

**Attention is drawn to the order  
prohibiting publication of  
certain information**

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

[2013] NZERA Christchurch 110  
5367516

BETWEEN

ADRIENNE MOLLOY  
Applicant

A N D

THE RJ & DE SMAILL  
PARTNERSHIP trading as  
Ladybird Hill  
Respondent

Member of Authority: Christine Hickey

Representatives: Jen Wilson, Counsel for Applicant  
Kelvin Campbell, Counsel for Respondent

Investigation meeting: 26 February 2013 at Oamaru

Submissions Received At the hearing, and further evidence supplied as  
requested 11 March 2013 and 12 March 2013

Date of Determination: 14 June 2013

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**DETERMINATION OF THE AUTHORITY**

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- A. Adrienne Molloy was unjustifiably dismissed.**
  
- B. Adrienne Molloy was unjustifiably disadvantaged by not having an employment agreement and by her duties being unilaterally changed.**
  
- C. The RJ & DE Smaill Partnership is to pay Adrienne Molloy \$4,500 compensation.**

### **Prohibition of publication**

[1] I prohibit from publication the financial accounts of the respondent under clause 10 (1) of the second schedule to the Employment Relations Act 2000, except to the limited extent it is necessary to refer to them in this determination.

### **Employment relationship problem**

[2] Adrienne Molloy was employed by the RJ & DE Smaill Partnership as the Head Chef and Restaurant Manager of the Ladybird Hill restaurant in Omarama. The restaurant was a newly established venture in conjunction with other aspects of a tourism business also run by Mr and Mrs Smaill.

[3] The parties understood that the restaurant would close for a time in the winter of 2012 and had discussed Ms Molloy's plan to go to England around about Easter 2012 to visit her family there. The exact closing date and the date of the expected re-opening of the restaurant was not discussed. However, both parties anticipated that Ms Molloy would take her annual leave and some unpaid leave over the winter of 2012 and would begin working again when the restaurant re-opened.

[4] Ms Molloy was aware the Smaills were *triallying the restaurant operation*. She says she understood that would be for a minimum of eighteen months, or at least two summers. The Smaills deny that they had put any time limit on the trial of the restaurant.

[5] Ms Molloy began work on 22 August 2011. The Smaills paid for her relocation costs from Dunedin to Omarama<sup>1</sup> and accommodated her for the first few weeks while she found more permanent accommodation. The parties worked together to establish the restaurant to the point where it could open for business in October 2011.

[6] When the restaurant opened Ms Molloy worked double shifts (lunch and dinner) Thursday to Sunday and did from 2-4 hours of *bookwork* on a Monday. Over the Christmas and New Year period the restaurant was open five or six days a week.

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<sup>1</sup> Which were \$1001.

[7] As part of her role as Restaurant Manager Ms Molloy did the cash reconciliation from the till at the end of the day and was in charge of managing the restaurant staff. Mrs Smaill worked in the front of house with two other staff.

[8] Ms Molloy says the Smaills agreed with her that the restaurant would need a second chef and another waitress over the busy summer period. However, the Smaills say that they agreed that Ms Molloy would need some help in the kitchen over that time but only envisaged engaging a kitchen hand and not a second chef. Ms Molloy prepared an advertisement and one couple were interviewed. Ms Molloy says she did not want to employ them as the male partner did not have any kitchen experience. However, the Smaills employed them as a waitress and a kitchen hand on fixed-term contracts for the summer period.

[9] Ms Molloy says that the lack of sufficient experienced staff in the kitchen over the Christmas and New Year period meant she worked very long hours at a *hectic* pace and that she felt unsupported and anxious over that time. Matters came to a head on 3 January 2012 during a particularly busy lunch time when Ms Molloy *lost my temper* and said *this place is a f\*\*\*ing joke*.

[10] After the restaurant closed the Smaills and Ms Molloy discussed her outburst. The Smaills made it clear her outburst was unacceptable. Accounts of the discussion differ with Ms Molloy understanding that she had been told to leave as the Smaills no longer wanted her to work there. The Smaills deny dismissing her but say that they told her that if she was so unhappy working there that she could leave.

