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Jellie v Hospitality Services Limited (Christchurch) [2018] NZERA 1168; [2018] NZERA Christchurch 168 (19 November 2018)

Last Updated: 24 November 2018

IN THE EMPLOYMENT RELATIONS AUTHORITY CHRISTCHURCH

[2018] NZERA Christchurch 168
3024992

BETWEEN	TIMOTHY JELLIE Applicant
A N D	HOSPITALITY SERVICES LIMITED Respondent

Member of Authority: James Crichton

Representatives: Applicant in person

Takeshi Ito, Counsel for respondent Investigation Meeting: 31 October 2018 at Greymouth Date of Determination: 19 November 2018

DETERMINATION OF THE EMPLOYMENT RELATIONS AUTHORITY

Employment Relationship Problem

[1] The applicant (Mr Jellie) filed a statement of problem on 28 February 2018 alleging “deliberate and systematic bullying and harassment” during his employment by the respondent at the Kingsgate Hotel in Greymouth (“Kingsgate”).

[2] There was a very truncated attempt at mediation which was unsuccessful and the matter then proceeded to the Authority.

[3] In a telephone conference that I conducted with the parties on 20 August 2018 Kingsgate stoutly maintained that there was no case to answer because they had investigated Mr Jellie’s complaints during the employment and found no evidence of the alleged bullying. Indeed, they contended that, if anything, Mr Jellie was the initiator of challenging behaviours in the workplace rather than the victim of those behaviours.

[4] I made clear during the telephone conference that the matter would proceed to investigation because Mr Jellie was entitled to have his claims investigated by the Authority.

[5] I directed that the parties were to file and serve their evidence on a timetable that was agreed and both parties complied appropriately with those arrangements.

[6] However, Mr Jellie's statement of evidence proceeded not on the footing that his case was about bullying and harassment but rather on the basis that he had been unjustifiably dismissed. Unsurprisingly, that raised an immediate argument from Kingsgate that the claimed basis for this purported personal grievance was raised out of time, was not consented to by the employer, and in the absence of authorisation from the Authority that it could proceed out of time, it was unable to be considered.

[7] Notwithstanding those claims by the employer, I chose to give Mr Jellie the benefit of a hearing on the totality of the matters that were raised by him whether strictly speaking within time or not, given that the Authority's investigation in to the original employment relationship problem of bullying was to proceed in any event.

[8] Mr Jellie was appointed to the role of bar supervisor at Kingsgate and commenced the performance of those duties on 2 October 2017. The employment came to an end by way of a summary dismissal on 18 January 2018. That summary dismissal was for cause.

[9] Mr Jellie worked part-time in that role and was guaranteed a minimum of 15 hours per week working in accordance with a roster that allocated hours to Mr Jellie and to other employees for the same role.

[10] I note in passing that Kingsgate has an extensive suite of employment policies and documents, that its new employees are formally inducted into their roles and that the documentation provided to them to evidence the policies and procedures of the employer are formally signed for as seen and understood by the employee during that induction.

[11] The induction and the recruitment interview were all managed by Mr Graham Collings who was Kingsgate's general manager. Mr Collings had worked at this hotel since 1998 and had extensive previous experience in the hospitality industry at management level.

[12] During Mr Jellie's employment at Kingsgate, there were eight incidents which Mr Collings was required to deal with.

[13] The first four incidents were dealt with informally by Mr Collings and did not result in any formal disciplinary process.

[14] The first such incident on 21 October concerned an allegation that Mr Jellie had spoken disrespectfully about a female co-worker.

[15] Mr Collings counselled Mr Jellie that it was not important that staff liked each other but it was important that staff were courteous and respectful towards each other.

[16] The second incident barely a week later involved a complaint from a patron in the bar when Mr Jellie was working. The patron complained about the way that Mr Jellie spoke to him. Mr Collings investigated this complaint, spoke to Mr Jellie in that regard, and then responded to the complainant apologising if Mr Jellie had caused offence but noting (quite properly) that Mr Jellie was responsible for conduct and behaviour in the bar and his intention in speaking to the customer was to control the use of inappropriate language by the customer.

