

**IN THE EMPLOYMENT COURT OF NEW ZEALAND
AUCKLAND**

**I TE KŌTI TAKE MAHI O AOTEAROA
TĀMAKI MAKĀURAU**

**[2024] NZEmpC 129
EMPC 82/2023
EMPC 40/2023**

IN THE MATTER OF a challenge to determinations of the
 Employment Relations Authority

BETWEEN CARRINGTON RESORT JADE LP
 Plaintiff

AND STACEY ROY
 Defendant

Hearing: 22 April 2024
 (Heard at Whangārei)

Appearances: W Tan, representative for plaintiff
 L Anderson, advocate for defendant

Judgment: 18 July 2024

JUDGMENT OF JUDGE J C HOLDEN

Challenge limited to finding of unjustifiable dismissal

[1] When Stacey Roy’s employment with Carrington Resort Jade LP ended, she took proceedings in the Employment Relations Authority.

[2] The Authority found that:¹

- (a) Carrington Resort breached ss 130 and 132 of the Employment Relations Act 2000 (the Act).

¹ *Roy v Carrington Resort Jade LP* [2023] NZERA 4 (Member Larmer).

- (b) Carrington Resort breached ss 81 and 83 of the Holidays Act 2003.
- (c) Carrington Resort unjustifiably disadvantaged Ms Roy by suspending her without pay from 25 to 30 April 2022.
- (d) Carrington Resort unjustifiably constructively dismissed Ms Roy from her employment on 30 April 2022.

[3] Remedies were ordered.²

[4] Carrington Resort filed a de novo challenge to the Authority's substantive determination. It also filed a challenge to the Authority's costs determination in which Carrington Resort was ordered to pay Ms Roy a total of \$8,209.04 towards her costs and disbursements.³

[5] Carrington Resort was found to have not facilitated the Authority's investigation and to have been obstructive of it, and to have failed to act in good faith towards Ms Roy during it. On that basis, and in the absence of any submissions to the Court on the good faith report it obtained from the Authority, the Court ordered that the case would proceed on a non-de novo basis, in relation to the finding that Carrington Resort unjustifiably constructively dismissed Ms Roy from her employment on 30 April 2022. The Court said that the remedies from Ms Roy's unjustifiable dismissal would also be in contest should the challenge to the finding of unjustifiable dismissal be unsuccessful.⁴

The evidence on some of the circumstances is clear

[6] Carrington Resort called evidence from four witnesses. Those were:

- William Tan, the general manager of Carrington Estate and the CEO of its parent company;

² At [185].

³ *Roy v Carrington Resort Jade LP* [2023] NZERA 51 (Member Larmer) at [41].

⁴ *Carrington Resort Jade LP v Roy (No 2)* [2023] NZEmpC 88 at [13]–[20].

- Sanket Shelar, who at the relevant time was head chef at the Carrington Winery Café and was the highest-ranked chef at Carrington Resort;
- a chef de partie who worked with Ms Roy in the Resort Restaurant at the relevant time, and
- another kitchen worker who also worked with Ms Roy in the Resort Restaurant.

[7] None of this evidence was before the Authority.

[8] Ms Roy also gave evidence.

[9] Ms Roy has worked at Carrington Resort a number of times. Her most recent period of employment started around early 2020. She was initially employed as a more junior chef but was promoted three times, working her way up to being the “junior sous chef”, which also meant she was effectively acting as the head chef of the Resort Restaurant kitchen.

[10] Ms Roy was regarded as a good chef and she felt that Mr Tan was supportive of her, both through her promotions and in respect of her management of the kitchen. There were, however, issues between Ms Roy and other staff which those staff raised with Mr Tan from time to time. Mr Tan did not witness any of the behaviours staff were concerned about but spoke to Ms Roy informally about the concerns raised. He regarded them as interpersonal issues and not particularly serious.

[11] In April 2022, however, Mr Tan says he was approached by several chefs in the Resort Restaurant kitchen, resigning and giving Ms Roy’s behaviour in the kitchen as a reason for their resignation. The chef de partie who gave evidence was one of those who had decided to resign. He went to see Mr Tan on or about 20 April 2022 to advise him that he was resigning as he was no longer prepared to work with Ms Roy. Mr Tan asked him to stay, saying he would speak with Ms Roy and seek solutions. The chef de partie agreed that he would do so.

[12] On Sunday 24 April, Mr Tan unsuccessfully attempted to contact Ms Roy by telephone. She acknowledges she saw he had tried to call her, but she did not return his calls. Mr Tan then emailed Ms Roy, advising her:

I have received a large number of complaints from almost the whole F & B team against you for the past few days, including the ones who already resigned. Complaints were received regarding your attitude towards other team members during work, your work ethic and other issues regarding your work quality.

