

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE**

[2022] NZERA 179
3109733

BETWEEN	CAMILA FACHINETTI Applicant
AND	KERRY JOANNE SEMIZ First Respondent
	RAMAZAN SEMIZ Second Respondent
	TURKMANS LIMITED Third Respondent

Member of Authority:	Leon Robinson
Representatives:	Malvern Gwizo, advocate for the Applicant Aynaz Nowparvar and Kimberley Alford, advocates for the Respondents
Investigation Meeting:	26 July 2021 at Auckland
Submissions received:	9 and 30 August 2021 from Applicant 18 and 27 August 2021 from Respondent
Determination:	3 May 2022

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Ms Camilla Fachinetti (Ms Fachinetti) claims that her employer's behaviour towards her caused her to resign and the resignation amounted to a constructive dismissal that was not justifiable. She also claims she was unjustifiably disadvantaged in her employment because of her employers' breach of its duty of good faith and their failure to provide her access to the Government's COVID-19 wage subsidy. The employers Mr Ramazan Semiz (Mr Semiz) and Mrs Kerry Joanne Semiz (Mrs Semiz) deny Ms Fachinetti's claims.

[2] The parties were unable to resolve the employment relationship problem between them by the use of mediation. Ms Fachinetti asks the Authority to find that she has personal grievances and to resolve those personal grievances by formal orders for reimbursement and compensation.

The Authority's investigation

[3] For the Authority's investigation written witness statements were lodged by both parties. All witnesses answered questions under oath or affirmation from the Authority and the parties' representatives. The representatives also gave closing submissions.

[4] This determination has been issued outside the timeframe set out at section 174C(3)(b) Employment Relations Act 2000 (the Act), where the Chief of the Authority considers exceptional circumstances exist. As permitted under section 174E of the Act, not all the evidence or information received has been recorded. Rather, this determination makes findings of fact and law and sets out conclusions on the issues necessary to dispose of the Applicant's claims.

The issues

[5] The issues requiring investigation and determination were:

- (a) who was the employer?
- (b) did the employee resign?
- (c) was the resignation caused by a breach of duty on the part of the employer?
- (d) if it was, whether a substantial risk of resignation was reasonably foreseeable, having regard to the seriousness of the breach?
- (e) were the employer's actions and how the employer acted, what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred?
- (f) if the employer's actions were not justified, what remedies should be awarded, considering:
 - Lost wages (subject to evidence of reasonable endeavours to mitigate loss); and
 - Compensation under s123(1)(c)(i) of the Act

- (g) if any remedies are awarded, should they be reduced (under s124 of the Act) for blameworthy conduct by the employer that contributed to the situation giving rise to the employee's grievance?
- (h) should either party contribute to the costs of representation of the other party?

Who was the employer?

[6] I am not satisfied that Ms Fachinetti entered into an employment relationship with the respondent limited liability company Turkmans Limited. I find that Ms Fachinetti was employed by the First and Second Respondents Mr Semiz and Mrs Semiz in their GoodHub Eatery. She was employed from 3 March 2020 as Front of House Attendant. The terms of the employment were recorded in a written employment agreement. I find that Ms Fachinetti was not provided a copy of the signed employment agreement but she was instead permitted an opportunity to take photographs of it on her mobile telephone.

[7] Mr Semiz and Mrs Semiz have been employers in the hospitality industry for more than twenty-eight years. They also own an eatery establishment Downbeat.

Did Ms Fachinetti resign?

[8] Mr and Mrs Semiz indicated that Ms Fachinetti was employed on a 90 day trial period and that if they did not wish to continue to employ her they would simply have invoked the 90 day trial period to end the employment, which they did not.

[9] Ms Fachinetti says that Mr and Mrs Semiz's behaviours made the workplace a toxic work environment and she began to feel anxious and fearful of being abused by them. She says they would often fight in the presence of the employees creating a very unpleasant environment. She says too that she witnessed them abuse other employees. She gives an example of Mrs Semiz screaming at an experienced barista for making a small mistake. She says comments Mrs Semiz made in reference to employee immigration status made her feel extremely vulnerable fearing that Mrs Semiz might use immigration status against her too. She also says that Mr Semiz would not always greet her.

