered. Ms Wilson was provided with an employment agreement for the hardware but did not sign it.

[17] Ms Wilson says that following this meeting she continued to complain about not obtaining her full time assistant delicatessen manager position. However, Ms Mene denied this and says she had no warning of any complaint and did not think that anyone knew that Ms Wilson was unhappy or intended raising a personal grievance.

[18] Not long after Ms Wilson started her work in hardware, she injured her back. She had ten days off with a medical certificate. A personal grievance was raised on 6 December 2007 by Ms Wilson's lawyer representing her at the time.

[19] On 18 May 2008 Ms Wilson recommenced in the position of assistant delicatessen manager when the employee appointed to that role moved to another position. Ms Wilson's current rate of pay is \$13.52 per hour and she is required to work 40.5 hours per week Monday to Sunday, with Fridays and Saturdays off. She now has an employment agreement and it was provided after her employment relationship problem was lodged. That agreement provides for variations of duties and responsibilities in any period of injury and sickness. The variation provisions do not apply in the period of Ms Wilson's injury when there is no evidence of any signed off agreement or that the provisions were relied upon at the time.

### **Determination**

[20] It is my finding that the letter dated 7 May 2007 was notice given to Ms Wilson that her employer was looking for her to return to work and if that was not possible consideration might need to be given to filling her role with another person.

[21] Even although Ms Wilson had returned to work on a rehabilitation plan with set hours, which increased as she was able to work, there was no further formal approach made to her in regard to filling the assistant delicatessen manager role.

[22] Upon her clearance to return to work Ms Wilson had a reasonable expectation to be able to return to fill her full time role that she had previously held. The fact that the employer had filled her position with another employee without any further consultation and communication was unjustified. This is especially so when arrangements were made initially to fill the position temporarily. This was done as a matter of convenience at the time because Tara O'Sullivan planned to go overseas later.

[23] Nor did the employer obtain from Ms Wilson any definitive indication of her likely date for a medical clearance to return to work. This omission was also unjustified. A fair and reasonable employer would have sought to obtain up to date details.

[24] The employer has relied on the need to replace Ms Wilson to enable *a large amount of pressure [being taken] off Tara and Gerda*. Ms O'Sullivan was planning to leave. I accept that the changes involved the need for Ms Wilson to return as soon as possible in order for the deli to function normally. Of course Ms Wilson's injury would have caused some disruption. The employer has not satisfied me that there was such

pressure and disruption to require a permanent appointment considering it had been managed with a temporary appointment initially.

[25] During the course of the Authority's investigation meeting Mr O'Sullivan referred to the applicant's absence causing stress on her manager. This had never previously been elaborated on and there is an absence of any details.

[26] The employer assisted the applicant in the rehabilitation plan and providing limited hours and light duties. I hold Ms Wilson had a genuine and reasonable expectation of resuming her assistant delicatessen manager role, especially where she was not contacted further in regard to the letter of 7 May 2007.

[27] Upon receiving her medical clearance and without being able to appoint her back to the position she previously held, the employer decided to pay her and subsequently offered her other positions and hours to make up her full time pay. However, there was a gap in time between the medical clearance and the ACC ceasing before the alternative full time hours could be arranged. This situation was of the employer's making where it had an obligation to provide her with full time work.

[28] Ms Wilson agreed to try the work in the hardware area, cold shelf and deli, but only because there was nothing else on offer and she says she had to work. Indeed she could not return to her assistant delicatessen manager role because it had been filled with someone else permanently.

[29] The employer was entitled to expect a full medical clearance before offering Ms Wilson further hours and I accept that Mr O'Sullivan may have had concerns about Ms Wilson being able to return full time when he asked to approach her doctor and surgeon for further information on her clearance if there were any doubts that she was able to return to work. Ms Wilson provided her permission and the clearance was confirmed. Thereupon the employer was obliged to fulfil the terms that the parties had and that involved Ms Wilson having a reasonable expectation to return to her position.

[30] There was a point raised by the employer that the surgeon stated on 11 October 2007 that "*If she cannot tolerate the activities required by her job, she will need to look for alternative employment.*" I have considered this statement was only a suggestion having regard to the care needed to be taken by Ms Wilson in returning to work upon being cleared and was something for her to consider. On this basis and having regard to the other suggestions for Ms Wilson to return to work I accept that Mr O'Sullivan

was entitled to ensure Ms Wilson was cleared in terms of his obligations on health and safety. The above suggestion was not pursued further by the surgeon in his clearance dated 14 November 2007.

### **Conclusion**

[31] It is my conclusion that the employer's failure to further communicate and consult with Ms Wilson about filling her position was unjustified. She was disadvantaged in her employment in as much as her employment was affected by this action and involved arrangements about paying her where she used holiday pay and received food vouchers and where she was required to work in three positions to make up her full time equivalent hours. Also the employer's omission to request Ms Wilson to provide any details and opinion from her doctor before her position was filled permanently was unjustified. A fair and reasonable employer would have provided an opportunity for Ms Wilson to comment and obtain some medical opinion on a likely return to work date before making a decision.

[32] The employer's action was partially mitigated by the provision of alternative work and hours that were provided. There was an attempt, albeit clumsy and patronising to offer her food vouchers when she had a reasonable expectation that she would return to her full time position when she had been cleared to work and her ACC ceased.

[33] Also if Ms Wilson noticed the employee being trained, her employer still had the responsibility to communicate with Ms Wilson about making a decision that she was entitled to be consulted over. I would add that while the possibility of someone else being appointed was raised in May there was a lapse of time that occurred when a fair and reasonable employer would have raised it again and not assumed that Ms Wilson would have known that a change was to occur, especially where her employer had agreed to a rehabilitation plan that envisaged a full time return to work.

### **Remedies and Contribution**

[34] During the course of the Authority's investigation meeting agreement was reached on the claim for the compensation for lost wages and the value of the food vouchers. I simply record that agreement was reached and I reserve leave for the parties to return should any difficulties arise over that matter.

[35] I now turn to compensation. I accept that Ms Wilson has not contributed to the situation giving rise to her personal grievance. I accept that she felt humiliated and her feelings were affected by her employer filling her role permanently and she found out when she saw the badge the other employee was wearing and the pay arrangements when her ACC ceased.

[36] It is my decision to compensate Ms Wilson \$3,000 for humiliation, loss of dignity and injury to feelings.

**Costs**

[37] Costs are reserved.

P R Stapp  
Member of the Employment Relations Authority