Everyone in the kitchen explained to me that they wish not to work with you, and apparently, the issues raised had been ongoing for months.

We had a few chefs resign because of the alleged mistreatment they received from you.

You will need to arrange a time, to come in to see me in my office to address the issues raised before you walk back to the kitchen.

[13] The next day, Monday 25 April, when Ms Roy came to work, she went to see Mr Tan in his office. Mr Tan was meeting with Mr Shelar, discussing other matters, but the door to his office was open and Ms Roy went in. Ms Roy was in Mr Tan's office for approximately six minutes. Ms Roy was upset at the meeting. About one minute into the meeting, a receptionist from the reception area outside Mr Tan's office got up and shut the door to his office. As Ms Roy was leaving the meeting, she kicked a box outside the door before she proceeded back to the kitchen. When she entered the kitchen, Ms Roy spoke to the kitchen staff, gathered her belongings and left. After she left the kitchen, Mr Shelar, who had followed her down there from Mr Tan's office, went outside with her and sat talking with her for some time, before Ms Roy left and went home.

[14] At 11.34 am on Thursday 28 April 2022, Mr Anderson, who was representing Ms Roy by that time, wrote to Carrington Resort raising a personal grievance for unjustifiable disadvantage for what was said to be a suspension. Mr Anderson said that Mr Tan had instructed Ms Roy to go home "for three days" while he decided what to do with her. The remedies sought included compensation under s 123(1)(c)(i) of the Act, reimbursement for lost wages as a result of the unjustifiable suspension, and costs. Mr Anderson invited Mr Tan to negotiate directly with him over the matter or to attend a Ministry of Business, Innovation and Employment mediation. There was no mention of a return to work.

[15] Carrington Resort did not respond to Mr Anderson but, two days later, on 30 April 2022, Mr Tan emailed Ms Roy, detailing what he says happened at the meeting on 25 April and asserting that Ms Roy had resigned during the meeting. The email also covered what Mr Tan says were the complaints about Ms Roy from other staff. Mr Tan said that, although Ms Roy had provided no notice for her resignation, Carrington Resort would pay her any outstanding wages and holiday pay with her final pay, which would be processed once she had returned all company property in her possession, such as uniforms and keys.

[16] The principal issue for the Court is whether the email of 30 April 2022 constituted a constructive dismissal. The alternative scenario is that promoted by Carrington Resort, being that Ms Roy resigned on 25 April 2022.

The events on 25 April are key

[17] Mr Tan, Mr Shelar and Ms Roy all gave evidence about what happened at the meeting in Mr Tan's office on 25 April 2022. Mr Shelar, Ms Roy and the kitchen worker gave evidence about what happened in the kitchen following the meeting in Mr Tan's office.

[18] Ms Roy says that when she went to see Mr Tan, she was very upset and wanted to know his reason for not allowing her to work in the kitchen. It was at this point that she says she was informed about other staff members' complaints and refusals to work with her. Ms Roy says that Mr Tan also referred to her as lazy, and made allegations concerning drug use and mental instability. Ms Roy says Mr Tan's allegations really "got" to her, particularly because she had worked hard to "turn her life around" and because there was no evidence to support the accusations.⁵ She says that this caused her to become more emotional and acknowledges that she raised her voice at this point. She says that Mr Tan told her to "go home" for "three days" while he "figured out" what to do with her. It was after that that Ms Roy says she said, "What do you want me to do? Resign?". She says that Mr Tan said, "Stacey, it is up to you if you want to resign" and that at that point, she got up and walked out of the meeting. She says she

⁵ For completeness, Ms Roy does not accept that she has previously had, or currently has, a "drug problem". I do not need to decide that point and put the alleged accusations to one side, for reasons I will come to.

left because Mr Tan refused to give her more information about the allegations and why she was not allowed to work.

[19] Mr Tan says Ms Roy “stormed” into his office without asking while he was meeting with Mr Shelar. He says she sat down and was there for only a short period of time. He estimated less than two minutes. Mr Tan says that there was a lot of yelling, shouting and cursing from Ms Roy with her saying, “If no one can work with me, I will f-ing go”. Mr Tan says he did not order Ms Roy to go home and he did not suspend or dismiss her. He says that she gave an oral resignation while cursing at everyone in his office and in the reception area. Mr Tan also disputes that he referred to drugs, mental health, or allegations of laziness in talking to Ms Roy. Mr Tan said he was disappointed in how things turned out and that he had always looked after Ms Roy.

[20] Mr Shelar says he was present with Mr Tan in his office discussing menu options when Ms Roy walked in without asking and sat down next to him. He said that Ms Roy seemed upset, she was talking in quite a rude way, and yelling and shouting at Mr Tan. Mr Shelar understood that she had found out about the other staff not wanting to work with her.

