

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2016] NZERA Wellington 75
5554648

BETWEEN TASSIA COSTA
 Applicant

AND OPAWA PROPERTIES LIMITED
 Respondent

Member of Authority: M B Loftus

Representatives: Russell Ward, Advocate for Applicant
 Scott and Dara Graham, on behalf of the Respondent

Investigation Meeting: 7 April 2016 at Whanganui

Submissions Received: At the investigation meeting

Determination: 5 July 2016

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant, Tassia Costa, claims she was unjustifiably dismissed (albeit constructively) by her employer, Opawa Properties Limited (Opawa), on 24 February 2015. She says her resignation was prompted by three specific events. They were:

- (a) A requirement she act as manager for the purposes of the Sale and Supply of Alcohol Act 2012 when she was not qualified to do so;
- (b) an arbitrary reduction in her hours of work; and
- (c) being subjected to unjustifiable disciplinary action.

[2] Ms Costa also claims Opawa was guilty of various breaches of the duty of good faith though these claims relate to the same matters which prompted her resignation.

[3] Opawa denies the accusations and says Ms Costa resigned of her own volition.

Background

[4] Opawa operates an accommodation and restaurant business in Ohakune. It is owned and operated by Dara and Scott Graham.

[5] Ms Costa commenced as a waitress/receptionist on 10 October 2013. There is no written employment agreement. Ms Costa says she was employed to work 30 hours a week being 4pm to 9pm Monday to Saturday but soon after starting her hours began to vary. She says this was without consultation but she did not complain as she wanted to keep the job.

[6] Ms Costa also says she was expected to work as duty manager when the owners of were absent. She claims she was instructed to tell anyone who queried her role that Mr Graham had briefly left the building. She was then to call him so he could come in. She says this requirement existed from commencement.

[7] Ms Costa says she was also required to act as the duty manager for a period of five days while Mr and Mrs Graham were away overseas. They deny taking the alleged trip.

[8] Ms Costa says:

I tried to voice my concerns with Scott but he would not listen. He continued to put his name on the wall every night despite almost never being there. This continued until October 2014 when a regular customer pointed out that Scott was never there despite being the advertised Duty Manager. When I told Scott this, he made me put my name on the wall instead, making me personally liable for any fines.¹

[9] Ms Costa goes on to say she then continued to be identified as the duty manager every night for five months until she resigned in February 2015. She says she tried to address the issue by asking Mr Graham put her on the required course. Despite three requests and an offer to pay herself this never occurred.

[10] Opawa denies these claims. It denies her allegations regarding frequency. It says all such requests were first discussed with Ms Costa and were permissible under

¹ Statement of Problem at 2.7

the Sale and Supply of Alcohol Act 2012. Mr Graham's mother, who lived in Palmerston North, was terminally ill and he tried to visit her each Thursday.

[11] Ms Costa also takes issue with what she says were two disciplinary meetings. The first occurred in November 2014 and was, according to Ms Costa, the result of a negative review on Trip Advisor. She says she had no notice of the meeting and no idea of what it was about. Ms Costa claims Mr Graham told her if she could not run the restaurant or if they received further bad feedback he would step in and replace her. She claims Mr Graham said he did not need her if he had to be there to maintain standards. She says the meeting resulted in a formal warning.

[12] Ms Costa takes issue with this on the grounds only 3 of 24 comments on Trip Advisor are negative. The proportion of negative reviews on a similar site, Booking.co, was less.

[13] Opawa says there was nothing more than a casual discussion during which Ms Costa was advised of the feedback. This was done in order to inform her so she could take it into consideration in the future. Opawa denies a warning was considered let alone issued.

[14] Ms Costa claims the second disciplinary meeting was also prompted by an online review but accompanied by an additional allegation relating to a complaint she had not offered coffee or dessert to friends of the Grahams' after they finished their dinner. She says she received a text demanding she attend a meeting on 23 February 2015. The text in question was sent at 11.51. It reads:

Hi Tassia, we need to have a meeting with you, can you come in at 1pm or 2? We have a few things that have been brought up with us today that are of concern and we need to discuss with you thanks.

[15] Ms Costa replied saying she would be there at 1pm and asked if she had done something wrong. The response was:

Had a few complaints well see you at 1.

[16] Ms Costa claims that during the meeting she was told the Grahams had decided to reduce her hours and give her a second formal warning. She says she was told she would now commence at 5pm and not 4pm.

[17] Mr Graham accepts there was a later start but puts this down to the flexible arrangement between the two and the fact there were regular variations to Ms Costa's hours. He denies there was any mention the change was disciplinary.