[10] Ms Fachinetti also says that when she did not perform as expected Mr and Mrs Semiz would react by making snide comments and yell at her in an accusatory and demeaning tone.

[11] Mr Kushal Shrestha worked as Restaurant Manager when Ms Fachinetti was employed at the GoodHub Eatery. He gave evidence to the Authority that he found communicating with Ms Fachinetti difficult because she took matters personally rather than professionally. Mr Shrestha said that when he told Mr Semiz about his difficulties working with Ms Fachinetti Mr Semiz told him to “just do [his] job” and he would talk to her. Mr Shrestha also says that on one occasion when she did not turn up for work, Ms Fachinetti texted him with a rude reply when he enquired of her whereabouts. He said it was unfortunate he had not retained his text history with Ms Fachinetti inferring she tended to communicate in a rude and impolite manner.

[12] Ms Fachinetti was rostered for work following lockdown on 5 May 2020. She left the employment that same date after an incident that occurred between her and Mr Semiz.

[13] Ms Fachinetti was serving customers taking their orders at the cash register. As she served a customer who proceeded to change their initial order, a waiting customer walked away throwing his arms in the air in frustration. Ms Fachinetti says that she had done nothing wrong to cause the waiting customer to leave in frustration.

[14] Mr Semiz formed a view that Ms Fachinetti was not performing her assigned duty correctly and as a result he told her to go to see Mrs Semiz in the kitchen for another task. He directed another employee to take over the cash register and he positioned himself to cover the coffee machine.

[15] Ms Fachinetti did not accept that she had done anything wrong for Mr Semiz to direct that she perform an alternative task. I find that Mr Semiz did say to her in a raised voice that she was not taking orders anymore. I find that Ms Fachinetti protested and challenged Mr Semiz directly by asking him “Why?” a number of times. I find that she did so because she wished Mr Semiz to engage with her so that she could explain her perspective of what had occurred. I find that Ms Fachinetti continued to challenge Mr Semiz so that she could explain she had done nothing wrong. I find that Mr Semiz became exercised by Ms Fachinetti’s direct challenge of him and I further find that he became very angry and he used a hand gesture motioning Ms Fachinetti to go to the kitchen at the rear of the premises.

[16] When Ms Fachinetti did go to the kitchen to see Mrs Semiz, I find that Mr Semiz followed her to the kitchen and in a raised voice continued to express his anger “You

are saying to an old Turkish man to calm down!” and other similar comments. I find that Mr Semiz was angered by Ms Fachinetti’s direct challenge of him and he was yelling at her in an angry and agitated state. I infer from Mr Semiz’s comments that he was particularly aggrieved that a young woman dared to challenge him – he being an old Turkish man.

[17] I find that Ms Fachinetti sought to have Mrs Semiz calm her husband down.

[18] I find that as a result of Mr Semiz’s behaviour and comments, Ms Fachinetti became distraught and fearful of her safety. I find that she felt unsafe and decided to leave the café.

[19] Ms Fachinetti left the café and I find that before doing so she made a statement to Mr and Mrs Semiz that she did not want to experience “that type of treatment” in reference to Mr Semiz’s yelling and aggression.