[21] Mr Shelar said that Mr Tan was calm and told Ms Roy about the issues that had been raised. Mr Shelar recalls Ms Roy saying to Mr Tan: “F- them all, if no one wants to work with me, I’ll f-ing go. Do I get holiday pay?” Mr Shelar recalls that Mr Tan then asked Ms Roy if she was resigning, and she confirmed that she was. He said Ms Roy then left Mr Tan’s office, slamming the door and going down to the kitchen. Mr Shelar says there was no mention of Ms Roy going home for three days and no mention of drugs, mental health or laziness.

[22] Mr Shelar followed Ms Roy to the kitchen and says that, once in the kitchen, Ms Roy shouted at the people working there saying: “F- all of youse, if no one wants to work with f-ing Stacey, f-ing Stacey will go.” Mr Shelar says she then packed up her personal items and walked out of the restaurant. Mr Shelar says he had known Ms Roy for quite some time, and he was concerned about her. He followed her out to the carpark where he says he spoke to her and tried to calm her down.

[23] The kitchen worker who gave evidence was in the kitchen when Ms Roy returned from Mr Tan's office and says that when Ms Roy arrived in the kitchen, she was yelling at everyone there and said that if they would not work with her that she would leave. The kitchen worker also confirmed that Ms Roy packed up her personal belongings and left the kitchen. The kitchen worker acknowledged that chefs sometimes take their personal knives home, but said that Ms Roy took all her personal effects.

[24] Ms Roy did not return to work at Carrington. She says this was because she expected to hear from Mr Tan after three days.

There is an issue over the emails

[25] Ms Roy says she did not see the email from Mr Tan dated 24 April until after 25 April. She says she went to see Mr Tan on 25 April after she saw an email that she says was sent to a generic kitchen email address, advising staff that she was not to commence work until Mr Tan had spoken to her. No such email was before the Court. Mr Tan says there was no email sent to the generic kitchen email address; he sent only two emails, being the email on 24 April 2022 and that on 30 April 2022.

[26] On balance, it is more likely than not that Ms Roy saw the email of 24 April before she met with Mr Tan. Mr Shelar's account of Ms Roy's demeanour when she arrived at Mr Tan's office, and what she said indicated that Ms Roy understood from the outset that the issue Mr Tan wished to see her about was the suggestion that other staff did not wish to work with her. She would not have gained that understanding from the email she describes to the generic kitchen email address.

Did Ms Roy resign?

[27] Whether an employee has resigned is an objective assessment which will be informed by the relevant circumstances.

[28] In some earlier judgments of the Court and the Authority, there was a suggestion that employers could not accept a resignation given in the heat of the

moment but should allow for a “cooling down” period.⁶ In more recent decisions of the Court, that approach has been rejected.⁷

[29] I agree with the Court’s analysis in *Mikes Transport Warehouse Ltd and Modern Transport Engineers Ltd v Vermuelen*.⁸ Resignation is a unilateral act; an employer cannot decline to accept a resignation if it is given. The issue is not whether the employee resigned in distress, anger, or frustration, or whether it would have been more sensible for the employee not to have resigned; the issue is whether the words and actions of the employee, objectively assessed, were such that the employee had terminated the employment relationship.

[30] Having considered the versions of the discussion of 25 April 2022, I am satisfied that Ms Roy was upset when she arrived in Mr Tan’s office and dominated the discussion; she was particularly upset at the suggestion that the others in the kitchen did not want to work with her; I do not accept that the discussion canvassed mental health or drugs, or allegations of laziness. Apart from Mr Tan and Mr Shelar’s evidence that those issues were not raised, they were not ones that Mr Tan was concerned about. His concern was over Ms Roy’s management of staff.

[31] I also do not accept that Mr Tan sent Ms Roy home. Rather, I accept that by her words and actions in the office, Ms Roy resigned. My conclusion is supported by what happened when Ms Roy returned to the kitchen, being what she said to the kitchen workers and also by her removing all her personal effects to take them home.

[32] It follows that I do not accept that the email of 30 April 2022 dismissed Ms Roy constructively or otherwise. Ms Roy’s employment ended on 25 April 2022.

[33] Ms Roy has not pleaded that she was constructively dismissed on 25 April 2022, nor has she pleaded that Mr Tan’s actions that led up to her resignation amounted to an unjustifiable disadvantage. Nevertheless, it is open to the Court to

⁶ See, for example, *Boobyer v Good Health Wanganui Ltd* EmpC Wellington WEC3/94, 24 February 1994; and *Kostic v Dodd* EmpC Christchurch CC14/07, 11 July 2007 at [86].

⁷ *Mikes Transport Warehouse Ltd and Modern Transport Engineers Ltd v Vermuelen* [2021] NZEmpC 197, [2021] ERNZ 1129; and *Urban Décor Ltd v Yu* [2022] NZEmpC 56, [2022] ERNZ 225.

