

ATTENTION IS DRAWN TO THE ORDER
PROHIBITING PUBLICATION OF CERTAIN
INFORMATION

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2019] NZERA 87
3030945

BETWEEN QWU
Applicant

AND LSG SKY CHEFS NEW ZEALAND
LIMITED
Respondent

Member of Authority: Christine Hickey

Representatives: Applicant in person
Daniel Erickson, counsel the Respondent

Investigation Meeting: 25 and 26 October 2018 in Christchurch

Submissions received: Orally from QWU at the end of the investigation meeting and
in writing on 3 December 2018
7 November 2018 from the Respondent

Date of Determination: 19 February 2019

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] On 16 March 2018, in his resignation letter QWU raised personal grievances based on unjustified disadvantage and constructive dismissal. These are his claims in the Authority.

[2] LSG Sky Chefs New Zealand Limited (LSG) denies that it unjustifiably disadvantaged QWU or caused him to resign.

Issues

[3] The issues I need to determine are:

- (a) Was QWU unjustifiably disadvantaged by:
 - (i) being moved to the night shift after raising concerns about his fellow employees treatment of him on 7 January 2018?
 - (ii) LSG proposing to issue a written warning for his refusal to follow a reasonable work instruction?
 - (iii) LSG alleging that his work related injury/ies may have been as a result of a failure to take reasonable care?
 - (iv) LSG requiring QWU to formally recognise that his role as a demi chef required him to provide direction to other staff and take responsibility for food quality documentation before it would complete the INZ1113 document to allow QWU to obtain a further work visa for his work with it?
- (b) Did all or any of those actions, or any other actions, amount to LSG breaching any of its statutory or contractual duties to QWU so seriously that it was reasonably foreseeable to LSG that QWU likely would resign from his employment as a result?
- (c) If so, what remedies are available to QWU?
- (d) Was there any blameworthy contribution by QWU to the situation giving rise to his personal grievances so that remedies should be reduced accordingly?
- (e) Should QWU's real name be prohibited from publication?
- (f) Should any costs be paid by one party to the other?

Background to the investigation meeting

[4] QWU's first language is not English. He represented himself. When he provided his statement of problem he included a written comprehensive timeline of events and a number of relevant documents. I did not require QWU to lodge a formal statement of his evidence as I relied largely on the documentation he had lodged with his statement of problem. I was grateful for the services of an interpreter to assist me to make sure that LSG and I fully understood QWU's case and his response to LSG's case. All witnesses from whom I heard evidence during the investigation meeting took a promise to tell the truth and answered questions from me and from the other party.

Prohibition from publication

[5] Clause 10 of Schedule 2 of the Employment Relations Act 2000 (the Act) gives the Authority the power to order that a party's name not be published.

[6] QWU has asked for his name to be withheld from publication. LSG has no objection to that. QWU also asked for LSG's name to be withheld from publication. However, LSG wants its name published.

[7] QWU suffered and as at the date of the investigation meeting continued to suffer poor health, which he attributes to LSG's treatment of him. I consider that the publication of his name or of any details of his health would be disadvantageous to QWU, particularly since he indicated to me he intends to continue in his career as a chef in New Zealand.

[8] Therefore, I prohibit his name and any identifying details from publication. I have not included many details about his poor health in this determination.

[9] Conversely, there are no grounds on which LSG's name should be withheld from publication.

Background facts

[10] QWU was in New Zealand working as a chef on a working visa for another employer when he applied for the job with LSG as a demi chef. In his previous role he worked as a senior chef de partie, which is senior to a demi chef. LSG assisted him to obtain a variation to

his work visa to allow him to work for it as of 10 October 2017. His visa was due to expire on 1 March 2018.

[11] QWU reported to the production manager in Christchurch, George Oliver. Mr Oliver is a trained chef and manages the day-to-day work of the hot kitchen, assembly and pot wash teams in Christchurch. He supervises 35 to 40 people who work in those three teams each day.

[12] Mr Oliver's office is beside the kitchen area and he also spent a lot of time in the kitchen himself. There are two production supervisors and two senior chefs who report to Mr Oliver. The production supervisors managed the day-to-day running of the teams.

[13] LSG says that a demi chef has a supervisory component to the role. QWU's job description sets out as a key accountability that he should "direct the work of commis and catering assistant to achieve production requirements of the allocated bench".

[14] QWU and all of the other kitchen staff had to adhere to LSG's hazard and critical control point (HACCP) procedures and documentation. QWU had been trained in the completion of the documentation.

QWU's first shoulder injury

[15] QWU worked on the morning shift from October 2017 until January 2018. On 31 December 2017, QWU injured his shoulder in the chiller while at work when a basket of produce fell on him. QWU finished work and attended the accident and emergency department of Christchurch hospital. He was diagnosed with a contusion to his upper arm or shoulder and a sprain of his rotator cuff. He was off work for some time.