[17] Incident three took place a month later and involved another altercation between Mr Jellie and co-workers. Mr Collings investigated, had another informal discussion with Mr Jellie, formed the view that Mr Jellie was contrite about the matters in question and in consequence, Mr Collings decided to take no further action. It is common ground that Mr Jellie told Mr Collings that he would not regret giving Mr Jellie another chance.

[18] Notwithstanding that, there was a further incident on 11 December 2017 where Mr Jellie sustained a complaint from a corporate client about the attitude he had exhibited while he was bar manager, that the person concerned said that the service was the worst she had ever experienced, that she felt intimidated by Mr Jellie's behaviour and that she would not return to the hotel if he was on duty.

[19] This matter was dealt with informally; Mr Jellie acknowledged that he had suggested that the customer concerned was being "precious". Mr Collings told Mr Jellie that this would have to be the last complaint that the hotel received about Mr Jellie.

[20] In incident five, it is alleged that Mr Jellie was overheard by a co-worker saying to a guest that a competitor hotel was a better place to stay than the Kingsgate and two days later there was yet another incident (incident six) in which a client complained that Mr Jellie had asked if two female guests were "hot".

[21] That same day there was another incident involving allegations about Mr Jellie this time concerning his attitude to not balancing his till and his refusal to sort it out himself but rather insisting that other staff should do it for him.

[22] There was a disciplinary meeting formally constituted on 8 January 2018. Mr Jellie's responses to these allegations were described by Mr Collings as both defensive and unapologetic.

[23] During the course of the meeting, Mr Jellie produced the first of two letters alleging he was being bullied and harassed by other staff. This is the letter dated 6 January 2018.

[24] The disciplinary meeting was adjourned to enable Mr Collings to consider matters further and conduct further inquiries and before it could be reconvened there was yet another incident wherein it is alleged that Mr Jellie called a co-worker a poaka (Te Reo for pig) and that he had verbally abused that staff member and others and spat on the ground near a car belonging to a staff member as they were leaving.

[25] Accordingly Mr Collings convened another meeting on 12 January 2018, discussed suspending Mr Jellie on full pay, obtained Mr Jellie's views on that and then proceeded with the suspension, on the footing that there would be a formal further disciplinary meeting on 17 January 2018.

[26] At that 17 January 2018 disciplinary meeting, Mr Jellie produced his second letter alleging bullying and harassment, this one dated 8 January 2018 but in response to the allegations most recently levelled at him, Mr Jellie had nothing further to say. Mr Jellie was then dismissed for serious misconduct and his last day was 18 January 2018.

Issues

[27] Two fundamental questions arise in this matter:

- (a) Was Mr Jellie unjustifiably dismissed from his employment? (assuming it is available to him to raise that claim now); and
- (b) Was Mr Jellie bullied and/or harassed by co-workers during the employment?

Can Mr Jellie raise a personal grievance for unjustified dismissal?

[28] It is apparent from what I have already said that the statement of problem filed by Mr Jellie made no mention whatever of an alleged unjustified dismissal and proceeded exclusively on the footing that he had suffered bullying and harassment in the workplace.

[29] Indeed, it was not until Mr Jellie filed his statement of evidence that an unjustified dismissal was alleged. That statement of evidence, for the first time, alleged that Mr Jellie's dismissal by Kingsgate was unjustified.

[30] The statement of evidence from Mr Jellie was filed on 28 August 2018; that is fully seven months after the dismissal and thus well outside the 90 days the law gives a grievant to raise an alleged personal grievance.

[31] There is no evidence before me to suggest that Mr Jellie raised a personal grievance for unjustified dismissal earlier than the date of the statement of evidence being filed. So, literally the first occasion on which the employer is asked to consider an alleged unjustified dismissal is seven months after the events complained of.

[32] The law on this matter is clear; Parliament has decided that employees must raise their grievance within 90 days of the events complained of in order that they can be dealt with reasonably proximately to the events complained of and not languish unattended, as might be the case if the matter is allowed to drag on.