[11] Ms Molloy did not attend work the next day and sought clarification by e-mail about whether she had been dismissed or not. She suggested that the parties attend mediation. The Smaills agreed that if Ms Molloy could arrange a mediator they would attend mediation.

[12] Ms Molloy undertook to return to work if she could guarantee that she would:

*be treated respectfully on my return and will be informed in writing of any changes to my normal duties.*

[13] The Smaills responded:

*You are an employee of Ladybird Hill and therefore our expectations would be that you return to work tomorrow, awaiting the requested mediation.*

*We expect a guarantee from you that your behaviour will be of high standard and that no further outbursts of blasphemy will occur again.*

*You normal chef duties will continue.*

[14] Ms Molloy returned to work on 5 January 2012. Mrs Smaill told her that she was no longer to do the cash reconciliation and was no longer managing the staff. Mrs Smaill says she meant that Ms Molloy was no longer in charge of the front of house staff but Ms Molloy took it to mean she no longer had any staff management responsibilities.

[15] On 31 January 2012 Mrs Smaill gave Ms Molloy a draft employment contract which named her as Head Chef but not as the Restaurant Manager and said that she was a *casual employee*. Ms Molloy did not sign the agreement and proposed several changes to it, including adding her title as Restaurant Manager and deleting the description of her as a casual employee. She returned the amended agreement to the Smaills.

[16] Ms Molloy and the other staff kept working until they were called to a meeting on 5 February 2012. Ms Molloy was handed another copy of an employment agreement. The only change that was incorporated was the inclusion of the title of Restaurant Manager. Ms Molloy was also handed a letter stating:

*Unfortunately due to the current financial climate and the downturn in customers at Ladybird Hill restaurant, we are unable to continue trading and therefore will be closing on Sunday 05 February 2012, effective from the time of receiving this notification.*

*We thank you for your time working at Ladybird Hill and wish you good luck for the future.*

*Enclosed is your final up to date payment as well as an additional \$600 to assist you with costs in relation to relocating.*

[17] Ms Molloy claims that she was unjustifiably dismissed. She says her dismissal was substantively unjustified and procedurally unfair. She also considers she was disadvantaged in her employment by the Smaills' failure to provide an employment agreement, their unilateral changes to her terms and conditions of employment and unreasonable expectations in respect of her working conditions.

[18] By way of remedy she claims lost wages from 5 February 2012 until 5 April 2012, additional relocation costs of \$300.00 and compensation for humiliation, loss of

dignity and injury to her feelings for the unjustified disadvantages and the unjustified dismissal.

[19] Ms Molloy is legally aided and understands she will be likely to have to repay some of the legal aid grant if she is successful in her claims. She asks for costs to be reserved.

[20] The Smaills deny that Ms Molloy was disadvantaged in any way during her employment. They say that they presented her with an employment agreement at the first reasonable opportunity, and that they relieved her of duties in order to assist her by reducing her stress levels and with no intention of disadvantaging her. They say that their expectations in relation to her working conditions, including that a second chef would not be employed, were clear and reasonable. They also deny that the dismissal was unjustified. They say it was necessary to close the restaurant because the business was making significant losses and there were no future bookings.

### **Issues**

[21] The issues the Authority needs to determine are:

- (a) whether Ms Molloy was disadvantaged in not having a copy of her employment agreement earlier;
- (b) whether Ms Molloy was disadvantaged by a failure to engage a second chef;
- (c) whether Ms Molloy was disadvantaged by her till and staff management duties being removed;
- (d) whether Ms Molloy was unjustifiably dismissed;
- (e) what remedies, if any Ms Molloy should receive; and
- (f) legal costs.