[16] On 7 January 2018, while still off work, QWU sent Mr Oliver an email with a number of complaints about the team he worked with and a description of how the accident came about.

[17] One of the complaints was that one of his fellow employees had drawn an obscene drawing of male genitals on a list of ingredients that QWU had made for himself. He also said that members of the team did not help him and seemed to be united against him.

[18] When Mr Oliver arrived back from annual leave on 8 January 2018 he noticed that QWU was not there for work and texted asking him to contact him as soon as possible. It was only at that point that he became aware that QWU had an injured shoulder and was off work on ACC.

[19] Slightly later that morning, Mr Oliver texted QWU again to say that he had just seen his email containing the complaints and would like to arrange a time to meet with him to discuss what was in the email.

[20] On 9 January 2018, QWU met with Mr Oliver and another LSG employee. They discussed both how QWU's shoulder became injured and the issues he had raised in his email. They discussed possible solutions to the difficulties with the morning team. Mr Oliver suggested that QWU could move to the night shift which would take him out of the problematic team and would also allow him to have reduced time pressures.

[21] Mr Oliver had been concerned during December that QWU was not working as well or as quickly as expected and had offered him support. However, he says QWU had not taken Mr Oliver up on his offer of support.

[22] QWU agreed to move to the night shift, although as part of these proceedings he says that this really did not suit him because it meant that he could not drop off and pick up his wife from her work. I accept that he did mention that as a difficulty of working the night shift.

[23] He also says that he should not have been moved but the bad behaviour of his fellow workers should have been dealt with instead. However, he did agree with Mr Oliver that he would move to the nightshift. He also said that he would like to come back to work as soon as his shoulder was recovered enough to allow him to do that.

[24] QWU was certified as unfit for work from 1 January until 25 January 2018 because he could not do any lifting with his right arm. Mr Oliver and QWU arranged to have a meeting on 22 January to plan for QWU's return to work on 25 January 2018.

QWU seeks support from LSG to renew his work visa

[25] While QWU was off work on ACC he applied for a renewal of his work visa that was due to expire on 1 March 2018. HE needed LSG's support for the visa renewal as his visa was linked to his employment at LSG.

[26] On 12 January 2018, QWU emailed Mr Oliver to ask for a copy of the full employment agreement that he signed in October 2017 so he could send it to Immigration New Zealand (INZ). In addition, he asked that LSG fill in a new INZ1113 form through LSG's human resources team. He asked Mr Oliver to get HR to send that form back to INZ along with a scanned copy of the full employment agreement.

[27] The INZ1113 form is entitled the Employer Supplementary Form which is for employers to complete who have offered a position to a person from overseas who is applying for a work visa.

[28] As part of that form the employer is required to prove that it has made genuine attempts to recruit New Zealanders for the role offered and to attach evidence of that, such as dated copies of advertising or records of its engagement with a recruitment company. The evidence also has to show where the advertising was placed as well as the frequency of the advertising and the duration of the advertising. The employer is also required to attest to whether it has made efforts to train New Zealanders to fill the positions available and to explain why any New Zealanders considered for the role were not suitable.

[29] On 15 January 2018, Mr Oliver emailed QWU to say that he would forward his request relating to the visa to the HR team that day.

[30] On Tuesday, 16 January 2018, QWU emailed Mr Oliver again saying that he had not yet received the required files from HR and that if he didn't get them by the following day he would have to talk to INZ again.

[31] On 17 January 2018, Mr Oliver replied to QWU that the HR manager was currently on annual leave and that when he was back at work he would look into the issue for QWU. However, Mr Oliver advised QWU to talk to INZ and arrange an extension on the date.

[32] On the same day, QWU emailed Mr Oliver to say that INZ had given him another five days to update all of the information requested. Mr Oliver wrote to him on the same day

asking when his visa expired and advising QWU that the HR manager was on leave for all of that week and would be unlikely to do anything for him until mid to late the following week. On the same day, QWU replied that his visa would expire on 1 March but he always tried to refresh it earlier to avoid the problem of not being able to work while the visa was being processed.

[33] Mr Oliver responded thanking QWU for clarifying and saying that he would do what he could to get what he needed to him shortly.

[34] On 25 January 2018, QWU again emailed Mr Oliver saying that he had let INZ know that the HR manager will be back on Wednesday. He asked Mr Oliver to double check with the HR manager and to get them to send the scanned copy of his IEA and the completed version of INZ1113.

[35] In addition, QWU asked Mr Oliver some questions about the pay he was receiving while he was away and who was going to cover his pay from 8 to 24 January and who would cover his medical costs until then.

[36] It appears that LSG did not respond to this query. By that time ACC had the responsibility of paying QWU 80% of his weekly income while he remained off work because of his injury.