[18] Ms Costa goes on to say when she arrived at work that evening a computer she normally used was displaying a website which described the process required to terminate an employee. She is of the view it was deliberately left in order to intimidate her. Mr Graham accepts he checked the process in case he had to go down a disciplinary path and sways he left the site open by mistake.

[19] The following day, 24 February 2015, Ms Costa received a text advising her to start at 5.35pm. It was at then she decided she had no option but to resign. She gave two weeks' notice which she worked.

[20] In her letter of resignation she accepts she made mistakes but claims they were minor and should be considered in context. The letter then goes on to comment on frequent changes to her hours/shifts before saying:

I have been forced to advertise myself as the "Manager on Duty" but you have refused on every occasion to provide me with the training and certification that I LEGALLY REQUIRE. This is not something that happens occasionally, it has occurred almost every shift that I have worked for the last twelve months ... It is not only completely illegal to put me in that position, it is completely unethical to put that much responsibility onto an employee that you pay THE MINIMUM WAGE.

I have tried to persevere through these unreasonable working conditions, for fear that any complaint would result in me getting fired.

[21] The letter then advises Ms Costa considered her treatment the previous day to be the *final straw*. She complains she was given inadequate notice of the meeting and that such a severe penalty was disrespectful. Comment is then made about the website and her conclusion the Graham's intention was now clear. She closes by advising she had sought legal advice and any future discussion about her employment be conducted via her lawyer.

[22] The Grahams' response opens with an expression of sadness Ms Costa had chosen to resign as they believed her to be a good employee. They assert they needed to be able to discuss issues with their staff and that is part of being an employer. They expressed regret Ms Costa had become aware they had investigated what constituted

an appropriate disciplinary process and attributed it to a desire to get things right. Reference is then made to the fact Ms Costa had agreed to come in as requested and had not suggested there was any imposition.

[23] The letter goes on to say there was never an intention to dismiss Ms Costa but only to discuss the recent complaints and *get your side of things*. The letter then says Ms Costa was offered extra hours whenever they were available and that was to assist her meet various upcoming expenses she wished to save towards.

[24] With respect to the duty manager position, the letter reads:

... we are allowed to give temporary authority of up to 48 hours to our employees, due to reasons that you are aware of for the past 14 months.

[25] The letter then advises Mr Graham had been discussing an appropriate time for Ms Costa to attend the appropriate course with a local district council official. The letter ends with:

Our hope is that you will stay in our employment and see yesterday's issues for what they really are a chance to learn and move forward.

[26] Mr Graham says he also spoke to Ms Costa that evening and asked she reconsider. The following day he sent a text asking if she would come and talk about things but she responded by advising she would not discuss any employment related matter without her lawyer being present. As events transpired Ms Costa did not reconsider and her departure has led to this claim.

Determination

[27] As already said Ms Costa claims she was constructively dismissed.

[28] In *Auckland etc. Shop Employees etc IUOW v Woolworths (NZ) Ltd*² the Court of Appeal held constructive dismissal includes, but is not limited to, cases where:

- a. An employer gives an employee a choice between resigning or being dismissed;

² (1985) ERNZ Sel Cas 136; 2 NZLR 372 (CA)

- b. An employer has followed a course of conduct with the deliberate and dominant purpose of coercing an employee to resign.
- c. A breach of duty by the employer causes an employee to resign.

[29] In *Wellington etc Clerical Workers etc IUOW v Greenwich*³ the Court stated that for a dismissal to be constructive:

It is not enough that the employer's conduct is inconsiderate and causes some unhappiness to the employee. It must be dismissive or repudiatory conduct.

[30] While a simplistic summary of more complex law, the underlying assumption is actions or words of the employer amounted to a breach which induced a subsequently proffered resignation. The onus falls on Ms Costa to establish, prima facie, there was such a breach.

[31] There must also be a causal link between the employer's conduct and the tendering of the resignation⁴ and the possibility of resignation in response to that conduct should be foreseeable.⁵

[32] When asked what it was that led her to believe she could no longer remain Ms Costa stated there were a number of issues. When asked to identify them she only referred to the second disciplinary meeting, the circumstances in which it was called and her discovery the Grahams had been checking on disciplinary procedures. It was only with some prompting she added the duty manager issue. Further prompting saw her say she thought the Grahams were being unfair as some 85% of feedback was positive and she was fearful that if she was dismissed in a small town the black mark may prevent future employment. The hours of work were not mentioned.

[33] Further questioning leads me to conclude the issue foremost in Ms Costa's mind and which prompted her decision to resign was the potential for disciplinary action and a fear of dismissal. That does not constitute adequate grounds upon which to base a claim of constructive dismissal. First, and notwithstanding her claim she received a warning, Ms Costa is unable to furnish any supporting evidence and when questioned further she resiled from the claim and instead referred to an implied threat.

