

NOTE: An order at paragraph [8] of this determination prohibits the publication of certain information

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2024] NZERA 30
3215359

BETWEEN

JTK
Applicant

AND

MURPHY'S LAW
54 LIMITED
Respondent

Member of Authority: Robin Arthur

Representatives: Kylie Hudson, counsel for the Applicant
John Ropati, counsel for the Respondent

Investigation Meeting: 6 & 7 September 2023 in Auckland

Submissions received: 14 September 2023 from Applicant
21 September 2023 from Respondent

Determination: 19 January 2024

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] From 14 March 2021 until 10 September 2022 JTK worked part-time, usually on a Friday and a Saturday, as a waitress at a bar and restaurant operated by Murphy's Law 54 Limited (Murphy's). On 26 August 2022 JTK gave two weeks' notice of resignation from her employment with Murphy's.

[2] Soon after she finished working at Murphy's JTK raised a personal grievance, through her lawyers, saying her resignation was really a constructive dismissal. She said it resulted directly from Murphy's not doing enough to properly address concerns

she had about the conduct of another employee towards her. She said this shortcoming was, in part, because Murphy's managing director Yvonne Hogan had not believed JTK's account of what had happened.

[3] In her application to the Authority JTK sought orders requiring Murphy's to pay her lost wages and distress compensation for her personal grievance.

[4] In reply Murphy's rejected allegations by JTK that she was forced to work in an unsafe environment or that it had concluded her concerns were fabricated or exaggerated. The company said CCTV footage was reviewed to check events of concern, other employees were questioned about those events and staff were spoken to about expected standards of behaviour.

The Authority's investigation

[5] The following people provided written witness statements for the Authority's investigation of JTK's application and gave additional oral evidence, under oath or affirmation, at an investigation meeting:

- JTK;
- Ms Hogan;
- Jody Oliver, a former duty manager at Murphy's;
- Juanita Gurnick, a former duty manager at Murphy's;
- Nadia Whyte, a duty manager at Murphy's;
- Samantha Close, a duty manager at Murphy's;
- Liam Elliot, former general manager at Murphy's;
- Cameron Thomson, a former bartender and waiter at Murphy's;
- Sarah Hackett, a flatmate of JTK; and
- Eugene Hamilton, owner of Franklin's Bar & Restaurant in Pukekohe.

[6] The parties' representatives also provided written closing submissions on the issues for determination.

[7] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law and expressed conclusions on issues necessary to dispose of the matter. It has not recorded all evidence and submissions

received. This determination has been issued outside the usual statutory period as the Chief of the Authority decided exceptional circumstances existed for the delay.¹

Order prohibiting publication of certain information

[8] By order made under clause 10(1) of Schedule 2 of the Act publication is prohibited, in relation to this matter, of the names of the Applicant and of a chef who was the subject of concerns she raised with Murphy's managers. In this determination the applicant is referred to as JTK, randomly selected letters not related to her actual name. The chef is referred to as Mr Z, a letter also unrelated to his actual name.

[9] The order anonymising JTK's real name is made on the Authority's own motion, in exercise of the discretion to do so, for reasons relating to her health and her future employment prospects.

[10] The order anonymising Mr Z's name is made, with the agreement of both parties, because he did not give evidence at the Authority investigation meeting and so had no fair opportunity to give his own account of events in response to allegations made about his conduct. In those circumstances it was not appropriate for his name to be a matter of permanent public record.

[11] Some Murphy's staff and customers will nevertheless be able to identify JTK and Mr Z from other information which this determination has had to include from the evidence given. They, along with anyone else, are bound by the order made not to use the actual names of JTK and Mr Z in whatever they may say or write about this matter in personal conversations or through social or other media. In this way the identities of JTK and Mr Z receive some protection.

The issues

[12] The key issue for investigation and determination was whether Murphy's had adequately addressed the concerns JTK raised about the conduct of Mr Z towards her. If not, the issue for determination would be whether her subsequent resignation was really a constructive dismissal caused by breaches of terms of employment about providing a safe workplace and investigating concerns raised by an employee.

¹ Employment Relations Act 2000, s 174C(4).

[13] Because of the conclusion reached on those issues, for reasons given in this determination, it was not necessary to consider any issues relating to remedies.

[14] The remaining issue was whether either party should contribute to the costs of representation of the other party. Arrangements to consider that issue, if necessary, are set out at the end of this determination.