[33] The only basis on which personal grievances can proceed outside of that 90 day window is where the employer agrees or where the Authority has granted leave for the matter to proceed, notwithstanding it is outside the 90 day window.

[34] In this particular case, the employer Kingsgate does not agree to the matter being considered and there is no application before me to grant leave to allow the personal grievance to be considered.

[35] All of that means that the allegation of a personal grievance by way of an unjustified dismissal is not able to be

considered. However, as I have endeavoured to make clear throughout this proceeding, I think Mr Jellie is entitled to have some consideration because he has undertaken this proceeding entirely without legal advice or even the advice of a lay-advocate, and while he is plainly an intelligent man, he is the first to concede that he is no lawyer.

[36] Accordingly, I intend to proceed to consider whether Mr Jellie might have had a personal grievance for unjustified dismissal if such a claim had been raised within time or even if he had applied for and been granted leave to pursue his grievance out of time.

[37] For the avoidance of doubt, I have concluded that even if there were a proper legal basis on which the grievance could proceed notwithstanding that it is outside the 90 day window, I am satisfied on the evidence before me that a fair and reasonable employer in Kingsgate's position could have decided to dismiss Mr Jellie for serious misconduct. It follows from that conclusion that even if Mr Jellie were able to get over the significant hurdle that his claim for personal grievance for unjustified dismissal is out of time, he would not be able to succeed with that claim in any event.

[38] I observe first that the test for justification set out in the law requires me only to identify whether the decision that Kingsgate made in the particular circumstances in which they made it was a decision that a fair and reasonable employer in Kingsgate's position could have made. It is important to note that Kingsgate does not have to satisfy me that its decision was the only decision that a fair and reasonable employer would have made but rather that the decision that Kingsgate made was one of the range of decisions that any fair and reasonable employer in Kingsgate's position could have made.

[39] Moreover, I need to be clear that even if I were persuaded on the evidence that the decision that Kingsgate made was not a decision that I would have made if I were in Kingsgate's position, that in itself is not enough to overturn the decision Kingsgate has made. It is not proper for the Authority to put itself in the place of the employer; the test requires that the Authority consider only what a fair and reasonable employer in Kingsgate's position could have done in the particular circumstances of the case.

[40] The reasons that I have reached the decision I have begun with the thorough and detailed employment documentation provided by Kingsgate in respect to its employment of Mr Jellie.

[41] It is evident that there is a well-developed personnel policy, that that policy is specifically provided to new employees, that new employees sign as having received that policy and understood it and in the particular circumstances of this case, not only do I have before me documentary evidence of Mr Jellie having signed all of the requisite employment documents but also Mr Jellie's straightforward acknowledgement in his evidence at my investigation meeting that he had in fact received and signed for and understood the employment policies and Code of Conduct of Kingsgate before undertaking any of his duties.

[42] Secondly, it is apparent on the evidence that Mr Collings went out of his way to give Mr Jellie the benefit of the doubt. There were four incidents from the commencement of the employment on 2 October 2017 to 11 December 2017 which were all dealt with by Mr Collings in an informal way without any disciplinary consequence.

[43] It is evident from Mr Collings' evidence that he kept expecting Mr Jellie to respond positively to the opportunity or further opportunity that Mr Collings was giving him, but always to no avail.

[44] On the face of it, within the space of not much more than two months employment, four incidents had taken place, two of which had reflected Mr Jellie's apparently brittle relationship with other staff, one, while broadly disclosing Mr Jellie's motive as being sound, still necessitated an apology from Mr Collings to a disgruntled client, and the final one again necessitated an apology to a client for Mr Jellie's behaviour.

[45] To summarise this period of the employment in another way, within the space of the first two and a half months of the employment, Mr Jellie had caused the employer concern on four separate occasions but on each of those occasions, Mr Jellie had been given another chance, but despite those continuing concessions by the employer, Mr Jellie's conduct continued to cause the employer concern.