[20] It is clear that Ms Fachinetti did resign. After she left the café she took advice and later that same day she emailed Mr and Mrs Semiz notifying them of her resignation as follows:-

Re: Notice of Resignation

I hereby offer my resignation from employment. Today the abuse I received at the work is such that I am no longer able to continue in my employment with Downbeat- Goodhub. I clearly had no desire to resign. I made a mistake in taking an order from your client. Ray’s responded by yelling and demeaning my person and did so in front of a customer and staff; clapping his hand as he degraded me-yelling at me. This was humiliating and uncalled for. There are ways of resolving matters that do include such degrading and humiliating an employee. I cannot expose myself to such degrading and inhumane treatment. Prior to this incident I have suffered micro-aggressions from management in the form of being ignored at work and not having timely or fair responses to concerns I was raising. The abusive yelling and demeaning conduct of today clearly indicates an escalation to grossly inappropriate behaviour on the party of the Downbeat- Goodhut. Because I have not willingly resigned but was forced to resign by the abusive conduct of DownbeatGoodhut I seek remedies of the loss of income and also for hurt, the humiliation I was put through, and stress including also as a result of loss of employment. Regards, Camila

[21] Mr Taz Mukorombindo, the President of the Canterbury New Zealand Business Association, wrote by letter dated 5 May 2020 to Mr Semiz with a subject line “Restructure and redundancy matter”. He advised that Ms Fachinetti had approached the Association in relation to her resignation that day which he stated was a forced resignation called a constructive dismissal. He urged Mr Semiz to keep paying Ms Fachinetti’s wages and respond urgently to his letter.

[22] As a result of the erroneous subject line, Mr and Mrs Semiz decided that Mr Mukorombindo lacked the required expertise for them to legitimately correspond with him.

Was the resignation caused by a breach of duty on the part of the employer?

[23] Ms Fachinetti describes being paid at the incorrect rate of pay and her experience engaging with Mr and Mrs Semiz to have the situation corrected plainly left her displeased. She tells how Mr and Mrs Semiz as her employer would not provide her with PAYE advice slips when she requested them. She accused her employer of paying her incorrectly, not paying PAYE correctly, fraudulently obtaining the COVID-wage subsidy on her behalf and being rude and acting in a racist way towards her. She says that she was left feeling apprehensive and came to have very serious doubts about their sincerity and integrity. She says that despite their knowledge of her dire financial situation they did not respond in a prompt way.

[24] Mrs Semiz told the Authority how she would allow Ms Fachinetti to take food home with her and said she was sympathetic to Ms Fachinetti's partner who had lost his employment. Mrs Semiz described how she and her husband regarded their employees as family.

[25] While it may well be that Ms Fachinetti experienced administrative difficulties in her employment, I am not persuaded those issues were directly causative in any material way to the ending of the employment relationship. I conclude that it was more likely Ms Fachinetti's raising of such issues likely led her employers to come to regard her as a troublesome employee.

[26] On 5 May 2020, I find that Mr Semiz did state in a raised voice "Ok you are not taking orders anymore!" in the presence of customers and staff and as Ms Fachinetti challenged him standing her ground in defiance of his direction. I find that Mr Semiz became increasingly more agitated and continued to gesticulate and utter in a raised voice comments expressing his anger that Ms Fachinetti had dare challenged him. "Just go ask Kerry what you can do!" he said in a dismissive fashion. As Ms Fachinetti continued to defy him in an effort to explain herself, he became more and more exercised. He was shaking as he said to her "You have to say 'Yes' to everything I say!" whilst clapping his hands and telling her to go to the kitchen. He became more and more angry.

[27] I find that Ms Fachinetti tried to explain what happened to Mrs Semiz and pleaded with her to get her husband to calm down in Mr Semiz's presence but he remained agitated.

[28] I was impressed with Ms Fachinetti. She is an intelligent young woman who has clear views about feminism and the rights of Women. I have no doubt whatsoever that she is not a young woman who will remain silent if she feels wronged or that she will dutifully be subservient to any man.

[29] What happened that day was Ms Fachinetti as an empowered young woman, sought to stand her ground and she challenged Mr Semiz because she considered he had wronged her when he in an aggressive angry way sought to banish her to the kitchen. Ms Fachinetti was not having it. He was wrong and she was going to tell him he was wrong. Only he, as an old Turkish man, was not going to be defied by her, a young informed and empowered woman and be told he was wrong.

