

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Storm-Lee Jade Jarvie (Applicant)
AND Zebrax Unlimited Ltd (Respondent)
REPRESENTATIVES Paul Diver, Advocate for Applicant
Brett Cunningham, Counsel for Respondent
MEMBER OF AUTHORITY R A Monaghan
INVESTIGATION MEETING 27 July 2001
SUBMISSIONS RECEIVED: 6 and 8 August 2001
DATE OF DETERMINATION 14 August 2001

DETERMINATION OF THE AUTHORITY

Employment relationship problem

Storm Jarvie says that she and her employer, Zebrax Unlimited Limited (“Zebrax”), reached an agreement varying her employment agreement in a way that amounted to a promotion. The promotion was to a more senior position, and included a pay increase. She says Zebrax purported to withdraw from the binding agreement that had been reached, in circumstances amounting to an unjustifiable action affecting her employment to her disadvantage. She seeks compensation and the reimbursement of lost earnings, but withdrew a claim for reinstatement.

Zebrax says that the parties attempted to negotiate with Ms Jarvie regarding the new position, but that the parties were unable to reach an agreement. In the absence of an agreement the existing arrangement was retained.

Background

In or about June 2000, Zebrax purchased a Pakuranga retail store at which Ms Jarvie worked. Ms Jarvie described her position at the time as ‘second-in-charge’ and she reported directly to the store manager. Later in the year, Ms Jarvie’s hourly rate of pay was increased to \$11.50 and her job title changed to ‘assistant manager’.

In March 2001 the store manager resigned, with effect from Monday 2 April 2001. At about the same time Zebrax was reviewing its management structure in respect of all four retail stores which it operated, and had decided to create one centralised manager’s position with responsibility for the four stores. It saw no need to have a manager in each store, and accordingly some of the substantive managerial duties formerly carried out at the stores became part of the central manager’s position. The most senior employee at each of the stores would be recognised as such but would exercise a supervisory rather than a true managerial role. Zebrax decided as a matter of policy not to include

the word 'manager' in the job titles for those positions, but to designate them 'store co-ordinator' instead.

On Friday 30 March 2001 Pliadis Deetlefs - a director of Zebrax who was also the daughter of the managing director and carried out those duties in her mother's absence - approached Ms Jarvie to discuss the possibility of Ms Jarvie being appointed store co-ordinator in the Pakuranga store. Ms Deetlefs explained the change in the management structure, and handed Ms Jarvie a written job description for the position of store co-ordinator.

Ms Jarvie noted that the position had more responsibility than the position she held at the time, which no doubt was true to a degree but I consider it unlikely that the store co-ordinator position had a similar level of responsibility to that of the defunct store manager's position.

The conversation turned to the rate of pay associated with the store co-ordinator's position. Ms Deetlefs offered an increase to \$12.00 per hour for the first three months, which Ms Jarvie considered too low. She replied that she considered a more appropriate rate to be \$14.00 per hour for the first three months, and \$16.00 per hour once she had established her suitability for the position. Ms Deetlefs indicated that was too high, but said she would discuss the matter with her mother, Shelley McDaniel.

A further matter discussed during that conversation concerned whether Ms Jarvie would be paid a wage or a salary. It seemed at the investigation meeting that all Ms Jarvie really wanted to know was whether she would be paid fortnightly or monthly, and she needed to know this so that she could arrange her financial obligations accordingly. However she did put her concern in that way to Ms Deetlefs or Mrs McDaniel, and appears to have been under the misunderstanding that income is characterised as wages or salary according to whether payment is made fortnightly or monthly. That is not the case.

When Ms Deetlefs said she would discuss with Mrs McDaniel that matter, too, she had in mind the correct definitions of 'salary' and 'wages'. However she also said she was planning to pay Ms Jarvie on a salary basis at the end of her first three months as store co-ordinator, although the amount had not been decided. If she put this to Ms Jarvie at the 30 March meeting then Ms Jarvie either did not hear her or was affected by her misunderstanding of what is meant by 'salary', but it is not necessary to determine this matter as the more relevant aspect of the disagreement about payment concerned quantum.

On 3 April Mrs McDaniel visited the Pakuranga store to meet with two staff members, one of whom was Ms Jarvie. She confirmed the second staff member in a full-time sales assistant's position, then moved to discuss the store co-ordinator's position with Ms Jarvie.