[46] Incident five took place on December 29 where it is alleged that Mr Jellie was overheard by a work colleague saying to a client that another hotel in town was a better place to stay than Kingsgate.

[47] Three days later incident six took place. Mr Jellie asked a client telephoning to make a booking for two women, if the booking was for persons who were "hot".

[48] Incident seven took place on the same date as incident six and involved Mr Jellie's failure to balance his bar

till, his refusal to see that as part of his duties, and his inappropriate language directed at other staff.

[49] Mr Jellie was invited to a formal disciplinary meeting to consider incidents five, six and seven and Mr Jellie was asked for his explanation about the incidents. I have received and considered Kingsgate's notes of that meeting. Mr Jellie advised me that he had taped the meeting and he wanted me to listen to the tape. I demurred; Mr Jellie's evidence was that the minutes of the meeting were "substantially" correct and on that footing it seemed to me unnecessary for me to hear any recording of the meeting. I observe that the notes of this disciplinary meeting, and of the subsequent disciplinary meeting, are set out in a very formal templated style which I consider reflects the care Kingsgate takes with its processes.

[50] Mr Jellie did not accept all of the allegations made against him at that first disciplinary meeting. He tried to pass some off as a joke or an exaggeration and he called some staff colleagues, liars and accused others of bullying him.

[51] Mr Jellie maintained that the hotel's culture was dysfunctional and he defended his actions and claimed to be a team player. Almost in passing, Mr Jellie said that he had been sacked from a previous job within three months; that surprised Mr Collings because that had not been disclosed by Mr Jellie on his job application form.

[52] The meeting was adjourned to enable Mr Collings to consider what he had heard. Amongst other things, Mr Jellie had tabled a letter alleging bullying and harassment. I deal with that in the next section of this determination.

[53] Shortly after the first disciplinary meeting which took place on 8 January 2018, there was a further and final incident involving Mr Jellie. It is alleged that Mr Jellie called a

colleague a rude name, that he abused that colleague and other persons when they were leaving the hotel and spat on the ground near a staff member's car.

[54] A second disciplinary meeting was held on 12 January at which Mr Jellie was suspended from duty on full pay. I am satisfied the process undertaken to effect the suspension was lawful; no issue was taken about the suspension by Mr Jellie.

[55] The third and final disciplinary meeting took place on 17 January 2018. Again, Mr Jellie taped this meeting. But again he appears to have been satisfied with the notes of that meeting as well and so I declined to listen to the tape of the meeting.

[56] At the second meeting, Mr Jellie produced to the employer another letter. This one was dated 8 January 2018 and it repeated and elaborated upon the allegations that he had earlier made in his previous letter, concerning bullying and harassment.

[57] Mr Jellie was dismissed from the employment at the third disciplinary meeting on 17 January and his employment concluded the following day on 18 January 2018.

[58] Put shortly, there were eight serious incidents brought to Kingsgate's attention each involving Mr Jellie over a period of three and a half months. Mr Collings' evidence (which I accept) was that he had never had so many complaints about one employee before.

[59] The nature of the complaints taken in their totality concerned both interactions with fellow staff and interactions with customers. Sadly the common denominator was Mr Jellie.

[60] Of the eight incidents, Mr Collings was prepared on the first four occasions to give Mr Jellie the benefit of the doubt. Mr Collings struck me as being a sensible and level headed manager and there is no doubt that he has significant industry experience. His evidence was that he had never seen anything like this before.

[61] Looking only at the second group of four incidents (the ones that resulted in a disciplinary process) again is fair to observe that some of those incidents involved complaints about Mr Jellie's engagement with staff and others involved Mr Jellie's interaction with customers.

[62] At the disciplinary meetings, it is plain on the evidence before me that Mr Collings sought explanations and was effectively given a range of responses from Mr Jellie including

some acknowledgement of some of the allegations made but also including blanket denials, allegations that staff were "liars"

and finally that far from any negative behaviour being directed by him toward others, he was in fact the victim of bullying and harassment.