## **Determination**

*Was Ms Molloy unjustifiably disadvantaged?*

### **Till reconciliation and management of front of house staff duties removed**

[22] When Ms Molloy returned to work on 5 January 2012 Mrs Smaill told her that she was no longer to do the till reconciliation at the end of each shift and that she was no longer in charge of managing the staff. The Smaills say that was not a demotion and that Ms Molloy remained on the same pay. Mrs Smaill did not consult Ms Molloy about the decision and gave her no reasons for changing her duties.

[23] The Smaills say:

*We amended her duties and responsibilities in the best interests of the business and in order to reduce her workload after her outburst. We believed that we needed to lessen the burden upon her and that is why some of the restaurant manager, or front of house duties, were removed from the Applicant.*

[24] According to Ms Molloy the duties that caused her stress were cooking duties in what she considered an under-staffed kitchen and not her staff management or till reconciliation duties. The Smaills changed Ms Molloy's duties without consultation with Ms Molloy and without her agreement. Mrs Smaill did not make it clear to Ms Molloy that she was still in charge of the kitchen staff. Employers are generally not entitled to unilaterally vary an employee's duties.

[25] I consider that the change in duties was a disadvantage to Ms Molloy in her employment because it reduced her managerial status although her pay was not affected. The decision was not one that a fair and reasonable employer could have made in all the circumstances at the time it was made. Therefore, the disadvantage was unjustified.

### **Kitchen working conditions as an unjustified disadvantage**

[26] Ms Molloy says that she and the Smaills agreed to advertise for a couple one of whom would assist her in the kitchen and the other to be one of the waiting staff. She says as head chef and restaurant manager she expected that an experienced chef would be engaged for a short term over the restaurant's busy summer season. She understood that the Smaills agreed with her. However, the Smaills say that they never

agreed to engage a second chef and always knew they would not be able to afford that.

[27] There was conflicting evidence at the investigation meeting on whether the ads that were placed on Trade Me and in the Four Square shop in Omarama actually sought a chef, or someone with experience in a restaurant kitchen. Ms Molloy says they did and the Smaills deny that. After the investigation meeting the Smaills provided a copy of ads they say were displayed in the Four Square shop – they seek a kitchen hand and front of house staff. Ms Molloy remembers drafting the ads with the Smaills and says they advertised for a couple. The Smaills' statement of evidence also refers to advertising for a couple although that is not what the copies of the ads sent to me show.

[28] In any event the Smaills engaged a waitress and her male partner. The male partner had no kitchen experience. Ms Molloy asked for him to be given a trial in the kitchen before he was engaged. However, the Smaills did not agree and employed the couple. Despite being disappointed about the lack of a second chef Ms Molloy agreed to give him a trial in the kitchen and to train him *as best I could* to assist her in the kitchen. However, he apparently had no aptitude for the role and only assisted as a dishwasher and kitchen hand at times. The rest of the time he worked in the vineyard.

[29] Ms Molloy says she again made it clear to Mr Smaill that they would be understaffed for the busy summer period but he did not agree they needed to engage another chef. Therefore, Ms Molloy says over the Christmas/New Year period she worked:

*...hectic long hours at high speed and in conditions of over 50 degrees heat in the kitchen. As a consequence I suffered frequent injuries, particularly burning and bruising.*

*I now felt unsupported and anxious about how I would continue to manage. Over that period decisions regarding bookings and staff were taken over by Donna, without consultation with me, resulting in a high number of customers that could not possibly be catered for in a timely fashion. This served to exacerbate the problem with lack of staff.*

[30] The Smaills say that they were unaware of any injuries and that Ms Molloy did not record any in the incident book in the kitchen.

[31] Ms Molloy has not established that the engagement of a second chef over the Christmas and New Year period was an agreed term or condition of her employment.

The duty of good faith to be communicative in s. 4(1A)(b) is mutual. I find that until Ms Molloy's outburst in the kitchen on 3 January 2012 she had not communicated the seriousness of her concerns about the pressure that she was under over that period to the Smaills. Without that knowledge the Smaills could not have been expected to respond and to do anything to remedy her stress. Ms Molloy did not suffer unjustified disadvantage in her employment due to any action, or inaction, of her employers.