Mrs McDaniel offered Ms Jarvie a rate of pay of \$13.00 for the first month and \$14.00 for the next two months. According to Ms Jarvie's written statement Mrs McDaniel went on to say "... and then a further increase, as they would be looking at the whole business again at that time." Ms Jarvie's written statement goes on to record "I then asked Shelley if she and Plia had discussed whether I would be paid on salary or wages." The discussion also canvassed Ms Jarvie's job title, as Ms Jarvie wanted the word 'manager' included in it, as well as other matters not directly related to the matters presently in dispute. Finally, Ms Jarvie was advised that any pay increase she received would have effect from 2 April. At the end of the meeting Ms Jarvie felt very happy because she believed she had secured her promotion, subject to further clarification of her job title and the frequency of payment.

There was a further meeting between Ms Jarvie and Mrs McDaniel on 5 April 2001. Mrs McDaniel initiated the meeting because she was uncomfortable about progress in the 3 April meeting. She

did not believe Ms Jarvie had given a clear answer on whether or not she accepted the rate of pay or the job title discussed on 3 April, and Mrs McDaniel's perception was that Ms Jarvie believed the company was 'ripping her off' by attempting to downgrade what in reality was still the store manager's position. While Ms Jarvie described the meeting in the relatively straightforward manner set out in the previous paragraph, Mrs McDaniel had perceived a general air of resistance and unhappiness in Ms Jarvie's responses to the extent that she did not perceive that there was a meeting of the minds on the matter of Ms Jarvie's new position.

One of the matters revisited at the 5 April meeting was whether Ms Jarvie would receive a pay rise at the end of the three month period. Ms Deetlefs had at least been planning to employ Ms Jarvie on a salary from the end of that period, while Ms Jarvie had been advocating an increase to \$16.00 per hour. Mrs McDaniel had been uncertain of precisely what had been discussed between Ms Jarvie and Ms Deetlefs regarding payment after the first three months, and as a result she was uncertain in her dealings with Ms Jarvie on the point.

Those strands were drawn together for the first time at the meeting of 5 April. Mrs McDaniel made it clear that the company could not afford to pay Ms Jarvie at the rate of \$16.00 per hour. Zebrax was also considering its position in the light of the possibility of competition from the newly-opening Botany Town Shopping Centre – with scenarios including a rationalisation of its operations by opening at the Botany Town Centre and closing at Pakuranga, a forced closure at Pakuranga because of competitive pressures, or maintaining stores at both Pakuranga and Botany Town Centre. In early April 2001 Mrs McDaniel and Ms Deetlefs did not know what would happen, hence were reluctant to commit themselves to providing Ms Jarvie with a pay increase in early July.

It was in effect common ground that something of this was explained to Ms Jarvie on 5 April. Whether or not Ms Jarvie agreed with or accepted the importance of the factors explained to her is beside the point – the point is whether they were explained and in what context. In those circumstances I accept it is likely Mrs McDaniel at least indicated to Ms Jarvie that she should not expect to receive a pay rise at the end of three months. However I am also prepared to accept that she indicated the matter would be reviewed – whatever she meant by that she knew by then that Ms Deetlefs had been considering moving on to salary-based remuneration. Further, as the arrangement under discussion related only to the first three months it was obvious there would have to be a review at the end of that period in any event.

I am also prepared to accept that Mrs McDaniel told Ms Jarvie that the offer was \$13.00 per hour for the first month and \$14.00 per hour for the next two, or nothing. Ms Jarvie felt let down and under pressure.

By Friday 6 April Mrs McDaniel still believed Ms Jarvie had not responded to the offer she was being asked to consider. That afternoon she contacted Ms Jarvie for another reason but also attempted to arrange a meeting in order to finalise the store co-ordinator's position.

The exchange was not constructive. It was common ground that Ms Jarvie's initial response to the request for a meeting was that she wished to seek advice on her position, although there was a dispute over whether Ms Jarvie used the words 'legal advice' or merely 'advice'. Mrs McDaniel assented and ended the call, although she said at the investigation meeting that she was unsure whether Ms Jarvie meant she wanted advice on her position with reference to her job at the Pakuranga store, or whether she wanted advice as to her rights.