[37] On 19 February 2018, QWU wrote again to Mr Oliver reminding him that he first wrote to him about his immigration requirements on 12 January. He noted that the HR manager had not yet sent him anything and was beginning to wonder whether HR was going to support him in renewing his visa. He said he only had just over a week left on his visa and after 28 February he would be on a temporary visa only and he understood he wouldn't be able to work. He wrote "but anyway, one month was wasted for nothing".

[38] Mr Oliver responded that he had discussed the issue with HR on numerous occasions and thought that they had sorted it out. He asked QWU to confirm what documentation he required and said he would chase it up. He wrote that if the visa was not renewed before 1 March LSG would be concerned as well.

[39] On Tuesday, 20 February 2018, QWU wrote again to Mr Oliver and said he still had not got any documentation back from the HR manager. Mr Oliver responded seeking

clarification about what documents QWU still required. QWU replied to confirm that he needed a new version of the INZ1113 filled in as well as a copy of his employment agreement.

13 February incident

[40] On 13 February 2018 QWU was working on the night shift in the hot kitchen. LSG was under staffed that day because two senior chefs were away. One of the senior chefs had to cancel his appearance at work late in the day because his partner was admitted hospital. Mr Oliver arranged for two experienced chefs from a temping agency to come in and work with QWU. They had previously worked for LSG. However, Mr Oliver was concerned that they would still require some direction and that LSG would also need someone to verify that all the HACCP documentation was completed and handed in.

[41] The completion of the HACCP documentation is a food safety requirement. It allows all products to be traced and contains a record of how the food was prepared, including cooking times and temperatures etc.

[42] Every LSG chef on a shift completes and signs their own documentation and at the end of the shift the documents are handed to whoever is supervising the shift. That person checks that each document is complete and puts them in an allocated area in Mr Oliver's office. Mr Oliver arranged for one of the production supervisors to stay late. She and he agreed that once she left QWU, as a demi chef, would be able to supervise the temporary chefs for the remainder of the shift.

[43] Not long before he went home at around 6:00 p.m., Mr Oliver told QWU what was required of him. He told him he would need to supervise the work of the two temporary chefs and because the senior chef was away he would need to verify that all their HACCP documentation was completed and handed in at the end of the shift.

[44] Mr Oliver explained to QWU that he would be responsible for ensuring that the meals were completed according to the specifications and appropriately chilled, labelled and placed into the holding chiller.

[45] However, QWU told Mr Oliver that he did not consider that he should be supervising the others and that he could not sign off the others in relation to the HACCP documentation.

Mr Oliver explained to QWU that his role as a demi chef included supervision of others and reminded him that he had been trained in the completion of the HACCP documents. However, QWU said he could not follow Mr Oliver's instructions and that "he would not fill in the form for others because it was not part of his role".

[46] Mr Oliver explained to QWU that he was not being asked to fill in the form for others but to collect them from the temporary chefs at the end of the shift and to make sure that they had been filled out properly. QWU refused to do that.

[47] Mr Oliver said that he told QWU that he had given him a reasonable work instruction and that if he did not comply "we would have a problem". QWU says Mr Oliver asked him if he "wanted to stay or wanted to go".

[48] At some point towards the end of that shift QWU reinjured his shoulder, originally injured on 31 December 2017. Another member of staff took QWU to a local 24 hour GP clinic for treatment. As a result of the re-injury QWU was certified as unfit to attend work for the following seven days.¹

Letter inviting to a meeting

[49] Mr Oliver was concerned about QWU's refusal to follow his instructions on 13 February 2018. As a result of QWU's refusal Mr Oliver considered that the production supervisor, who stayed later than her shift required, and the temporary chefs were placed under undue pressure. He discussed his concerns with Mr Dempsey.

[50] Mr Dempsey assisted Mr Oliver to write a letter inviting QWU to a meeting on 27 February to investigate two allegations.² The first allegation was that he refused to provide basic supervision for staff operating under him in the kitchen on 13 February. The second was that he failed to take reasonable care when handling product leading to his injury that night. LSG labelled that as a breach of QWU's duties as an employee.

[51] LSG informed QWU that refusing to carry out a reasonable work instruction was serious misconduct and could result in the termination of his employment. Finally, LSG

¹ Initially there was some confusion as the second shoulder injury was recorded as a separate injury. However, all parties now agree that it was a re-aggravation of the 31 December 2017 injury.

² The letter from Mr Oliver was mistakenly dated 21 November 2018, however it was issued on 21 February 2018.

advised him that it could not complete the INZ1113 document until the disciplinary process was complete. That is because:

This document is a declaration by LSG Sky Chefs and requires us to describe your role. The allegation of your refusal to carry out a key function of your role includes the claim by you that supervision and leadership are not a part of your job function. If true, this would contradict our understanding of your position and the basis of our declaration. We advise you of this to ensure there is no uncertainty about why this document will be delayed.