Legal principles

[15] When a worker has raised a personal grievance about the circumstances in which their employment has ended, the Act places the onus on the employer to show it had acted fairly and reasonably.² This statutory “test of justification” asks, in this case, whether what Murphy’s did when JTK raised her concerns met the objective standard of “what a fair and reasonable employer could have done in all the circumstances at the time”?

[16] An employer, acting fairly and reasonably in accordance with that standard, is expected to abide by the terms of its employment agreement with the worker. In Murphy’s case those terms included one requiring employees who believed they had been harassed to report the behaviour to the employer and a commitment that “the employer will listen to the complaint, and investigate and take action as may be appropriate”. The employment agreement also included a term acknowledging statutory health and safety obligations and stating “the employer will take all practicable steps to ensure a safe and healthy work environment”.

[17] The general duty of good faith also requires both employers and workers to be active, constructive, responsive and communicative in maintaining productive employment relationships.³

[18] An employer which has not complied with applicable terms in its employment agreement and statutory obligations may be found to have breached its duties to the worker. If such a breach is found to have caused the worker to resign, the end of the employment may be held to be a “constructive dismissal”, because it resulted from what the employer did (or, perhaps, failed to do) rather than truly being at the choice of the worker.

² Employment Relations Act 2000, s 103A.

³ Employment Relations Act 2000, s 4(1A)

JTK What is your problem? What happened when I was away?

Mr Z Sorry but I have no time for bollocks g

 And do u remember telling me to go fuck myself ... That's what's up

JTK So exactly what is your idea of bollocks? What was the problem exactly.

 I go away then come back and you're a different person I'm unsure what the problem is

Mr Z Don't blame me g ... U came back I told you what we don't have in the kitchen ... then you ordered wrong thing again and again, I told you that we don't have it and u telling me to go fuck myself.

 And I don't feel like talking with you at all.

JTK You never told me and your attitude has changed since iv been back maybe have a little look in the mirror before giving out advice. [smile emoji]

Mr Z Ioooo
Wow
Its always somebody else fault ...
Wow! Surprise!!
Get a life.

JTK Good talk sweetheart. [thumbs up emoji]

Mr Z Go and talk shit around g

JTK Just to clarify what "shit" am I talking?

Mr Z U should know and btw leave me alone

JTK [laughing emojis] Says the one messaging me pathetic messages ...

Mr Z Wow
Get a life g ... you are old woman g.

[25] JTK decided to let Mr Elliot know about her conflict with Mr Z. In a telephone conversation she told Mr Elliot about her brief relationship with Mr Z outside work and sent him a copy of her text exchanges with Mr Z on 27 and 28 July. Mr Elliot responded with a message in which he said he "would let the dust settle between you guys for a few days" and then "I'll have a word with him on the quiet and see why the f**k he's being a dick". He described Mr Z as "a complicated character" and suggested JTK "just keep a distance for a while and don't go back there".

30 July incident

[26] At the start of her shift, on the morning of 30 July, Mr Elliot talked further with JTK. She told him Mr Z had asked other work colleagues about discussions she had with them and sometimes, during work, came into the restaurant area. She said, as a chef, he had no reason to be out of the kitchen.

[27] She also told Mr Elliot about some scratches on her newly purchased car which she had noticed the day after her 28 July message exchange with Mr Z. She thought the car may have been scratched while parked outside her home. She had no evidence but was suspicious Mr Z might have 'keyed' her car.

[28] After talking to JTK Mr Elliot left the premises, as he was on a day off, but told JTK to call him if anything else happened.

[29] Around half an hour later JTK said Mr Z interrupted a break she was taking with Ms Whyte. She said Mr Z told Ms Whyte that "people around hear are talking shit" and "don't trust anyone". She said Mr Z then said to her: "go f**k yourself, bitch. F**k you".

[30] JTK described Ms Whyte as then stepping in between them and pushing Mr Z away. Ms Whyte, in her evidence for the Authority investigation, said she had stepped in between them with her hands held up but did not touch Mr Z.

[31] JTK immediately reported the incident by text message to Mr Elliot. She said Mr Z had "just come at me aggressively swearing and told me to go f**k myself." Mr Elliot responded that was "really not appropriate behaviour". He wrote that if she did not feel comfortable carrying on with work that day, she could talk to the duty managers and "see if you can be sent home".