### **No employment agreement**

[32] Ms Molloy was not given a written employment agreement until five months after she began working, and five days before she was dismissed. Section 63A of the Act requires an employer to provide an employee with a copy of the intended agreement, advise her she is entitled to seek independent advice, give her a reasonable opportunity to seek such advice and to consider any issues that the employee raises and respond to them. Section 65 is also relevant. It requires an employment agreement to be in writing.

[33] Ms Wilson submits that the lack of a written employment agreement recording the terms and conditions agreed to verbally before Ms Molloy started work contributed to her confusion and anxiety when difficulties arose in the employment relationship in January 2012.

[34] The Smaills says they provided an employment agreement at *the first realistically available opportunity*. They agree that it was *later than was ideal*. However, when an employment agreement was provided it clearly mis-stated Ms Molloy's true position. She was not a casual employee, but had been employed as the Head Chef and Restaurant Manager on a full-time basis.

[35] Ms Molloy asked for a written employment agreement on more than one occasion. I consider that it was a failure of the Smaills' duty as employers to provide a written proposed employment agreement so long after Ms Molloy's employment began. It was provided only at the time when the Smaills were already considering the future of their business and when the employment relationship was already under considerable strain.

[36] The failure to provide the employment agreement was also a breach of the Smaills' duty of good faith under s.4(1A)(b) of the Employment Relations Act 2000

to be active and constructive in establishing and maintaining a productive employment relationship and to be responsive and communicative.

[37] The lack of clear documentation of what Ms Molloy's duties were contributed to the stress Ms Molloy felt when the till reconciliation and management of front of house staff duties were taken away from her. I determine that the lack of an employment agreement was an unjustified disadvantage to Ms Molloy in her employment.

*Was Ms Molloy unjustifiably dismissed?*

[38] Section 103A of the Employment Relations Act 2000 sets out the test of the justification for Ms Molloy's dismissal. I need to consider whether the decision and how it was made were what a fair and reasonable employer could have done in all the circumstances at the time.

[39] Although the factors under s.103A(3) are more applicable to dismissals which are not redundancies I need to consider whether, before proceeding to disestablish Ms Molloy's position, the RJ and DE Smaill Partnership went through a fair process which:

- raised with Ms Molloy concerns about the continuation of her employment;
- gave Ms Molloy an opportunity to respond; and
- genuinely considered her response, if any.

[40] In a recent decision of the Employment Court Chief Judge Colgan stated how section 103A should be applied in relation to redundancies:

*It will be insufficient under s 103A, when an employer is challenged to justify a dismissal or disadvantage in employment, for the employer simply to say that this was a genuine business decision and the Court (or the Authority) is not entitled to enquire into the merits of it. The Court (or Authority) will need to do so to determine whether the decision, and how it was reached, were what a fair and reasonable employer would/could have done in all the relevant circumstances.<sup>2</sup>*

[41] In deciding whether or not to make an employee redundant an employer is also bound by the duty of good faith set out in s.4 (1A) of the Act. In particular, when an employer is proposing to make a decision that will have an adverse effect on an

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<sup>2</sup> *Michael Rittson-Thomas trading as Totara Farms v Davidson* [2013] NZEmpC 39 at [54]

employee's continuation of employment they are required to provide the affected employee with<sup>3</sup>:

- access to information relevant to the decision about the continuation of the employee's employment; and
- an opportunity to comment on the information before a decision is made.

[42] Ms Molloy says that the sudden closure of the restaurant coming so quickly after the deterioration of the employment relationship between her and the Smaills made her feel as if it had been orchestrated simply to get rid of her. She says that the fact the restaurant opened again in October 2012 reinforced her belief.

[43] Ms Molloy says that if she had known that the restaurant was not making money and that the Smaills needed to close it before Easter, when she was expecting it to close, but would re-open in October 2012 she would have been prepared to take leave from February and come back to work in October. However, she did not get that opportunity.