⁸ At [36]–[42].

find that the nature of the personal grievance is of a different type from that alleged.⁹ Accordingly, I consider those two issues now.

Was there a constructive dismissal at the meeting of 25 April?

[34] There is no suggestion that Mr Tan gave Ms Roy a choice between resigning or being dismissed. Ms Roy's evidence was that when she suggested resigning, Mr Tan expressly said that it was up to her whether she wanted to resign. I also do not accept that Mr Tan embarked on a course of conduct with a deliberate or dominant purpose of coercing her to resign; he raised concerns in a reasonably forthright way regarding her relationships with other staff, but there is nothing to suggest that he was not wanting to work through those issues with Ms Roy, as he had done in the past. I also do not accept that Ms Roy resigned because of any breach of duty by Carrington Resort.

[35] Accordingly, the situation does not fall into any of the usual categories of constructive dismissal as:¹⁰

- (a) Carrington Resort did not give Ms Roy an option of resigning or being dismissed;
- (b) Carrington Resort did not follow a course of conduct with a deliberate and dominant purpose of coercing Ms Roy to resign;
- (c) Carrington Resort did not breach a duty or duties which led to Ms Roy resigning.

[36] There is no other evidence that suggests some other type of constructive dismissal took place.¹¹

⁹ Employment Relations Act 2000, s 122.

¹⁰ *Auckland Shop Employees IUOW v Woolworths (NZ) Ltd* [1985] 2 NZLR 372 (CA) at [374]– [375].

¹¹ Noting that the three categories identified are not exhaustive.

Was there an unjustifiable disadvantage?

[37] I have considered whether Mr Tan's actions towards Ms Roy leading up to her resignation at the meeting of 25 April 2022 amounted to an unjustifiable disadvantage. Certainly, if she saw the email sent on Sunday 24 April 2022 before the meeting, that would have been upsetting for Ms Roy, but Mr Tan was required to provide her with sufficient information for her to understand what the concern was. He then invited her to meet with him. The course of the meeting was driven by Ms Roy. I accept that Ms Roy was upset and shouting, and that Mr Tan was calm. It was Ms Roy who raised her resigning, something Mr Tan did not push for or promote. Accordingly, while I acknowledge that Ms Roy found the situation upsetting, I do not find that the actions taken by Mr Tan prior to the resignation were unjustifiable.

Result

[38] Accordingly, Carrington Resort's challenge in respect of the finding of unjustifiable dismissal succeeds. The lost remuneration sum paid to Ms Roy by Carrington Resort as a result of the Authority's determination is required to be repaid. The compensation payment under s 123(1)(c)(i) of the Act covered both the finding of unjustifiable disadvantage in respect of the suspension and the finding of unjustifiable dismissal.¹² Some division of that figure is, therefore, required. The total figure under s 123(1)(c)(i) awarded by the Authority was \$24,000. The bulk of that would reflect the found unjustifiable dismissal. I consider that an appropriate division would see \$18,000 as for the found unjustifiable dismissal. I now order that sum of \$18,000 be repaid by Ms Roy to Carrington Resort.

[39] Ms Roy should make those payments within 28 days of this judgment.

Costs affected by the lack of good faith before the Authority

[40] In its statement of claim, Carrington Resort says that it seeks to recover all costs.

¹² *Roy v Carrington Resort Jade LP*, above n 1, at [151].

[41] Notwithstanding the success on aspects of the challenge, I do not disturb the costs determination of the Authority. If Carrington Resort had acted in good faith in the course of the Authority's investigation, the Court proceedings may have been unnecessary. As it was, Ms Roy had to go through the Authority process before Carrington Resort engaged on the issues.

[42] If costs cannot be agreed between the parties, and Carrington Resort wishes to pursue an application for costs in respect of the Court proceedings, it may file an application within 21 days of the date of this judgment. Ms Roy is to respond within 14 days thereafter and any submissions in response are to be filed and served within a further seven days. Carrington Resort should be aware, however, that the good faith issues that arose in respect of the Authority investigation may well come into play in respect of costs in the Court as well.

Carrington Resort disadvantaged by its conduct before the Authority

[43] Finally, I note that Carrington Resort's lack of engagement in the Authority has been to its disadvantage. As its challenge was limited to the finding of unjustifiable dismissal, it lost the opportunity to challenge the other findings of the Authority, including the finding of unjustifiable disadvantage in respect of the found suspension. That, however, is as a result of its own conduct. If it had engaged properly in the Authority, the outcome in the Authority may well have been different and, if not, a full de novo challenge could have been brought.

J C Holden
Judge

Judgment signed at 12.30 pm on 18 July 2024