

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

CA 28/10
5160542

BETWEEN JANITA EDWARDS
 Applicant

AND TIN FILLERS CATERING
 LIMITED T/A TIN FILLERS
 Respondent

Member of Authority: Paul Montgomery

Representatives: June Gregg, for Applicant
 Paul Washington, for Respondent

Investigation Meeting: 14 October 2009 at Christchurch

Submissions Received: 20 October 2009 for Applicant
 11 November 2009 for Respondent

Determination: 9 February 2010

DETERMINATION OF THE AUTHORITY

[1] Ms Edwards alleges she was unjustifiably constructively dismissed from her position as a kitchen hand with the respondent. She says she was subjected to criticism over small matters in the workplace and subject to a regime of bullying by the owners' daughter, who assumed control of the operation when neither director was present.

[2] Ms Edwards seeks lost wages, compensation for hurt and humiliation and expenses.

[3] The respondent denies the applicant's allegations. It says the *walk out* by Ms Edwards was a total surprise as it came without warning. Further, it says that immediately following the departure of the applicant, Mr Paul Washington, a director of the company, telephoned Ms Edwards to find out what had triggered her departure.

Mr Washington says he was told Ms Edwards would not be spoken to the way Elizabeth had spoken to her, and was told the applicant would not be returning. The respondent says it attempted to resolve the issues with Ms Edwards but found the applicant uncooperative. Accordingly, they declined to grant the remedies sought.

[4] The parties attempted to resolve the issues in mediation but were not successful.

Essential facts

[5] At the time the applicant was hired she was asked whether she had difficulties taking instructions from a younger person. Ms Edwards said that she did not. The question arose from the fact that Ms Elizabeth Washington was 2IC in the business and when Mr Paul and Mrs Nicky Washington were not on site, Elizabeth ran the bakery operation.

[6] In the course of the employment several issues arose over delivery dockets and invoices when Ms Edwards was doing deliveries to customers. Another issue was the applicant readjusting the drivers seat in the delivery van and not returning it to its previous position causing irritation to other users. The other issue was the way in which Ms Edwards carried boxes containing products for delivery. All led to some verbal interaction on occasions. The walk out followed Elizabeth's asking the applicant to be sure she returned the seat in the van to its former position after completing a delivery.

[7] The applicant reacted by telling Ms Washington she no longer wanted the job, did not want to work with her and then left the premises.

The Issues

[8] To resolve this problem the Authority needs to make findings on the following issues:

- Was the behaviour of the respondent's representative sufficiently serious to justify Ms Edwards repudiating the employment agreement; and
- Was the applicant's action reasonably foreseeable to the respondent; and
- Was Ms Edwards constructively dismissed; and

- If so, what remedies are appropriate.

The investigation meeting

[9] The Authority was assisted in the investigation meeting by the applicant, her husband Jim Dawson and her step mother Mrs Anna Edwards.

[10] For the respondent evidence was given by Mr Paul and Mrs Nicky Washington, Ms Elizabeth Washington and Mr Doug Washington. Ms Wendy Day and Ms Trish Read provided statements but did not attend. Their evidence has been treated with some caution.

[11] The Authority expresses its thanks to all who assisted by giving their evidence openly and honestly at the meeting.

Legal issues

[12] The leading relevant cases in allegations of constructive dismissal are *Auckland Shop Employees IUOW v. Woolworths (NZ) Ltd* (1985) ERNZ Sel Cas 95 and *Auckland Electric Power Board v. Auckland Provincial District Local Authorities Officers IUOW* [1994] 2 NZLR 415 (CA).

[13] The first of these cases sets out the three most common situations in which constructive dismissal may arise:

- (i) Was the employer given the option of resigning or being dismissed;
- (ii) Did the employer follow a course of action with the predominant and deliberate purpose of eliciting a resignation from the employee;
- (iii) Did a breach of duty by the employer cause the employee to resign.

[14] In the second case Cook P observed:

In such a case as this we consider that the first relevant question is whether the resignation has been caused by a breach of duty on the part of the employer. To determine that question all the circumstances of the resignation have to be examined, not merely of course the terms of the notice or other communication whereby the employee has tendered the resignation. If the question of causation is answered in the affirmative, the next question is whether the breach of duty by the employer was of sufficient seriousness to make it reasonably foreseeable by the employer that the employee would not

be prepared to work under the conditions prevailing: in other words, whether a substantial risk of resignation was reasonably foreseeable, having regard to the seriousness of the breach.

Discussion and analysis

[15] The applicant and Mrs Nicky Washington formed a sound relationship in the course of Ms Edwards' time with the respondent. With Nicky running the operation on the day-to-day basis they appeared to get along very well. That changed when Nicky began working at night leaving Elizabeth to run the operation during the day.

[16] It is clear the younger woman and the applicant had little in common and while some incidents between them were imperfectly handled by Elizabeth, they were far from major events to an impartial observer. I can understand however, why the applicant was irritated.

[17] The situation was far from harmonious and Ms Edwards told the Authority she had discussed the work situation with her husband Jim on 12 March 2009. She said *we both decided I should voice my concerns with Nicky over the weekend.*

[18] The following morning at the bakery, while Paul Washington was present, as were other staff, Elizabeth asked the applicant to ensure she re-positioned the van seat after using it. Paul said the request was neither threatening nor unkindly expressed. Ms Edwards said it was belittling and deliberately done in front of others.

[19] Ms Edwards says *five minutes after Paul left for his main job, I took off my gloves, walked over to Elizabeth and said, I can't work with you any more Elizabeth, and walked out. I drove around to my step mother's house and broke down.*

[20] The evidence is unequivocal and indicates Ms Edwards resigned her position and seeks to rely on a serious breach by the respondent in grounding her grievance.

[21] The respondent and its staff were clearly surprised at the applicant's departure and it is also clear Mr Washington was advised immediately and contacted Ms Edwards while she was still at her step mother's home.

[22] Mr Washington was clear in his evidence; he was looking for reasons and received none. He attempted to communicate by email to establish the applicant's grievance and still received no response apart from the demand to meet on the

respondent's premises. In frustration, he told Ms Edwards to arrange a mediation with the Mediation Services of the Department of Labour in the hope he could get an understanding of why the applicant had gone.

[23] Very regrettably, Ms Edwards did not follow through on her intention to address her concerns with Mrs Washington.

Determination

[24] Returning to the issues set out above, I find:

- The applicant, while aggrieved at the manner in which Elizabeth addressed a situation, tendered a verbal resignation and never sought to withdraw it.
- The incident which triggered the resignation was, objectively observed, insufficient to justify repudiation of the employment agreement.
- The applicant was not constructively dismissed and does not have a personal grievance.

[25] While having some empathy with the situation which led to Ms Edwards' resignation, the Authority is unable to assist her further.

Costs

[26] Both parties represented themselves. I understand from its final submissions the respondent incurred some legal costs for advice. Its submission on costs is to be lodged with the Authority and served on Ms Edwards within 14 days of the date of this determination. Ms Edwards is to have a further 7 days to lodge her submission in reply with the Authority and to serve a copy of that submission on the respondent.

Paul Montgomery
Member of the Employment Relations Authority