[30] I am inclined to accept Ms Fachinetti's description of the exchange. In accepting her description of it, I find the scenario disturbing. There is a very unattractive dynamic to the incident that day. Ms Fachinetti, a young lady and a vulnerable visitor to this country, found herself facing the wrath of Mr Semiz supported as he was by his wife Mrs Semiz, two mature adults, parents and experienced employers in a most regrettable, unfortunate and very unpleasant interaction. When I consider they held themselves out to their younger visiting tourist employees as having the standing of parents, the dynamic is even more distasteful.

[31] I have little doubt that the way in which Mr Semiz behaved towards Ms Fachinetti on 5 May 2020 constituted a breach of duty owed to Ms Fachinetti. She was owed a duty of fair and reasonable treatment. She was not treated fairly or reasonably that day. This breach of duty was directly causative of Ms Fachinetti's decision to resign from the employment.

Was a substantial risk of resignation reasonably foreseeable, having regard to the seriousness of the breach?

[32] I find that the breach was so serious, that a substantive risk of resignation was reasonably foreseeable.

Were the employers' actions and how the employer acted, what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred?

[33] I find that the manner in which Mr Semiz acted towards Ms Fachinetti on 5 May 2020 was not the actions of a fair and reasonable employer. I find that Ms Fachinetti's resignation amounts to a constructive dismissal and that constructive dismissal was not justifiable.

The outcome

[34] I find that Ms Fachinetti has a personal grievance for unjustifiable dismissal.

The resolution

[35] Ms Fachinetti is entitled to remedies to resolve the personal grievance for unjustifiable constructive dismissal.

[36] I must first consider whether there was any blameworthy conduct on Ms Fachinetti's part which contributed to the situation that led to the personal grievance I have found. I find that there was no such blameworthy conduct on Ms Fachinetti's part and there is no basis to reduce either the nature or the extent of any remedies to be provided to her.

Reimbursement

[37] Ms Fachinetti says that she commenced a casual job from 8 July 2020 until 12 September 2020 in which she earned \$648.00 per week.

[38] I am satisfied that Mr Fachinetti has lost remuneration as a result of the personal grievance of unjustifiable constructive dismissal.

[39] I consider Ms Fachinetti is entitled to be reimbursed the remuneration she would otherwise have earned had she not been unjustifiably dismissed. I am satisfied that she acted to mitigate her losses. I order Ramazan Semiz and Kerry Joanne Semiz to pay 3 months lost wages in the gross sum of \$6,897.60 (Six thousand eight hundred and ninety-seven dollars and sixty cents) (\$573.30x12) to Camila Fachinetti as reimbursement and to do so within 28 days of the date of this determination.

Compensation

[40] Ms Fachinetti gives affidavit evidence that her health deteriorated as a result of the treatment by her employers. She says she suffered panic attacks, anxiety and

became depressed. She says she doubted herself, became insecure and was afraid to be in public or loud places with many people. She felt that she was not good enough to work in hospitality. I am satisfied that Ms Fachinetti has been treated with medication for her mental wellbeing under the care of medical professionals.

[41] Ms Fachinetti says that after having therapy, she does not doubt herself anymore.

[42] I am satisfied that Ms Fachinetti has suffered hurt and humiliation, loss of dignity and injury to her feelings as a result of the unjustifiable constructive dismissal. Having regard to the nature and circumstances of the personal grievance, the period of the employment and the particular evidence given by Ms Fachinetti, I order Ramazan Semiz and Kerry Joanne Semiz to pay to Camila Fachinetti the sum of \$5,000.00 (Five thousand dollars) as compensation and to do so within 28 days of the date of this determination.

Costs

[43] The parties are encouraged to resolve any issue of costs between them. If they are not able to do so Mr Gwizo is to lodge and serve a memorandum on costs within 14 days of the date of this determination. From the date of service of that memorandum Ms Nowparvar will have 14 days to lodge any reply memorandum. I will not consider any memorandum submitted out of time without leave.

Leon Robinson
Member of the Employment Relations Authority