[63] It is absolutely clear on the evidence that Kingsgate did not make a hasty decision to dismiss; indeed, what happened was that the first half of the eight incidents were let go and Mr Jellie was given the benefit of the doubt in each case.

[64] Eventually though Kingsgate determined that they had to act and the sequence of incidents around the turn of the year were finally the cause of a disciplinary response which resulted in Mr Jellie's dismissal for serious misconduct.

[65] The notes of the final meeting make clear that Mr Jellie was given a fair opportunity to be heard but really offered no viable explanation for his behaviour. In that case, it is difficult to see how the employer could do anything other than find the allegations against Mr Jellie proved on the balance of probabilities, and the assessment, that the conduct was serious misconduct, would appear to follow inexorably.

[66] I conclude that the outcome was an outcome that a fair and reasonable employer in Kingsgate's position could have arrived at after the conducting of a property inquiry.

[67] It is very clear that Mr Collings carefully investigated each of the eight incidents, took statements from parties and carefully assessed what Mr Jellie said in reply where Mr Jellie made an adequate response.

[68] In all the circumstances, I am unable to find any basis for Mr Jellie to complain that his dismissal for serious misconduct was in any way unjustified. It seems to me available to a good and fair employer in Kingsgate's position to evaluate Mr Jellie's behaviour as serious misconduct having regard to the very clear enunciation of the principles of serious misconduct in Kingsgate's personnel policy, a copy of which Mr Jellie had been provided with and had acknowledged receiving and reading. A conclusion that the appropriate penalty for the breach was dismissal, is, I am satisfied, one of the conclusions that a fair and reasonable employer could arrive at.

Has Mr Jellie been subjected to bullying and harassment?

[69] The evidence for Mr Jellie being bullied or harassed by co-workers is slight indeed. He maintained in his oral evidence that he was the victim rather than the perpetrator. He put into evidence the two letters that were provided to the employer alleging bullying and harassment, the first dated 6 January 2018, the second dated 8 January 2018. Both these letters simply state generic complaints about bullying and harassment. Neither contains any detail of the time, date and place that one would expect and indeed need, in order to investigate.

[70] Nor did Mr Jellie take the obvious opportunity to develop his evidence around bullying and harassment in the statement of evidence that he prepared for my investigation meeting. Indeed as counsel for Kingsgate correctly observes in his submissions, the statement of evidence prepared by Mr Jellie is in stark contrast to the statement of problem Mr Jellie had earlier filed in the matter. The statement of problem was concerned exclusively with an allegation of bullying and harassment but again in broad and generic terms without specificity, attaching as well, the two letters which Mr Jellie provided to Kingsgate during the employment.

[71] Conversely, the statement of evidence Mr Jellie prepared does not refer at all to bullying and harassment but opens a new front by claiming unjustified dismissal, the issue that I have dealt with in the preceding section of this determination.

[72] Mr Jellie maintains that he consistently raised allegations that he was being bullied when he met with Mr Collings during the series of incidents scattered through the employment history. Mr Collings denies that the subject was referred to regularly and indeed, at the investigation meeting Mr Jellie maintained that he had first raised the claim that he was being bullied in the meeting that he had with Mr Collings on 23 October after the first incident, two days before. Mr Jellie maintained in his evidence that Mr Collings' advice throughout, whenever Mr Jellie raised the issue of his being bullied, was to encourage Mr Jellie "to put up with it".

[73] While there is disagreement about at what stage the issue of bullying was raised between Mr Jellie and Mr Collings, it is clear that by the meeting the two men had about a

month after the first incident following on from incident three, that bullying by others of Mr Jellie was raised.

[74] So by the end of November 2017 it is clear that Mr Jellie had at least raised the allegation to the employer that he was being bullied. All Mr Jellie's two letters do is reiterate the same claim two months after the first notification to the employer that an allegation of bullying was being made.

[75] Kingsgate has comprehensive bullying procedures in its personnel policies which I have carefully reviewed and I am satisfied comply appropriately with best practice.

[76] The evidence from Ms Kim-Marie Rixson, the Human Resources Vice President for Kingsgate, is that Kingsgate had a zero tolerance approach to bullying in the workplace and had taken disciplinary action in the past against employees who were found to have bullied others.