[44] The Smaills say that Ms Molloy was always aware that the restaurant was in a trial period. They say they did not have a plan for how long they would run the trial for because they did not know if it would be financially viable. They purchased what had been the Clay Cliffs Winery in 2009. There were no business records of customer numbers or months of operation.

[45] They say that Ladybird Hill was losing money and that it was not economically viable for the business to remain open. All the employees lost their jobs as a regrettable result of the business closure.

[46] Mr Smaill says that there were no forward bookings for the restaurant after 5 February 2012 and that there had been hardly any clientele in the week leading up to 5 February 2012. He went and talked to the campground and motel owners and they had very few forward bookings, which led him to believe that the restaurant would not have any business either.

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<sup>3</sup> Section 4(1A)(c).

[47] The Smaills knew that they had been losing money every week because Mrs Smaill did the accounts weekly and monthly. They had been trying over the summer to offset the restaurant losses with the cherry money.

[48] Mrs Smaill says that December and January were the best months for the restaurant but expenses were still high overall and they were not making any money.

[49] The Smaills say that daily staff wages for a ten hour day in January/February 2012 were \$1,030.00. They provided figures showing the takings for 26-29 January 2012 averaged over that but figures provided for 2-5 February 2012 amounted to less than the daily wages bill.

[50] The Smaills point out they also had other operating expenses such as power, food, beverages, rates, and cleaning and the restaurant was making a loss even over the busiest period of the year. They have provided the financial statements of the partnership to 31 March 2012 which were prepared for tax purposes. The financial statements show that the restaurant itself made a loss in that year and the business as a whole made an even greater loss. However, Mr Smaill says that at the time they made the decision to close the business they had not discussed that with their accountant, so they did not have an exact knowledge of those figures.

[51] Mr Smaill says that they did not think of consulting the staff about the problem because they thought such a discussion would only have alarmed the staff. Mr Smaill says that they have 20 years business experience and were able to make the decision themselves. He also says:

*It was pretty obvious to staff we didn't have enough people coming through the door.*

[52] The business closed on 5 February 2012. The Smaills say at that point there was no intention to re-open.

[53] After they closed the business Mr and Mrs Smaill put a notice in the Omarama Four Square shop:

***Ladybird Hill** would like to thank all our loyal customers as well as the Omarama business community for their valued support.*

*In the pursuit of excellence we have decided to shutdown to focus on further development of the business and property.*

*We look forward to your continued support.*

[54] Ms Molloy considers the notice signalled that the Smaills always intended to re-open the business after winter, which is what had been discussed with her before she was employed. The Smaills deny that and say at the time they made the employees redundant they had no intention of operating the business again. They say that the reason they put the notice up was because there was a rumour locally that their restaurant staff had quit.

[55] The Smaills say they tried to sell the entire tourism venture, including the restaurant, but were unable to do so. They say it was also impossible to lease the business out due to its lack of profitability. Instead, they re-opened the business, including the restaurant in October 2012. They say that the entire business has been *reopened in a changed business model* and costs have been reduced by Mr and Mrs Smaill both working in the restaurant. The business is now *a more broadly based tourism-type business* with the restaurant as a part of it.

[56] The restaurant will only operate between October and March. There are now only three staff plus the owners for the restaurant as opposed to four staff plus Mrs Smaill. However, they say that the business was still not proving viable in February 2013.

[57] It is hard to argue with the figures provided which suggest that the restaurant was not profitable during Ms Molloy's employment. Based on that information alone it appears to have been a sensible decision, perhaps an unavoidable one, to close the business. It was a genuine business decision and I do not consider that it was a sham decision made to get rid of Ms Molloy. In all the circumstances at the time a decision to close the business was one a fair and reasonable employer could have made.

[58] Mr Campbell accepts that there is usually an obligation to consult employees before making them redundant. However, he submits that this was a new business in a fluid situation and that the inevitable result was going to be the closure of the business. Mr Campbell submits it was not the kind of situation where an employee could make useful input into on-going business model.

