

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 149/10
5136021

BETWEEN BIRGUL AYYILDIZ
 Applicant

AND HARRISON CAFÉ LIMITED
 Respondent

Member of Authority: Robin Arthur

Representatives: Helen White for Applicant
 Delma Harrison for Respondent

Investigation Meeting: 25 September 2009

Determination: 29 March 2010

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Birgul Ayyildiz worked at the Café Greenfingers from February to August 2008. Harrison Café Limited (HCL) operates the café attached to a garden centre in Remuera.

[2] Mrs Ayyildiz had no formal cooking qualifications but was employed as a kitchen hand and “preparation chef”.

[3] She left the job on 24 August 2008 after an incident in which the head chef swore at her, calling her a “*fucking bitch*”. Mrs Ayyildiz had previously complained to HCL director Delma Harrison that the chef did not let her take breaks and had criticised her for not completing work fast enough.

[4] Mrs Ayyildiz brought a claim of constructive dismissal to the Authority. She said she did not leave the job willingly but rather because she felt forced to do so by

HCL's failure to protect her from unacceptable conduct by the head chef.

[5] HCL said it took immediate steps to discipline the chef for swearing at Mrs Ayyildiz and had dealt with previous concerns about her breaks and the chef criticising her work speed.

[6] Mrs Harrison said she made repeated attempts to get Mrs Ayyildiz to return to work after 24 August. She also believed the personal grievance application was motivated by Mrs Ayyildiz's husband as they had argued over whether Mrs Ayyildiz had become too tired to work six days a week. Mr Ayyildiz had insisted Mrs Ayyildiz hours should not be reduced to five days a week.

Issues and investigation

[7] The issues for determination by the Authority are:

- (i) Whether HCL breached its obligation to treat Mrs Ayyildiz fairly, including dealing properly with her complaints about the head chef; and
- (ii) if so, was any such breach of its obligations sufficiently serious to make it reasonably foreseeable to HCL that Mrs Ayyildiz would not be prepared to keep working under those conditions?

[8] For the investigation the Authority considered written statements by Mrs Ayyildiz, her husband Teyfik Ayyildiz, Mrs Harrison and Olivia Ramsay. Ms Ramsay was a full-time café worker during 2008 and had since become the café manager. Each witness attended and answered questions from the Authority member under oath or affirmation. Mrs Ayyildiz was assisted in giving her evidence by an interpreter of the Turkish language. Each party also had the opportunity to ask additional questions and to provide an oral closing submission.

Legal framework

[9] Mrs Ayyildiz did not have signed a written employment agreement setting out the terms of employment for the job she began in February 2008. However throughout Mrs Ayyildiz's employment HCL was nevertheless bound by an implied term not to conduct itself in a manner calculated or likely to destroy or seriously

damage its relationship of confidence and trust with her.¹

[10] What happened in Mrs Ayyildiz's circumstances must be examined to see if how HCL dealt with her concerns clearly went beyond being inconsiderate conduct causing her some unhappiness or resentment to becoming conduct sufficiently grave to justify her ending the employment relationship.²

Was there a breach or breaches of duty by HCL?

[11] I find Mrs Ayyildiz has failed to establish HCL's treatment of her during her employment amounted to breaches of duty of the type alleged. I do so for the following reasons.

[12] When Mrs Ayyildiz complained to Mrs Harrison that she was not getting proper breaks, Mrs Harrison spoke with the head chef and made arrangements for breaks to be provided.

[13] Mrs Harrison also talked with the chef about the work demands he made of Mrs Ayyildiz. Mrs Ayyildiz's own evidence was that she heard Mrs Harrison tell the chef to give Mrs Ayyildiz more time to do work such as preparing the cabinet of food at the café counter. She also remembered frequent praise from Mrs Harrison about her work.

[14] There were clearly tensions between the head chef and Mrs Ayyildiz about work expectations but such tensions are commonplace in café or restaurant kitchens. Mrs Ayyildiz's own evidence established that while the chef sometimes criticised her work, she also criticised his work.

[15] In what was described in evidence as "*the fish pie incident*", Ms Ayyildiz complained about the chef yelling at her. She said this occurred after he asked her to fill the café cabinet but she said she was busy making the fish pies he had earlier asked her to make. When she asked why he yelled at her the chef replied that she never listened to him or did what he told her to do. He then told her he was "*stressed*

¹ *Auckland Shop Employees IUW v Woolworths (NZ) Limited* (1985) ERNZ Sel Cas 136, 139 (CA).

² *Wellington Clerical IUW v Greenwich* (1983) ERNZ Sel Cas 95, 104.

too much”, could not work any more and would have to go home. Mrs Ayyildiz said she replied: “*If you want to leave, you can leave. You don’t do much work any way. If you want to go, you can go. It makes no difference*”.