[52] LSG included a copy of QWU's demi chef job description with the letter inviting him to the disciplinary meeting.

The disciplinary meeting

[53] The disciplinary meeting took place on 6 March 2018. QWU had prepared a detailed written response to LSG's allegations. He was accompanied by two lawyers, one was an employment specialist and the other was an immigration law specialist, who was also able to act as an interpreter.

[54] In his written response, QWU refuted the allegations that were made against him and stated that he believed LSG was treating him unfairly in particular by using his immigration status to his disadvantage intentionally. He wrote that he felt like his honesty and integrity had been used against him and did not consider that any form of disciplinary action was reasonable in the circumstances. He also wrote that the process had been incredibly stressful for him and had significantly affected his mental and physical health. He said that he was not sleeping or eating properly, was suffering from headaches and was anxious about his career and his visa situation.

[55] Mr Dempsey started the meeting by stating that LSG was not "looking to get rid" of QWU. He also stated that there was a nationwide shortage of chefs. He stated there was not a predetermined outcome that LSG wanted, other than an agreed positive outcome.

[56] Mr Dempsey also clarified that LSG did not suspect QWU of injuring himself on purpose, although that is what he had taken the allegation to be. Instead, Mr Dempsey said that LSG was responsible for QWU's safety at work and that he also had a responsibility to ensure his safety. Mr Dempsey said that he had been told QWU had been "lifting quite heavy items" which led to a relapse in his injury.

[57] QWU strenuously refuted any allegation of not taking enough care in his work leading to a relapse in his injury.

[58] He also stated that it had been unfair, given that he had only been on the night shift for a few weeks, of LSG to expect him to step up and be a “hero” and that he did not have enough experience to do that. In addition, he said he could fill in his own HACCP documentation but that he could not:

.. fill in the form for others, I can't. I can supervise them to finish the form, supervise them to sign their name and complete the form. That I can do.

[59] There was an agreement that QWU may have misunderstood what he was being asked to do, which was to make sure the temp chefs completed their own HACCP documentation, when he understood he was being asked to fill in their documents as well as his own.

[60] So far as his readiness to supervise other chefs on 13 February, QWU said that he never refused to do that but pointed out that he could only teach them to do things he already knew to do. He was concerned that if any unusual situation arose he was not equipped to deal with that as he had not been trained for all eventualities. For example, if there was not enough of one ingredient he could usually ask the production supervisor what to substitute. However, without someone senior to him he would not know what to do and was reluctant to get it wrong. He was happy to take more responsibility “but there's things that I really don't know”.

[61] He stressed that he was prepared to take a leadership role but needed to be adequately trained to do so.

[62] Mr Dempsey confirmed that LSG had been advertising for QWU's role and so could show a clear advertising trail to INZ to support his visa application. However, he was reluctant to put his name to the INZ1113 if LSG and QWU did not agree on what QWU's role entailed.

[63] In relation to QWU's injury, Mr Dempsey clarified what happened on the evening of 13 February to make the injury recur. In addition, LSG tried to understand what, if any, therapy QWU had been advised to have for his shoulder. The parties discussed whether QWU should have sought physiotherapy as his doctor had recommended.

[64] ACC had tried to contact QWU by telephone. However, at the investigation meeting QWU told me that he had some calls from unknown numbers to his phone but he would not answer any calls from unknown numbers or return calls because he thought they would be scam calls.

[65] At the meeting, Mr Dempsey sought QWU's agreement for him to contact ACC to arrange a return to work programme for QWU and to ensure his shoulder was fully recovered. Mr Dempsey directed QWU to go back to his doctor and to take their advice. For example, if the doctor suggested physiotherapy QWU should get physiotherapy. Mr Dempsey undertook to work with QWU's case manager at ACC to work out how and when QWU could return to work, and to make sure that he would be comfortable and safe and working within any physical limits he had.

[66] Towards the end of the meeting, Mr Dempsey said now that he and Mr Oliver had heard from QWU and understood his concerns they would have to have a discussion about what happened next. However:

... we're certainly not in a position here where we're terminating anyone's employment. I'm on a balance where we end up in terms of that. This is practical stuff we have to address and probably you and I need to do that more closely than anything else but that's about your work visa. As I said in the letter that I sent, your work visa is predicated on the demi chef role. The demi chef [role] is predicated on that leadership, supervision and direction of staff. We have to have that component right. I don't expect an answer from you now around that. I think that's a discussion that really, we need to get really clear understanding from you [QWU] as to what you want to do. Our commitment is that you come back and say, definitely want the demi chef role and definitely understand it has those components. We can then say, we can provide you with some hands on training, some guidance around those functions, so that you grow more comfortable with them. You're going to have to do them to get comfortable. ...