[59] It is clear that the Smaills did not provide Ms Molloy with information about their proposed decision to make her redundant before actually doing so. Therefore, they breached their duty of good faith under s. 4(1A)(c).

[60] The Smaills did not consult Ms Molloy and give her a reasonable opportunity to respond to them and take her response into account, as s.103A(3) of the Act would require a fair and reasonable employer to do before making a decision to close the business and make her redundant.

[61] These defects in the process were more than minor and resulted in Ms Molloy being treated unfairly. For example, if Ms Molloy had been consulted it may have been possible for the parties to come to an agreement that rendered the dismissal less problematic for Ms Molloy; for example, if they opened the restaurant for business again they would re-employ her.

[62] Despite the difficult financial position the business was in the way the Smaills acted in making Ms Molloy redundant was not what a fair and reasonable employer could have done in all the circumstances at the time they made the decision to make her redundant. Therefore, Ms Molloy's redundancy amounts to an unjustified dismissal.

## **Remedies**

### ***Lost wages***

[63] Section 123(1)(b) of the Act gives the Authority discretion to order the employer to reimburse the employee the whole or part of the wages or other money lost by the employee as a result of the grievance.

[64] Ms Molloy claims lost wages up to 4 April 2012 when she got another job. Her final pay was for wages owed and for a further 4.2 days in lieu of notice. She was paid all of her holiday pay. The Smaills also paid Ms Molloy \$600.00 in recognition of the fact that she had relocated to Omarama for the job and would be likely to have to move out of Omarama to get further employment.

[65] Ms Molloy claims that she needed to leave Omarama immediately as she had better prospects of finding work in Dunedin. She claims that the cost of relocation was \$300 more than she was paid by the Smaills.

[66] Although Ms Molloy's dismissal was unjustified the redundancy was inevitable in all the circumstances. The cost of Ms Molloy's relocation was not a

result of her personal grievance because it was a genuine redundancy, although the process was unfair.

[67] In these circumstances I consider that the Smaills are not liable for Ms Molloy's loss of wages as even if a more fair process had been followed Ms Molloy would have been made redundant in February 2012 in any event.

### ***Distress compensation***

[68] I accept that Ms Molloy suffered distress and humiliation as a result of her unjustified disadvantages and unjustified dismissal.

[69] I find that Ms Molloy was left confused and uncertain in her employment by the lack of an employment agreement, humiliated by the removal of her managerial duties and was shocked and distressed by the redundancy, coming without any prior warning, and without sufficient information to understand its inevitability.

[70] I order the Smaills to pay Ms Molloy \$4,500 under section 123(1)(i)(c) of the Act to compensate her for the humiliation, loss of dignity, and injury to feelings she suffered as a result of her unjustified disadvantages and dismissal.

### **Contribution**

[71] Having established Ms Molloy has a personal grievance, s.124 of the Act requires me to consider whether she contributed to the situation which gave rise to her grievance, and if so reduce remedies accordingly.

[72] A dismissal by way of redundancy comes about through no fault of the employee. Therefore Ms Molloy cannot be said to have contributed to her own dismissal.

[73] Ms Molloy was not to blame for the failure of the Smaills to supply her with a written employment agreement in a timely manner. Therefore she did not contribute to that unjustified disadvantage personal grievance.

[74] Ms Molloy lost her temper on 3 January 2012 and swore in the kitchen. However, she promptly sought to explain her outburst and to apologise for it. Her outburst was conduct that led to the decision to remove her till reconciliation and staff

management responsibilities. However, I do not consider it so blameworthy that the compensation payable to her should be reduced.

### **Costs**

[75] Costs are reserved. Ms Molloy is legally aided. The parties are encouraged to reach agreement on costs. If that is not possible Ms Molloy may have 28 days from the date of this determination to file a memorandum on costs. The Smailles may have 14 days after that to file a memorandum in response. I note that the Authority is likely to decide costs on the basis of a half of the notional daily tariff of \$3,500 to recognise that the meeting took half a day.

Christine Hickey  
Member of the Employment Relations Authority