[32] Mr Elliot also let JTK know soon after that he had rung Ms Close, who was a duty manager working that day. Ms Close spoke to JTK about going home but JTK said she was confident to continue working. Ms Close also arranged for JTK to work on the bar and for Ms Whyte to work on 'the pass', the service area where orders were picked up from the kitchen for delivery to customers in the restaurant and bar area. This arrangement minimised contact JTK would have with Mr Z for the remainder of the shift.

[33] Responding to a text query from Mr Elliot later that afternoon, JTK said she was “algood” and was “more worried about outside of work [if] he behaves like that in front of customers and cameras”.

[34] Mr Elliot also reported the incident to Ms Hogan. As general manager Mr Elliot dealt with day-to-day staffing matters. He reported serious employment issues to Ms Hogan who, as a director, worked weekdays at the premises attending to administrative and other business matters.

[35] The next day Ms Hogan watched what could be seen on Murphy’s CCTV footage of the interaction between JTK, Mr Z and Ms Whyte on 30 July. In her witness statement for the Authority investigation Ms Hogan said the footage, without an audio track, showed an interaction lasting no more than 2-3 minutes. No customers were present. She said there was “no physical altercation, touching or pushing by anyone”.

[36] She and Mr Elliot then spoke with Mr Z. Ms Hogan said she told Mr Z any personal issues he had with JTK were not to be brought into the workplace. She said Mr Z was reminded to act in a professional manner at all times and was told swearing at other staff members would not be tolerated. She said Mr Z assured her there would be no further outbursts.

8 August

[37] On 8 August Mr Elliot contacted JTK with a query about Mr Z’s conduct over the weekend. JTK’s reply message said Mr Z had remained at the bar for a few hours after work on 6 August and described him as “lingering”. She said on 7 August he had approached other staff members she had spoken to and asked “what were you and that bitch talking about”. Mr Elliot responded “that’s not on”. He asked JTK if she “would be up for coming and speaking with [Ms Hogan] about it”. JTK agreed but, when Mr Elliot asked if she could meet with Ms Hogan the next day, JTK said she would let him know tomorrow as she had a family matter to attend to. Mr Elliot responded: “Sweet no worries let me know”.

[38] In the following fortnight Mr Elliot was in contact with JTK about working some additional shifts and a leave request but JTK made no further reference to meeting with Ms Hogan to discuss her concerns. In her evidence to the Authority investigation JTK said she was diverted during that period by attending to a family matter.

20 August

[39] On 20 August a further incident occurred between JTK and Mr Z. Earlier in the shift there was a disagreement over an order Ms Whyte said was taken by JTK but was incorrect when delivered to the customer. Mr Z was annoyed at having to then remake the order.

[40] Later in the shift JTK said Mr Z yelled at her when she asked whether some food on the service pass area was ready to be taken out to customers. She said she responded to him yelling by saying: "I'm not interested in your nonsense today, I'm simply asking if I can take the food since you haven't put the docket up".

[41] JTK walked away to a nearby staff area. When Ms Gurnick, the sports bar manager, asked her what was happening JTK burst into tears and told Ms Gurnick she would ring Mr Elliot. Unable to contact him by phone JTK sent Mr Elliot a text message: "He's already starting his bullshit. I'm not putting up with this every f**ken shift. I wanna put in a formal complaint iv had enough".

[42] JTK said she had gone to the bathroom to clean her face and call Mr Elliot. Ms Gurnick came into the bathroom to check on her, gave her a hug and told her to go to the sports bar.

[43] As they left the bathroom Mr Z approached JTK and Ms Gurnick, wanting to talk to JTK. In her written witness statement JTK said she had responded by saying "leave me alone, I've had enough" but Mr Z would not let her past and Ms Gurnick had pushed him away from JTK.

[44] Ms Gurnick had a different account of that interaction. She said she thought Mr Z was coming to apologise to JTK but JTK had responded by telling Mr Z he was "a f**king moron". Ms Gurnick said Mr Z then became upset and "was physically crying". She said Mr Z said he was going to see Ms Hogan as he felt JTK was bullying him. Ms Gurnick said Mr Z then turned around and "stormed off back to the kitchen with me following him".

[45] Ms Gurnick said she had not pushed Mr Z away.

[46] In her oral evidence JTK recalled that, as he walked away, Mr Z had said he “was going to call the police, probably because I called him a f**king moron”. She said Mr Z “reckoned he was going down in his lunch break to the Police station.”