You will make mistakes, you will get it wrong, you will get it right but you need to be able to test things. That's what I need from your side, to understand, so that I can then know we've got good understanding.

[67] Mr Dempsey finished the meeting by saying:

Let's be very clear, we don't want you to leave, we want you to stay. We need to have an agreement about how it works.

[68] QWU's employment lawyer undertook to come back to LSG with a confirmation about whether QWU was prepared to accept his demi chef role includes some supervisory

components. On that basis, LSG undertook to complete the INZ1113 form once it had confirmation that QWU was “comfortable with that role function.”

After the meeting

[69] Prior to the meeting Mr Dempsey had enquired of QWU’s ACC case manager whether ACC was aware whether QWU was receiving any treatment or intervention. The case manager replied that QWU had not applied for any weekly compensation or any treatment costs since 11 January 2018.

[70] After the meeting, Mr Dempsey wrote to the case manager about QWU’s injury and LSG’s concern that it was not being treated with any urgency yet its impact was ongoing. He also asked ACC to ensure there was a managed return to work process put in place, once QWU was able to return to work, to ensure QWU and his manager would be aware of any medically indicated restrictions.

[71] On 7 March 2018, Mr Dempsey sent a letter to QWU stating LSG’s conclusions about its allegations following the meeting and hearing QWU’s explanation.

[72] In relation to QWU’s injury and re-aggravation of that injury and his slow recovery LSG considered that was partly due to his avoidance of interaction with ACC. However:

We ... accept that you are relatively new to the workforce in New Zealand and that your uncertainty about your rights and responsibilities under ACC may have led to some of your decisions.

... was largely the result of knowledge about New Zealand’s medical system and expectations.

We will not be taking further action on this allegation, but we do require you to seek medical clearance before returning to work, and we will be working with ACC to put in place a return to work process that you will be required to comply with.

[73] In relation to the 13 February incident, LSG concluded that although it may have been the first time QWU was required to provide direction to other staff and take responsibility for the documentation related to their bench, it was a reasonable direction for him to take that level of responsibility that evening. Mr Dempsey pointed out that a demi chef was paid more per hour than a commis chef to reflect the relative level of responsibility a demi chef has.

[74] Mr Dempsey wrote that in the meeting “we advised we were considering a written warning for refusal to carry out a reasonable work instruction.” LSG proposed to give QWU a written warning for the 13 February incident:

This lower level disciplinary outcome is based on the mitigation that you had some real uncertainty about your ability and knowledge to perform the required tasks and manage unexpected situations that you thought might arise. You also had some difficulty communicating this on the night.

[75] LSG proposed the warning would remain in force for six months from 6 March 2018.

[76] Mr Dempsey invited QWU to respond if he had any concerns about the proposed outcomes by midday, 9 March 2018, otherwise LSG would assume QWU accepted the proposed outcome.

[77] Also in that letter, LSG asked QWU to communicate his willingness and:

... ability to take up the full duties of a demi-chef. Without this being agreed, we are unable to complete the [INZ] documents. ... we await your response to this.

[78] In relation to QWU’s claim that LSG’s allegations had caused him stress, depression and upset, LSG responded that it accepted that the allegations may have been upsetting but that it considered it had dealt openly and in good faith towards him and would continue to do so. LSG considered that QWU’s advisers should have been able to mitigate some of the stress and anxiety he felt. It also denied that it was punishing him for his injury, as he felt it was. Instead, LSG said that it was working with ACC to get him his full entitlements and actively supporting him to return to work safely. It said it was committed to continuing to do that.

[79] On 9 March 2018, QWU’s solicitor asked for an extension to give feedback because she was still in the process of obtaining instructions from QWU and there were “communication barriers”. On 13 March 2018, in response to a query from Mr Dempsey as to when LSG would hear QWU’s response, his solicitor told LSG that she would be in touch as soon as she could.

[80] On 15 March, QWU’s solicitor undertook to call Mr Dempsey later in the day. She responded that she had been able to talk to QWU but that he was still unsure of his position with respect to the proposed disciplinary action and that the stress was contributing to his

inability to think clearly. She asked for one more day to allow QWU to consider his response and notified LSG that he was going to see his doctor the following day and would get a medical certificate.

[81] On 15 March QWU's lawyer sent a medical certificate that recorded that QWU had consulted him on 11 January because of ongoing shoulder pain due to his work-related injury. In addition, QWU consulted his doctor on 17 February and 7 March 2018:

... presenting with features in my opinion suggestive of depression, anxiety and somatisation triggered by work-related conflicts.

