

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2017] NZERA Auckland 101
3003605

BETWEEN BARBARA CROSS
 Applicant

A N D NEW ZEALAND
 WATERMELON
 DISTRIBUTORS LIMITED
 Respondent

Member of Authority: T G Tetitaha

Representatives: S Punshon, Counsel for Applicant
 P Harvey, Advocate for Respondent

Investigation Meeting: 6 April 2017 at Kaitaia

Submissions Received: 6 April 2017 from both parties

Date of Oral
Determination: 6 April 2017

Written Determination: 7 April 2017

ORAL DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] This employment relationship dispute is about an alleged constructive unjustified dismissal. Barbara Cross was employed by New Zealand Watermelon Distributors Limited as a casual labourer in a seeding room. She had worked for the respondent since August 2014. Her job involved washing trays known as “washing dishes” then filling these with dirt for the seeding machines. Occasionally she was required to hand plant seeds in the trays such as pumpkin seeds.

[2] This was seasonal work. It was also affected by the weather. There were times when she was told at the end of the day that she had no work for the following day.

Bullying

[3] This matter centres on three incidents that occurred in August and October 2016. On 23 August 2016, there was an incident between Ms Cross and another worker whom I shall refer to as LG. LG came into the seeding room where Ms Cross was working. He is alleged to have been yelling and swearing. He said “*this is a fucking mess*” and smashed her empty seed trays to the floor. At the time Ms Cross was washing dishes. She ignored LG. After lunch she spoke to him about the work she had to do that afternoon and continued working.

[4] On 25 August 2016, Ms Cross was again in the seeding room with LG. He was grumbling about his partner’s work situation. His partner had been offered a job with the respondent. Ms Cross made a comment “*hope she can keep up with me*”. For reasons unknown, LG allegedly started swearing and saying “*I’m the best and hardest worker here*”. Ms Cross says LG then turned to her and said “*you think you’re so fucking perfect, you are really starting to piss me off*”. He then left.

[5] Unsurprisingly, Ms Cross was somewhat upset. She attempted to contact Mr Paul Harvey, the respondent owner and director. She sent a text to his wife, Brenda Harvey, complaining about LG’s behaviour, asking if she could speak to Mr Harvey. Mr Harvey spoke to LG. As a result of those discussions, I accept LG was issued with a verbal warning about his behaviour. Matters calmed down and Ms Cross continued working with LG.

[6] However, on 2 October 2016, matters flared up again. LG arrived at work after Ms Cross had already arrived and parked her car. LG started yelling at Ms Cross telling her to “*fucking move [her] car*”. Ms Cross became somewhat angry and upset. She admits she said “*you are just a fucking little cunt*”. Ms Cross moved her car and then returned to work in the seeding area. LG then left to go home to shower.

[7] Ms Cross was upset by LG’s behaviour. She sent a text to Mr Harvey telling him:

I’ve been verbally abused by [LG] in front of workers. Please get here now. I will not tolerate this.

[8] She sent later sent another text stating she was:

... really scared about what will happen when LG returns. The verbal abuse may turn physical. Contact me at home.

[9] Ms Cross then left the premises.

[10] Mr Harvey met with LG that afternoon. He was dissatisfied with LG's explanation and proceeded to give him a final warning. He advised LG that he may be dismissed if this behaviour continued. He also wanted LG to apologise to Ms Cross. Mr Harvey arranged to meet with Ms Cross the following morning. He told her he would be meeting with both of them.

[11] When Ms Cross arrived at work on 3 October, only Mr Harvey was present. LG was in a separate room. Mr Harvey wished to speak to Ms Cross first before bringing LG into the room. He told her that he had spoken to LG about his behaviour. Ms Cross was dissatisfied with that response. She then resigned. The meeting was very short and took less than five minutes.

[12] Subsequently Ms Cross raised a personal grievance of constructive unjustified dismissal on or about 28 October 2016.

Issues

[13] Ms Cross alleges her resignation was both constructive and unjustified. She alleges her resignation was caused by a breach of duty by Mr Harvey to maintain a safe workplace free from bullying. She further alleged that this breach was occasioned by Mr Harvey's inadequate action regarding her concerns of bullying by LG.

Law

[14] At law constructive dismissal includes, but is not limited to, cases where a breach of duty by an employer causes an employee to resign¹. The very nature of a claim for constructive dismissal is dependent on the events that preceded it. The focus of such claims is on the employee's motivation for the decision to leave and whether the motivation arises from a breach of the employer's duties or other actions by the employer².

¹ *Auckland Shop Employees Union v Woolworths (NZ) Ltd* [1985] 2 NZLR 372, (1985) ERNZ Sel Cas 136 (CA)

² *Commissioner of Police v Hawkins* [2007] NZEmpC 272

[15] The Court has repeatedly noted that an employee should not seize upon the employer's position in a dispute as a pretext to resign and found an action for constructive dismissal. Where there is a genuine dispute between the parties as to their rights based on reasonable grounds, neither party can use the other's stance in the dispute as a ground for either dismissal or a resignation intended to be treated as a dismissal. Parties owe each other a duty to refer the dispute at least to mediation³.

Determination

[16] In these particular circumstances, Mr Harvey was attempting to resolve a dispute between two employees. It is accepted he took some action. He spoke to both parties. He made a decision and warned LG about his behaviour in August 2016. As a result of his action, no further incidences occurred between the employees from August to October 2016. He had reasonable grounds to believe that his actions of warning were sufficient to prevent further incidents.

[17] When he spoke to Ms Cross on 3 October 2016 regarding the last incident, it was very short. My impression of the evidence regarding the concerns Ms Cross brings to me today is that they were not properly raised with him before she resigned. He did not have the factual detail about that incident before me today.

[18] Mr Harvey could not, based on the information he had before him, have done anything more. At that stage he had spoken to LG. He was unhappy with LG's explanation. He had not at that stage had an opportunity to discuss matters in detail with Ms Cross. On 3 October 2016 he wanted to meet to tell her what his decision had been in respect of LG and to seek, as he said in his own words "*how to move forward*" with both of the employees.

[19] I accept Mr Harvey's evidence that he was incredibly surprised by Ms Cross' resignation. He believed they could work this out and continue in an employment relationship. Ms Cross took a different view.

[20] Mr Harvey may have been in a position to consider other options if Ms Cross had remained and given him an opportunity to consider her responses. Potential solutions were cut short. Ms Cross' resignation was premature. The respondent did not breach any duty. Ms Cross resigned.

³ *New Zealand Institute of Fashion Technology v Aitken* [2004] 2 ERNZ 340 (EmpC) at [66]

Determination

[21] The application is dismissed. There is no order for costs because Ms Cross is legally aided and the respondent was self-represented.

T G Tetitaha
Member of the Employment Relations Authority