I do not believe there were reasonable grounds for Mrs McDaniel's uncertainty over what Ms Jarvie meant, and for similar reasons I do not believe anything turns on whether Ms Jarvie said she wanted 'legal advice' or simply that she wanted 'advice'. On Mrs McDaniel's evidence, on 5 April in

particular Ms Jarvie had already indicated strong feelings of dissatisfaction with what was being offered, and Mrs McDaniel was also taking the view that matters between Zebrax and Ms Jarvie had not been finalised. In those circumstances a wish on the part of either party to seek relevant advice of whatever kind could be expected.

In any event Mrs McDaniel phoned Ms Jarvie back only a few minutes after the previous call. During that conversation she told Ms Jarvie that regardless of whether Ms Jarvie was seeking advice, she was not prepared to leave unresolved matters concerning the supervision of the store. She denied saying she wanted Ms Jarvie's decision by 5 pm that day or the position would be filled by someone else, but I consider it likely that at the very least she indicated to Ms Jarvie that she was not willing to brook further delay in the resolution of the matter.

Both Mrs McDaniel and Ms Jarvie alleged that the other person was shouting during the conversation, and both denied shouting themselves. Mrs McDaniel admitted being angry and Ms Jarvie's description of her level of resentment at the time leads me to conclude it was unlikely that her end of the conversation was dispassionate. Thus the conversation ended in a manner unsatisfactory to both parties and with nothing having been resolved.

By letter dated 9 April 2001 Mrs McDaniel wrote to Ms Jarvie as follows:

"I regret that it has clearly become necessary to end our discussion relating to the position of store co ordinator at Pakuranga. I record that no final agreements - were reached. ..."

The letter went on to explain that the company now believed Ms Jarvie was not suitable for the store co-ordinator's position. Ms Jarvie replied by letter dated 10 April 2001, raising a personal grievance in respect of the preceding discussions and saying among other things:

"I believe we had a temporary verbal agreement on my promotion with the finer points of wage and title to be discussed...."

Subsequent meetings aimed at settling the matter were unsuccessful.

Whether a binding agreement was reached

The first step in determining this matter concerns the application of basic principles of contract, namely was Ms Jarvie made an offer which she then accepted in terms that were accordingly binding on both parties. From the background I have just set out I extract the facts which are directly relevant to this part of my determination

Ms Deetlefs commenced the process of negotiating a new position with Ms Jarvie, offering:

- . a position designated store co-ordinator, at a level somewhere between the existing assistant manager's and manager's positions;
- . a rate of pay of \$12.00 per hour for the first three months;

Ms Jarvie's immediate response was to:

- . take the view that the new position was little different from the store manager's position;
- . seek a rate of pay of \$14.00 for the first three months with an increase to \$16.00 once she had proved herself.

I have mentioned also the discussion about whether payment would take the form of salary or wages, but that matter was clearly left unresolved at the end of the meeting, as was the question of the rate of pay itself. Indeed I do not consider that any agreement was reached on anything during that discussion, nor did I understand there to be any argument to the contrary. The meeting became a preliminary discussion in which the matters for further negotiation were identified, and the parties put their respective positions to each other.

Negotiations progressed during the meeting of 3 April with Mrs McDaniel offering \$13.00 for the first month, then \$14.00 for the next two months. I consider it likely that Mrs McDaniel also offered Ms Jarvie the prospect at least of a review and possibly of a further increase at the end of the three month period. However Mrs McDaniel did not specify what that might be and Ms Jarvie had no grounds for assuming it would be to \$16.00 per hour or any other figure.

When considering this aspect of the negotiating process I looked for evidence that Ms Jarvie indicated to Mrs McDaniel her agreement to the above offer. I am not satisfied that she did so. This is particularly so because contemporaneous documentation shows that her status and seniority were significant issues to her, and it is clear that her view of the payment she should receive was closely allied with her view that the position being offered to her was in reality a store manager's position. Accordingly one of the matters that was an important part of her negotiating stance at the time was that the word 'manager' appear in her job title, but that requirement was contrary to Zebrax policy and was not agreed to.

Thus while I am prepared to accept that Ms Jarvie may have felt happy at the end of that meeting, and even that from her point of view she had reason to be, because she did not communicate her acceptance of the Zebrax offer I do not accept that a concluded agreement was reached during the meeting. Moreover, it is clear there was no meeting of the minds regarding the position in that Ms Jarvie considered it a true management position and expected a rate of pay to reflect that. Neither of those factors was resolved during the meeting.