Resignation

[82] On 16 March 2018, QWU's solicitor wrote to LSG in response to the proposed outcomes in the 7 March letter. She wrote that QWU did not accept the proposed disciplinary action and considered that the actions of LSG, including the disciplinary process and the decision to issue him with a written warning were not the actions of a fair and reasonable employer acting in good faith. She wrote that those actions caused a significant amount of stress for QWU and had meant he had lost all trust and confidence in LSG. She told LSG QWU was seeking medical care for the impact the stress has had on his health.

[83] QWU said that he was left with no option but to resign from his employment. He raised grievances of constructive dismissal and unjustified disadvantage.

[84] In relation to the immigration documentation, QWU said that LSG's refusal to provide him with the document he needed for his visa application was not the action of a fair and reasonable employer. He remained employed in his position as demi-chef and the disciplinary process did not affect that so there was no reason to refuse to complete the immigration documentation. That effectively prejudiced his ability to remain in the country, was unjustified and put him under significant stress.

LSG's response to resignation

[85] On 26 March 2018, LSG replied that it did not accept that QWU had grounds for a personal grievance. In addition, it maintained the proposed actions it had earlier outlined. It encouraged QWU to remain an employee and withdraw his resignation. It confirmed that it would complete the immigration documentation as soon as he accepted the demi chef position

description in full. It gave him until midday 29 March to take advice and withdraw his resignation, if he wished to do so.

[86] On 29 March 2018, QWU's solicitor advised LSG that he did not wish to withdraw his resignation and that she would make arrangements for mediation. She also advised LSG that QWU was on an interim visa. That was issued on 22 February 2018, and allowed him to remain working for the same employer and in the same position as his previous work visa.

[87] LSG replied on 5 April that it was concerned that QWU had misled it during the disciplinary process by continuing to claim that a component of his stress arose from his lack of legal work status.

[88] QWU's solicitor replied that QWU had not known that he had an interim visa until he was advised of that by his lawyer on 26 February 2018. However, the uncertainty of his visa status coupled with his work-related stress that had been arising since late 2017 placed significant stress on him, particularly because if his visa application is declined he and his wife will need to move back to China. An interim visa is not a guarantee that a further work visa will be issued.

Was QWU unjustifiably disadvantaged by being moved to the night shift?

[89] QWU says that he was disadvantaged by being moved to the night shift. He says he was no longer able to take his wife to work and was unaware of any process that LSG took to deal with his complaints against his former co-workers on the earlier shift.

[90] LSG says that there was no actual disadvantage to QWU in any of his terms and conditions of employment. He retained the same role and was paid the same amount.

[91] LSG says that Mr Oliver made the decision to protect QWU from any harassing or bullying behaviour towards him from employees on the earlier shift.

[92] It also says that since it had no information from QWU on who had made the drawing, it met with the whole shift group and spoke to them about LSG's view that their behaviour was unacceptable and that no similar behaviour was to be repeated.

[93] In addition, LSG says that QWU agreed with Mr Oliver about the transfer to the night shift being appropriate when he spoke to him in person and then subsequently by text message.

[94] At the investigation meeting, QWU said that he did not want to work on the night shift but felt he had no option but to agree with Mr Oliver. I do not accept that. If that was the case I would have expected him to say so to Mr Oliver and certainly not to follow up his oral agreement with an agreement by text the following day. Saying that he had no option but to agree with Mr Oliver, yet agreeing, cannot be an excuse to later allege Mr Oliver's action was unjustifiably disadvantageous to him. In fact, in a text the next day to Mr Oliver he wrote:

... appreciate your precious time talk with me. I am not going to involve any party, I work for the company and managers who I trust ...

[95] In addition, QWU said at the investigation meeting that he knew exactly who it was that had drawn the offensive picture. However, he had never told LSG who it was. He had known at the time he made his complaint and when he had the meeting with Mr Oliver. He chose not to reveal that to LSG. That limited LSG's ability to deal with the problem properly.

[96] In any event, I do not consider QWU was disadvantaged in his employment by LSG's reaction to his complaint. LSG acted quickly to meet him and hear about his complaints in person. It also acted appropriately by removing him from the environment in which he was potentially being harassed and bullied. LSG's behaviour was of the kind a fair and reasonable employer could have undertaken in all the circumstances at the time. Its behaviour was justified.

Was QWU unjustifiably disadvantaged by LSG proposing to issue a written warning?

[97] There is no question that a written warning on an employee's file is a disadvantage to them in their employment. However, I need to establish whether the proposed written warning, for a six month period, was unjustified.

[98] QWU's refusal to undertake the directions given to him by Mr Oliver on 13 February 2018 were that he could not fill in the temp chefs' HACCP documentation for them and that he should not be required to supervise them that night.

[99] At the disciplinary meeting LSG confirmed that Mr Oliver had not asked QWU to fill in the HACCP documents for the other chefs, merely to ensure that they completed the documents themselves. At the disciplinary meeting QWU communicated that he could have supervised the temp chefs filling in their forms but he thought he had been asked to fill them in for them, which he could not do.