[16] Ms Ramsay gave evidence of overhearing the argument in which she says the chef’s voice “*rose very quickly*” and Mrs Ayyildiz “*yelled and screamed*” at him. Mrs Ayyildiz recalled starting to cry and Ms Ramsay hugging her and telling her to calm down. Although the chef wanted to continue work Ms Ramsay insisted that he leave.

[17] Around July 2008 Mrs Harrison spoke with Mrs Ayyildiz about the number of days she was working. Mrs Harrison was concerned Mrs Ayyildiz appeared increasingly tired. Mrs Ayyildiz worked six days a week and had told Mrs Harrison that she also often had to pick Mr Ayyildiz up late at night from his restaurant job. At some times Mrs Ayyildiz also worked at that restaurant and was spending some time developing a homemade cheeses business.

[18] Mrs Harrison says Mrs Ayyildiz agreed, after a “*woman to woman*” discussion about getting so tired by the long working week, to reduce her hours to five days a week. However when Mr Ayyildiz arrived at the café later that day and spoke with Mrs Harrison, he was unhappy about that arrangement. Mrs Ayyildiz then denied that she had agreed to work only five days a week.

[19] Against that background Mrs Ayyildiz says that on 24 August the head chef swore at her. This happened because of confusion over an order during a busy lunch period.

[20] Mrs Ayyildiz’s evidence was that she had heard the chef using expressions such as “*fucking hell*” about things in the kitchen on previous occasions but he had never sworn directly at her before.

[21] After he called her a “*fucking bitch*” Mrs Ayyildiz turned to another worker and asked if he had heard what the chef said. She described that worker as shaking his head in a manner indicating disapproval of the chef’s comment. Mrs Ayyildiz said that she started trembling and walked out of the work area.

[22] She telephoned her husband who said he would come and talk with Mrs Harrison about the incident. Mrs Ayyildiz waited outside the café where another worker brought her a drink. Shortly after Mrs Harrison's son came and saw her. When she told him about the swearing incident he said that he would talk to the chef and she should go home for the rest of the day.

[23] When Mr Ayyildiz arrived he and Mrs Ayyildiz both spoke to Mrs Harrison. Mrs Harrison said she would deal with the incident by giving the chef a written warning if that was what Mrs Ayyildiz wanted. An argument then developed as Mr Ayyildiz said it should not be a matter of whether or not his wife wanted this to happen. Mrs Harrison responded by criticising Mr Ayyildiz for requiring his wife to work too hard. The discussion ended with Mr Ayyildiz saying to Mrs Harrison: "*You'll pay for this*". He and Mrs Ayyildiz then left.

[24] The next day Mrs Harrison issued the chef with a written warning and required him to write a letter of apology to Mrs Ayyildiz. Meanwhile Mrs Ayyildiz went to her doctor and received a medical certificate saying she was unfit to work for a week. A further certificate was also issued for the following week. During that time both Mrs Harrison and the chef unsuccessfully tried to contact Mrs Ayyildiz about returning to work. When the chef then contacted Mr Ayyildiz by telephone he was told Mrs Ayyildiz would not be returning. Her personal grievance was formally raised with HCL in the following weeks.

[25] I find no breach by HCL of its duties to Mrs Ayyildiz in how it handled this incident of swearing by the head chef. Although it was aware of his propensity to swear – having what Ms Ramsay called in her evidence, "*a bit of a dirty mouth*" – HCL promptly disciplined him for his inappropriate behaviour towards Mrs Ayyildiz on 24 August.

[26] The argument that occurred between Mrs Harrison and Mr Ayyildiz on 24 August was unfortunate but not grounds for a finding of a breach of HCL's duties to Mrs Ayyildiz.

Was resignation reasonably foreseeable?

[27] Having reached the conclusion there was no breach of duty by HCL, Mrs Ayyildiz's claim fails. However if that conclusion were wrong, I consider the facts would not support a conclusion that her resignation for such a breach was reasonably foreseeable in any event. I do so for the following reasons.

[28] Mrs Ayyildiz had previously insisted that she wanted to keep working at the café even through hours of work that Mrs Harrison saw as too demanding. It was a job which she made it plain she would tolerate some adversity to keep.

[29] Mrs Ayyildiz's own evidence also established that she was an active participant in some robust exchanges at work. She had previously kept working after arguments with the chef and there was nothing to indicate to HCL that she would not do so again given its immediate acceptance that he was in the wrong and should be disciplined for his conduct.

Determination

[30] The application is dismissed.

Costs

[31] Mrs Harrison represented the company and there is no information before the Authority about any legal expenses incurred by HCL. Any costs are to lie where they fall.

Robin Arthur
Member of the Employment Relations Authority