³ (1983) ERNZ Sel Cas 95; [1983] ACJ 965

⁴ *Z v A* [1993] 2 ERNZ 469

⁵ *Weston v Advkit Para Legal Services Ltd* [2010] NZEmpC 140

Second an employer is, if it has concerns, bound to raise and discuss them with its employee and in this case it was doing so.

[34] The only possible issue was the website which Mr Graham accepts was left open though he attributes this to carelessness. That is a one-off and while inconsiderate and a source of unhappiness is not destructive of the relationship. Indeed, I have to conclude it wise the Grahams attempt to get the process right as, if nothing else, it ensures Ms Costa has a right of reply and could perhaps allay any fears.

[35] Turning to the duty manager issue. Ms Costa claims she was frequently required to perform this role. The Grahams dispute that and on this I prefer their evidence. I do so for three reasons. First Ms Costa furnished no supporting evidence or witnesses. Second, some of her claims failed to withstand scrutiny with, for example, the Grahams establishing they were not overseas when Ms Costa claimed she had to cover a five day absence. Third, her evidence altered when questioned. She resiled from her claim she was given no choice and accepted Mr Graham did ask before making her duty manager and said she would always accept. She also accepted she did not challenge him when he made his requests and exhibited some confusion about the statutory requirements.

[36] Sections 229 and 230 of the Sale and Supply of Alcohol Act 2012 provide for the appointment of either temporary or acting managers.

[37] A temporary manager is engaged where a manager is ill or absent for any reason, dismissed or resigns and must apply for a manager's certificate within two days of appointment. If there is no such application then the appointment must lapse.⁶ Temporary managers may be appointed for a maximum of three consecutive weeks to cover absence or illness and their tenure may not exceed six weeks in any twelve month. There are no such restrictions on the appointment of acting managers.

[38] Licensees are required to notify relevant authorities of the appointment of a temporary or acting manager but not when the appointment is for less than 48 consecutive hours.⁷

⁶ Section 229(2) and 229(3)

⁷ Section 231(3) of the Sale and Supply of Alcohol Act 2012

[39] It is this last point which perhaps explains events here. For some reason Ms Costa seems to believe there is no circumstance under which she could be appointed duty manager without the requisite approval and qualification. That is not correct but she exhibited no knowledge of the fact. At no point does she allege she was required to remain duty manager for more than forty eight hours and it appears she did not seek clarification of the statutory requirements. In other words it appears the circumstances under which she was appointed when Mr Grahams was visiting his mother were permissible and if Ms Costa had concerns the duty of good faith⁸ requires that she air them and not, as she accepts she did, simply agree to the various requests she act as manager.

[40] There is then the issue of hours of work which while not mentioned as a reason for her decision to resign when questioned, were cited to in her pleadings and letter of resignation. It is accepted law the nature of an arrangement may change. Here, and irrespective of what was originally agreed, I have Ms Costa's own evidence that flexibility and variability in the hours of work was part of this arrangement almost from the beginning, she accepted that and worked accordingly. In such circumstances I conclude the Grahams were simply operating in accordance with the parties accepted practice and there is not, therefore, any evidence of a disadvantage warranting the response of resignation.

[41] Finally I note strong evidence the Grahams wished to retain Ms Costa yet she ignored their advances in this respect and closed her mind to them. Here I note the Courts approach to a similar scenario in *Fredericks v VIP Frames and Trusses Ltd.*⁹ There is no evidence the Grahams were engaged in a course of conduct designed to procure Ms Costa's departure. Indeed it is evident they relied on her, were desperate to retain her and made that clear.

[42] Ms Costa also asked that each of the concerns which led to her resignation be considered as disadvantage grievances. For the reasons already enunciated I conclude the Grahams were, in each case, acting in accordance with their rights. While Ms Costa may consider these events operated to her disadvantage they cannot be considered unjustified. These claims will therefore fail.

Conclusion and costs

⁸ In particular s 4(1A)(b)

⁹ [2015] NZEmpC 203

[43] When I consider the evidence and particularly Ms Costa's oral evidence about what was in her mind I conclude she has been unable to discharge the onus of establishing she was constructively dismissed. Her claim therefore fails.

[44] Opawa has successfully defended the claim and in the normal course of events would be entitled to a contribution toward the cost of doing so. However Opawa was represented by officers of the company and there are no legal costs I am aware of. Recoverable costs, if any exist, are therefore negligible. Given a costs determination can be revisited and in order to avoid putting the parties to further effort and cost, I advise a view costs should lie where they fall.

M B Loftus
Member of the Employment Relations Authority