In the absence of any concluded agreement following the 3 April meeting, Mrs McDaniel was entitled to withdraw any offer of an increase in pay after the first three months. The offer put to Ms Jarvie at the 5 April meeting was that she would receive a rate of pay of \$13.00 for the first month and \$14.00 for the next two, with a review after that.

Again I have looked for evidence that Ms Jarvie conveyed her acceptance of this offer to Mrs McDaniel at the time. Ms Jarvie did not give any indication in her brief of whether she said to Mrs McDaniel that she accepted the offer, but instead described her reaction as being a feeling that she had no option but to accept. The reason she gave for feeling she had no option but to accept was concerned with her view of the number of full time staff Zebrax employed at the time, and her assessment of her prospects in that light was not necessarily accurate. She did not raise that concern with Mrs McDaniel on 5 April.

The way in which Ms Jarvie described her reaction leads me to conclude that a great deal went on in her head, but little of it was conveyed to Mrs McDaniel during the relevant discussions. In addition, bearing in mind that Ms Jarvie believed an agreement had been concluded on 3 April, it would not be surprising if she saw no need to say any more on 5 April concerning her agreement and instead felt 'pushed into a corner'.

Finally I am aware that Ms Jarvie began carrying out supervisory duties on 2 April 2001. However I do not believe that in itself means that a concluded and binding agreement had been reached on her promotion. None of the major terms and conditions associated with the new position had been finalised at that date, and although both parties probably expected that they would be the fact is that

no such agreement was ever reached. At best, until agreement was reached, Ms Jarvie was in a position equivalent to ‘acting store co-ordinator’.

Similarly I do not consider determinative the fact the company wrote on 6 April to its suppliers saying: “Congratulations on being promoted to Amanda and Storm, who will be supervising our Manukau and Pakuranga stores respectively.” Plainly the comment was premature, although on 6 April the parties were still attempting to negotiate the terms and conditions of Ms Jarvie’s new position. Had I formed a less clear view of the content of the discussions during 3 and 5 April in particular I might have interpreted the comment differently, but since I am satisfied that the meetings were inconclusive to the extent that no agreement was finalised I am not prepared to interpret the statement in the letter of 6 April to different effect.

Because I do not believe a concluded agreement had been reached by the end of 5 April, I conclude that as a matter of contract ZebraX was entitled to withdraw all offers on 9 April.

Existence of a personal grievance

Ms Jarvie’s personal grievance is based on s 103(1)(b) of the Employment Relations Act 2001, and I set out that provision as the basis for my further conclusions:

- “ ... personal grievance means any grievance that an employee may have against the employee’s employer ... because of a claim –
- (a) ...
 - (b) that the employee’s employment, or 1 or more conditions of the employee’s employment ... is or are or was ... affected to the employee’s disadvantage by some unjustifiable action by the employer.”

No agreement was reached on the store co-ordinator’s position, and Ms Jarvie’s position remained as it was, so no argument based on a loss of the benefits associated with the store co-ordinator’s position can succeed.

Nevertheless there is one aspect of the way in which the negotiations were handled that remains capable of amounting to a disadvantage grievance. That is, there was more to the breakdown in the negotiations than the mere conclusion by one or both parties that it would not be possible to reach agreement on the matters under negotiation. Here it was the employer’s view of Ms Jarvie’s conduct during the negotiations that led it to decide she was not suitable for the position.

To assess the significance of that, I refer to the judgment of the Court of Appeal in **Victoria University of Wellington v Haddon** [1996] 1 ERNZ 139. In that case Mr Haddon had been appointed to a short term contract which expired. He sought to remain in employment by applying for a permanent position, but was not appointed. The Court concluded this was outside the definition of a disadvantage grievance since Mr Haddon’s existing position (the short term contract) was unaffected by the failure to secure appointment to the permanent position. Those facts are clearly distinguishable from the facts of the present case, but the Court made further obiter statements about the possibility of finding a personal grievance where a permanent employee does not secure a promotion, saying:

- “In that situation however the employee’s employment continued nonetheless. Where opportunities for promotion are an element in a particular employment relationship the employee can reasonably expect fair treatment when those opportunities arise. Unfair treatment may then disadvantage the employee in his or her employment. The same cannot be said of a situation in which a promotion in the normal course to a new position is not contemplated in the employment relationship [because it is a short term one]” (p 149 lines 8 – 14)

I believe Ms Jarvie’s was a situation in which she was entitled to expect fair treatment because an opportunity for promotion had not only arisen in the normal course of her employment but she was

in the process of negotiating the associated terms and conditions. I do not believe she was accorded fair treatment because the employer used her behaviour during the negotiations as a reason for not proceeding with them, without warning her that it was intending to do so or giving her an opportunity to consider her position and respond on that matter.