[47] Meanwhile Ms Whyte had spoken to Mr Elliot, using JTK’s phone, and Mr Elliot said he would come into work.

[48] Mr Elliot arrived around 20 minutes later. He then arranged a meeting with Mr Z and JTK, which he described as a mediation. JTK agreed to take part. The meeting lasted more than an hour.

[49] Mr Elliot described Mr Z as having a lot to say, including about his belief that JTK and other restaurant staff deliberately did things to wind him up, including putting in incorrect orders on purpose. JTK described what Mr Z had said in the meeting as intense ramblings which included abusive comments about her and, incorrectly, saying she had wanted to continue a romantic relationship with him.

[50] At one point Mr Z became so tearful and upset Mr Elliot asked JTK to wait outside. While alone with Mr Z, Mr Elliot said they talked about why he was so emotional. Mr Z referred to a recent separation from his wife, with whom he had a child, and working excessive hours.

[51] JTK rejoined the meeting around 15 minutes later. According to Mr Elliot the meeting ended soon after with both JTK and Mr Z agreeing to try and put personal issues behind them. He said JTK and Mr Z shook hands, hugged one another and returned to work the remainder of their shifts.

[52] JTK said Mr Z had forced her to hug him. When Mr Z then left the room, JTK stayed and talked with Mr Elliot. Mr Elliot thanked her for how she had dealt with JTK in the meeting. He told her Mr Z was dealing with some serious mental health issues previously unknown to him and he would help Mr Z get support and lighten his workload.

21 August

[53] The next day, at the end of working a night shift, JTK talked with Mr Thomson, a co-worker, about Mr Z’s behaviour. During that conversation, according to JTK, Mr

Thomson said Mr Z had told him “about his desire to harm me, specifically mentioning that he wanted to kill me after the [previous day’s] meeting with Mr Elliot”.

[54] JTK said she genuinely believed her safety was at risk due to what she had been told about Mr Z’s mental health. At 9:32pm she sent Mr Elliot the following text message:

Hey mate, ummm can you let me know what gets done with [Mr Z] tomorrow because [Mr Thomson] has informed me [Mr Z] has told him he wants to kill me and its reaching point where I need to inform the police and get it on record.

[55] Mr Elliot responded eight minutes later in what led to the following exchange of messages:

Mr Elliot Hey mate, I understand that is serious if he’s said that. He does however overreact and say stupid things. I am going to discuss the situation with [Ms Hogan] in depth tomorrow and I’ll let you know where we go from here.

JTK Yea I realize he talks shit and I’m taking it into account but I am unsure at what point I need to starting taking it seriously because its starting to scare me.

And I think iv worked out why he loses it on Saturday’s is because he sees me Friday and stews all night over it and I cop it the next day.

Mr Elliot As we discussed on Saturday there is some serious issues there. What we need to do is remove you from the situation and get him to focus on himself. I can only apologise for this mate it is truly is an ugly situation to be in and hopefully we can sort it.

JTK It is what it is, it’s a learning experience .. no need to apologise I’m just nervous of the mental state .. and may talk to you tomorrow.

22 August

[56] On 22 August Mr Elliot told Ms Hogan about the incident over the weekend. Ms Hogan and Mr Elliot then looked at the CCTV footage for 20 August. According to Ms Hogan’s written witness statement, the footage showed Mr Z walking towards JTK and Ms Gurnick, a verbal exchange between Mr Z and JTK, Ms Gurnick say something to Mr Z and Mr Z turning and walking back to the kitchen. Ms Hogan said the footage showed no physical touching or pushing of anyone.

[57] Mr Elliot then talked separately with Mr Thomson and Mr Z about the allegation that Mr Z had talked about wanting to kill JTK. Both denied Mr Z had made those comments.

[58] Mr Elliot said Mr Thomson “was adamant that at no time did he have any discussions with [Mr Z] about threatening to kill [JTK] and at no time did [Mr Z] ever tell him that he wanted to kill [JTK]”.

[59] Mr Thomson, in his written witness statement for the Authority investigation, said this about Mr Elliot’s query about his conversation on 21 August with JTK:

This all came as a surprise to me because what actually happened towards the end of our shift on Sunday 21st August was this. It was [JTK] who actually raised the subject of threatening to kill when she said to me – “hey have you heard the latest about what [Mr Z] has been saying – [Mr Z] wants to kill me”.