[100] The main problem he had on the day was that he did not consider it fair to give him so much responsibility on the shift, given that he had only been on night shift a couple of weeks.

[101] In QWU's response to the allegations he alleged that supervision of chefs under him was not the same as leadership and direction of chefs under him. He did not think it was reasonable to expect him to "act up" in that supervisory role.

[102] The relevant key accountabilities in the demi chef job description are that a demi chef is required to:

- Direct that the work of commis and catering assistant to achieve production requirements of the allocated bench;
- Assess and maintain food quality for all products produced in the allocated bench;
- Ensure completion of food safety documentation in the allocated bench;
- Train commis and catering assistants in correct techniques.
- Any other duties or tasks assigned to you by your supervisor/manager.

[103] The Online Oxford Dictionary definition of the word "direct," used as a verb, is to "supervise and control" or "control the operations of" or "govern or manage." LSG asked QWU to direct (meaning to supervise and manage) the work of the temp chefs on that evening.

[104] I consider that request was reasonable of LSG, in the very unusual conditions it found itself in on the night shift on 13 February 2018. It directed QWU to supervise the temp chefs, that is, to direct their work to make sure they achieved the production requirements of the allocated bench.

[105] It was also reasonable for LSG to instruct him to ensure the temp chefs completed the food safety documentation properly. Insofar as that requirement was concerned, I consider

that there were some communication difficulties experienced by QWU that night in understanding exactly what it was that Mr Oliver was asking of him in relation to the HACCP documents.

[106] LSG conducted a fair process in respect of the allegation that it made that QWU had refused a reasonable and lawful instruction. It put the allegation to QWU, it met with him and his representatives to hear his explanation. It took his explanation into consideration when deciding to propose a written warning for a limited period of time. Further, it gave QWU the opportunity to respond to its proposal and extended the time within which it required to hear from him.

[107] LSG's actions were those a fair and reasonable employer could have undertaken in all the circumstances at the time. Its actions were justified.

Was QWU unjustifiably disadvantaged by LSG alleging that his injury may have been as a result of his failure to take reasonable care?

[108] After hearing from QWU and his representatives LSG dropped this allegation. It did not propose any disciplinary action.

[109] LSG confirmed to QWU both in the meeting and in its letter of 7 March 2018 that it did not think that he caused himself an injury on purpose, which is what he felt LSG had alleged.

[110] LSG clarified that it considered that QWU's actions inadvertently led to him aggravating his existing condition. However, it accepted that he was relatively new to the workforce in New Zealand and that some uncertainty about his rights and responsibilities in relation to ACC may have led to some of his decisions.

[111] It directed him to go back to his doctor and to follow the doctor's advice about what rehabilitative treatment he needed.

[112] LSG also committed to working with ACC to get QWU back to work as soon as he was medically fit to work.

[113] I accept that QWU was upset by what he understood the allegation to be, and strongly refuted it. However, once LSG accepted that he had not intentionally aggravated his existing

shoulder injury, and understood the progress of his claim/s with ACC it dropped the allegation. There was no residual disadvantage to QWU in his employment from the allegation.

[114] LSG's approach in putting its concern to QWU and listening to his explanation was fair and reasonable. Its actions were not unjustified.

Was QWU unjustifiably disadvantaged by LSG requiring him to accept all aspects of his role before it would complete the INZ1113 document?

[115] I accept that the uncertainty QWU must have felt, at least leading up to 26 February 2018, when he was informed that INZ had issued an interim visa to allow him to remain working for LSG, was stressful and unpleasant for him.

[116] However, at the disciplinary meeting on 6 March 2018, LSG informed QWU and his lawyers that it had been making progress by advertising for New Zealand demi chefs for the role in which QWU was employed. An employer filling in an INZ1113 form needs to be able to certify that it has taken reasonable steps to obtain a New Zealand citizen or resident to undertake the role, before INZ will grant a work visa for a particular role. The advertising process takes some time, and is a large part of what the employer needs to be able to prove.

[117] Another part of the form requires the employer to list the type of work, duties and responsibilities for the role and the skills and competencies required. LSG was justified in making sure that QWU understood and agreed with the demi chef job description.

[118] LSG was justified in requiring this before it completed the form. Provided that QWU did agree with the job description for the role he had by then been undertaking for five months, there would have been no disadvantage to him in his employment.

[119] Also, at the disciplinary meeting, Mr Dempsey had been very clear with QWU what LSG required of him as a demi chef and had offered to train and support him to ensure he felt comfortable with the level of responsibility it required of him.

[120] QWU's lawyer put it to LSG that it was unfair to require this agreement via its 7 March 2018 letter, when the letter did not also offer any of the support and training LSG had discussed in the meeting.