On that limited ground I conclude that Ms Jarvie's employment was affected to her disadvantage by an unjustifiable action on Zebrax' part.

There were other complaints raised in the context of actions constituting unjustifiable disadvantage, and these can be summarised as arising out of the way in which the negotiations with Ms Jarvie were conducted, and the aftermath of the failure of the negotiations. Rather than address those arguments individually, I set out my view of what was happening during the attempts to negotiate.

I believe the respondent's approach was hampered by the dual involvement of Ms Deetlefs and Mrs McDaniel, particularly as the evidence suggests that Mrs McDaniel was not fully briefed in advance on the matters she was attempting to negotiate with Ms Jarvie. Her need to refer back to Ms Deetlefs for clarification, together with Ms Deetlefs' absence from subsequent conversations with Ms Jarvie, contributed to the breakdown in communication which occurred. Secondly the respondent did not appreciate that Ms Jarvie's understanding of what amounts to a true managerial role was less than complete, and the evidence indicates that the proposed changes to the managerial structure were not adequately explained to her. This may have been as a result of the separate involvement of Ms Deetlefs and Mrs McDaniel, and it may have been that neither appreciated the way in which Ms Jarvie was relying on mere position descriptions in order to back up her view of her position.

Correspondingly I believe that Ms Jarvie's approach was hampered by her lack of appreciation of the difference between day to day supervisory activities, and a management position which on the one hand confers a relatively high degree of authority to make business decisions matched with a corresponding level of responsibility and accountability. These things were not clear from the bare position descriptions on which she was relying. Secondly I do not believe there were reasonable grounds for her conclusion that she was being ripped off. The feeling contributed unnecessarily to the resentment she felt, and contributed to the acknowledged breakdown in communication between the parties. Finally, I do not accept that her behaviour during the meetings was as calm and measured as she portrayed it. Her suspicion and resentment showed.

This is not the sort of thing that I believe is encompassed in the mutual obligations of parties to an employment relationship to deal with each other in good faith. It is more illustrative of how communication can break down either without fault on either side, or with similar degrees of fault on both sides. For similar reasons I do not believe there has been any misleading or deceptive conduct or any breach of the good faith obligations.

There was also oblique reference in the applicant's submission to the requirements of s 64 of the Employment Relations Act. These requirements apply where no collective employment contract covers the work to be done by an employee, and include obligations regarding the provision of a copy of an intended agreement before it is entered into and to allow an employee to seek advice. No argument was put forward as to whether the section applies where an employee is already in employment and is, in effect, in negotiation about enhancing an existing position and increasing the applicable rate of pay. In fact, s 64(5) provides: "In this section, **employee** means a prospective employee." As Ms Jarvie was not a prospective employee I do not accept any submissions based on obligations of the kind set out in s 64.

I reject as misconceived the remaining submissions regarding the bargaining process.

Remedies

As reinstatement has been withdrawn, and there are no grounds on which to order reimbursement of remuneration lost as a result of the grievance, the only available remedy remaining is compensation under s 123(c)(i) of the Act.

I have found that Ms Jarvie has a personal grievance on the ground that she was disadvantaged in her employment by an unjustifiable action, but on a very limited ground. Hence although I accept that the failure of the negotiations has led to some humiliation and embarrassment for Ms Jarvie, not all of that is attributable to the ground on which I have found her grievance exists. Moreover her own behaviour did contribute to the outcome.

Taking these factors into account, I order that Zebrax pay to Ms Jarvie the sum of \$1,500 under s 123(c)(i) of the Act.

Costs

Costs are reserved.

The parties are invited to agree on the matter for themselves. If they are unable to do so they shall have 14 days from the date of this determination in which to file and exchange memoranda on the matter. If either wishes to reply to anything in the other's memorandum, there shall be a further three working days from the date of receipt of the relevant memorandum in which to file and exchange such reply.

R A Monaghan
Member of Employment Relations Authority