[77] Ms Rixson's evidence is important in this case because she is very clear that, contrary to Mr Jellie's allegations that his complaints of bullying were neglected by the employer and were not investigated at all, in fact once the complaints were made, the complaints were, in accordance with Kingsgate's policy, escalated directly to head office in Auckland where the human resources people, led by Ms Rixson, provided guidance to Mr Collings the general manager on the site.

[78] In this particular case, when the bullying allegation was escalated by Mr Collings to head office, Mr Collings was directed to conduct a full inquiry.

[79] This involved Mr Collings talking to the protagonists in the various incidents that Mr Jellie was involved with during the short employment and then providing that material to Ms Rixson for final analysis and determination.

[80] Plainly, in the absence of proper documented claims identifying who was said to be the bully, when events complained of were supposed to have happened and where, it is always going to be challenging for an employer to reach definitive conclusions.

[81] In this particular case, Ms Rixson determined that there was no need to progress matters further having discussed the matter carefully with Mr Collings and reviewed the

evidence Mr Collings had collected from both clients and staff involved in the eight incidents that Mr Jellie was implicated in.

[82] Indeed, Kingsgate took the view that far from Mr Jellie being bullied, if there was indeed bullying going on, it was Mr Jellie who was bullying others.

[83] Kingsgate also considered whether the culture in the workplace was unhealthy. Mr Collings' evidence on this point is pretty graphic. He told me that the hotel was a relatively small and discrete operation with a total of forty employees only, that many of these employees did not work full time and that as a consequence of the small size of the employer, and the long tenure of many of the staff, if there was something unwholesome going on within the workplace he would expect to know about it.

[84] As I have already made clear, I am satisfied with the careful investigation that Mr Collings undertook in relation to all of the eight incidents that Mr Jellie was involved in, and I do not accept Mr Jellie's characterisation of Mr Collings as being biased against him.

[85] Indeed, I think the evidence is to the contrary; Mr Collings bent over backwards to give Mr Jellie the benefit of the doubt treating four of the incidents that Mr Jellie was involved with informally and without disciplinary consequences, notwithstanding their seriousness, in order to give Mr Jellie an opportunity to settle into his role.

[86] Put shortly, I have not been persuaded that there is any evidence of an unwholesome culture in the Kingsgate workplace or indeed any evidence that Mr Jellie was being bullied by workmates or potentially by clients.

Determination

[87] Mr Jellie has not persuaded me that he has any claim against Kingsgate and accordingly his various allegations cannot be taken any further.

Costs

[88] Kingsgate seek a contribution to their costs on the daily tariff. The effect of this might be that Mr Jellie would have to pay to Kingsgate the sum of \$4,500 were that sum to be

awarded. \$4,500 is the Authority's current daily tariff rate, and in cases where there is no argument for that amount to go either up or down, where a matter takes a normal hearing day to take the evidence, the daily tariff can apply.

[89] Mr Jellie made no comment about the matter of costs at the end of my investigation meeting and I want to give him the opportunity to do that if he wishes.

[90] He should let me have any submissions that he wishes to make in writing within fourteen days of the date of this determination. He can provide any information he wishes to my Authority officer.

[91] I would be pleased to have Mr Jellie's view about his ability to pay costs and any other matters that he thinks relevant in respect to the imposition of costs.

[92] Assuming that Mr Jellie does take the opportunity to make a submission on costs, I give Kingsgate an opportunity to respond to those submissions and allow a further fourteen days from the date that Kingsgate receive Mr Jellie's submissions for them to file submissions in reply.

[93] I would observe without deciding the matter, that Kingsgate might think it appropriate to allow costs to lie where they fall; Kingsgate are in a better position to bear that cost than I fancy Mr Jellie may be in meeting any costs award and it might assist the parties to get appropriate closure having regard to the small community in which the subject hotel operates and Mr Jellie's continued involvement in that community.

James Crichton

Member of the Employment Relations Authority

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