[60] Ms Hogan and Mr Elliot then held two further meetings.

[61] The first was with the kitchen staff as a group. Ms Hogan said she talked about her expectation that the staff would act in a professional manner at all times and that personal issues were not to be brought into the workplace.

[62] Their second meeting was with Mr Z individually. She said it was again “made quite clear to [Mr Z] that his behaviour was unacceptable and would not be tolerated”. She said Mr Z was told any aggressive behaviour or swearing had to stop immediately.

[63] The following day Mr Elliot was in touch with JTK about future shift arrangements. She asked for an update on what had happened with Mr Z. Mr Elliot replied that she would “need to come and speak with [Ms Hogan]”.

[64] When JTK asked if Ms Hogan was “bothered” by what she had been told Mr Elliot replied that he had communicated all he could and if JTK wanted to “take it further or make a complaint” she needed to talk to Ms Hogan in person. JTK responded: “If nothing is going to be done I’m putting in a formal complaint I am being harassed at my work by a unstable person?!?”

[65] Mr Elliot and JTK then arranged for her to meet with Ms Hogan at 10.30am the following day. JTK advised that she would “bring [Ms Whyte] in as a witness as she’s been there both times he’s come at me aggressively”.

24 August

[66] In their meeting Ms Hogan told JTK she had watched the CCTV footage for the 30 July and 20 August incidents involving Mr Z. She said Mr Elliot had spoken to Mr Thomson and Mr Z and both denied the allegation that Mr Z had referred to wanting to kill JTK.

[67] Ms Hogan told JTK that she and Mr Elliot had also spoken to Mr Z about the incidents, reminded him of his obligation to act in a professional manner and told him swearing would not be tolerated.

[68] Ms Hogan denied JTK's allegation that she had, in that discussion, discouraged JTK from making a report to the Police about Mr Z's actions. Ms Hogan said she had, however, referred to potential "consequences" of going to the Police. Ms Hogan, in her oral evidence, said she meant that if there was "a non-molestation order", Mr Z could not work in the same place as JTK and, without a chef, the restaurant "would have to close the door".

[69] Ms Hogan said they had also talked about what could be done to reduce contact between JTK and Mr Z at work. JTK could not be rostered solely for bar work as she did not have the necessary training and, due to her university study commitments, her usual rostered days could not be changed. They had, however, arranged for JTK to work in the bar area as much as possible, away from 'the pass' area between the restaurant and the kitchen.

25 August

[70] The following day, Ms Oliver resigned from her position with Murphy's and talked with Ms Hogan and Murphy's other director, Phil Hogan, about her resignation. JTK said Ms Oliver later told her that Ms Hogan had, in that conversation, referred to JTK as "the one telling lies" about Mr Z.

[71] JTK said what Ms Oliver told her made her realise "at that moment" that she had no protection at work. She said this contributed to her decision to herself resign the next day.

[72] Ms Hogan denied telling Ms Oliver that JTK was a liar. Ms Oliver, in her written witness statement for the Authority investigation, said Ms Hogan had referred

to JTK as “the one creating all the drama with [Mr Z]”. In her oral evidence Ms Oliver confirmed that her recall was that Ms Hogan had not used the word ‘lying’.

Resignation and notice period

[73] After submitting her notice of resignation on 26 August, JTK saw her doctor. She was prescribed anti-depressant and sleeping medication. She was also given a medical certificate saying she was unfit for work in the two-week notice period. JTK’s medical notes record that she had asked her GP for the certificate as an “option to leave” in case Mr Z made her “feel uncomfortable”.

[74] JTK said she opted to work her shifts in that fortnight but confirmed, in her oral evidence, that she had already used up her sick leave entitlements so would have lost pay if she had not worked. She reported no problems or difficulties with Mr Z at work during those two weeks.

Subsequent work

[75] During her notice period JTK arranged a new job. From 16 September she worked at Franklin’s Bar & Restaurant in Pukekohe until she went on a pre-planned overseas holiday from 10 to 25 November. She and her new employer expected she would then return to work at Franklins through the Christmas period. However, at the start of her holiday, JTK resigned. In a message to her employer JTK said she was resigning because her father had offered her well-paid farm work over the summer “and the money is way too good to turn down”.