[121] I do not consider that to have been an aspect of LSG's dealings with QWU that was unjustified in all the circumstances. QWU remained injured and off work and there remained an urgency to get the INZ1113 completed. Insofar as LSG knew, at that stage, QWU's visa had expired and he could not come back to work as at that date because of that, even if he was not injured.

[122] Even if QWU experienced that requirement as a disadvantage, I do not see how it could reasonably and objectively be held to be one. QWU wanted to work for LSG in New Zealand as a demi chef. LSG wanted QWU to work for it as a demi chef. QWU was merely required to agree that he understood all of the responsibilities a demi chef had working for LSG before LSG would support his application for a new work visa.

[123] LSG's action was not discriminatory and was justified in all the circumstances at the time.

Was QWU constructively dismissed?

[124] QWU's claim of constructive dismissal is that LSG's actions led to a total breakdown in the trust and confidence he needed to have to remain working for LSG. For that to be the case, LSG would have to have breached a statutory or contractual duty to QWU, which was so significant that it was reasonably foreseeable to LSG that he would resign as a consequence.

[125] In his letter of resignation he gave as his reason for resignation the amount of stress he was under because of the disciplinary outcome proposed and LSG's actions before any allegations were made as well as the process LSG used in relation to the allegations.

[126] The most significant implied duty in an employment relationship is to maintain a relationship of trust and confidence. For a breach by an employer to be of the kind that can lead to a constructive dismissal it must be a repudiatory breach. That is, it must be the kind of breach that makes it clear to the employee that the employer does not intend to be bound by the employment contract, and will not perform it fully or consistently in the future.³

³ *NZ Woollen Workers IUW v Distinctive Knitwear NZ Ltd* [1990] 2 NZLR 438.

[127] In *Wellington Clerical Workers IUOW v Greenwich* Justice Williamson observed in describing this type of constructive dismissal:⁴

It is essential to examine the actual facts of each case to see whether the conduct of the employer can fairly and clearly be said to have crossed the border line which separates inconsiderate conduct causing some unhappiness or resentment to the employee, from dismissive or repudiatory conduct reasonably sufficient to justify the termination of the employment relationship.

[128] QWU was clearly unhappy with LSG. His evidence was that he was depressed because of work stress caused by LSG's behaviour and allegations towards him and that the disciplinary process was the last straw. However, while LSG's behaviour towards him overall caused him unhappiness and resentment it did not amount to dismissive or repudiatory conduct.

[129] I have not found any of QWU's claimed unjustified disadvantage grievances to be proved. Therefore, they cannot form a basis for the unjustified constructive dismissal claim.

[130] Apart from the claims I have already dealt with as personal grievance claims there are no other allegations QWU has made about LSG having breached any of its duties to him as his employer.

[131] None of LSG's actions above made it reasonably foreseeable to it that QWU would resign. LSG had made it very clear to him that it wanted to retain his services.

[132] LSG offered not to act on his resignation and to allow him to change his mind. If he did not consider he would ever feel confident enough to undertake the duties LSG required of a demi chef it offered to engage him as a commis chef.

[133] At the investigation meeting, QWU told me the main reason for his resignation was that he needed the work visa and did not want to be on an interim visa, because it gave no guarantee that he would get a work visa. Although LSG had not completed and submitted the INZ1113 form prior to 22 February 2018 when INZ issued the temporary visa to QWU, it had been undertaking the required advertising and collecting the evidence it needed to support his visa application.

⁴[1983] ACJ 965, at page 975.

[134] I consider QWU resigned for reasons connected to his visa status in New Zealand that in his mind made a temporary visa too unstable for him to continue working for LSG under the conditions it wished to continue engaging him under. However, LSG was justified in carrying out the disciplinary process, which was a fair and reasonable one, and in issuing a written warning and asking QWU to confirm that he accepted all of a demi chef's duties.

Conclusion

[135] QWU resigned and was not unjustifiably dismissed. His claims are dismissed.

Costs

[136] Generally speaking, the unsuccessful party to Authority proceedings, in this case QWU, can be expected to make a contribution to the successful party's legal costs.

[137] If LSG wishes QWU to pay towards its legal costs it should attempt to seek agreement from QWU to pay costs. If that is not possible, LSG has 28 days from the date of this determination to make submissions on costs. QWU then has a further 14 days to reply to LSG's request for costs.

[138] The starting point for consideration of costs is \$4,500 for the first day of an investigation meeting and \$3,500 for the second day. However, I am also able to take into account a party's financial position. If QWU objects to any LSG application for costs on the basis that he cannot afford to pay then he will need to give me written evidence of his income, his savings and his financial outgoings along with his submissions.

Christine Hickey
Member of the Employment Relations Authority