[76] In her written witness statement JTK said she had really resigned because her work performance was affected by her bad experience at Murphy’s and resulting depression. In her oral evidence JTK revealed there was, in fact, no farm work to go to but she felt that was the “best reason” she could give for resigning.

[77] Mr Hamilton, Franklin’s director, said he had no criticisms of JTK’s work, had not seen any problems in her performance and would have re-employed her if she had come back looking for work.

[78] Since resigning from the Franklin’s job, JTK has been involved in her full-time university studies, including placement work, for a professional health services role. She has not undertaken other regular paid employment.

Assessing Murphy's actions

[79] Against that detailed background of events leading to JTK's personal grievance application, JTK submitted there were a number of shortcomings in how Murphy's dealt with her concerns. In summary, JTK submitted Murphy's had not done what a fair and reasonable employer could have done because:

- Her complaints were not formally and sufficiently investigated, including by not interviewing her;
- Ms Hogan placed too much reliance on what she saw from looking at CCTV footage of events on 30 July and 20 August;
- "Informal talks" with Mr Z were relied as a primary response rather than issuing him with a formal, written warning;
- Murphy's had prioritised commercial considerations, to keep a full-time chef over a part-time waitress, including by pressing JTK not to file a report with the Police about her concerns over Mr Z's behaviour towards her;
- She was advised to "let it go" rather than make a formal complaint to Murphy's;
- An earlier instance of concern about Mr Z's conduct towards another staff member was ignored; and
- Murphy's, generally, had failed to take sufficient steps to protect JTK's safety once she had raised her concerns about Mr Z's conduct.

[80] Each criticism is considered in turn below.

Sufficient investigation

[81] A fair and reasonable employer could be expected to promptly take steps to look into allegations of verbal harassment or abuse by one staff member of another staff member in a workplace and not to dismiss or ignore such concerns because they arose from some personal or private relationship outside of work.

[82] The evidence of both JTK and Mr Elliot showed Mr Elliot had acted promptly on each occasion JTK raised a concern with him about Mr Z's conduct towards her. His actions, in his role as general manager, were relevant to the assessment of the adequacy of the employer's response, not only what Ms Hogan as a director said or did.

[83] On 30 July, for example, Mr Elliot made arrangements for JTK to be moved to another part of the workplace for the remainder of her shift but said, if she wanted to, she could go home instead. And, as a result of promptly reporting the concern to her, Ms Hogan reviewed CCTV footage the next day as part of looking into what happened.

[84] On 8 August Mr Elliot asked JTK for an update on her view of the situation after hearing from other staff members of another unsatisfactory interaction with Mr Z over the previous weekend. He had not merely waited for JTK to tell him about it. He responded to her reply by saying “that’s not on” and immediately took steps to get her to come into work to speak to Ms Hogan about what had happened. It had not suited JTK to do so then and she had told Mr Elliot she would get back to him about making arrangements to see Ms Hogan.

[85] When JTK said on 23 August that she wanted to make “a formal complaint” Mr Elliot arranged for her to meet with Ms Hogan the following day to discuss her concerns.

[86] While notes of discussions with staff members were not kept, Mr Elliot’s evidence established that he had promptly sought information from other employees as concerns were raised. An instance of this was when he spoke to both Mr Thompson and Mr Z on 22 August after hearing from JTK at 9:32pm on 21 August of the alleged comments about Mr Z wanting to kill her.

[87] He also acted promptly on 20 August, coming to the premises within minutes of getting a call about the incident between JTK, Mr Z and Ms Gurnick. The meeting he then arranged with JTK and Mr Z to better understand the issue and their views was consistent with Murphy’s good faith obligation to be active and constructive in addressing problems in the employment relationship.

Limited reliance on CCTV footage

[88] JTK submitted Ms Hogan had relied too much on the impression she formed from viewing the CCTV footage of incidents on 30 July and 20 August to then dismiss JTK’s concerns as unfounded.

[89] Employers must exercise caution in relying on CCTV footage to do more than corroborate the presence of a person in a particular place at a particular time or the fact that a person could be seen speaking or what could be seen about the physical manner

in which a person was behaving. Without an audio track, video footage cannot be reliably used to corroborate exactly what was said or the tone of any discussion.⁴

[90] The evidence did not establish Ms Hogan or Mr Elliot had, however, relied on what they could see in the CCTV footage to draw any conclusions about what was actually said on those occasions. Rather, the key point Ms Hogan was able to establish was that there was no physical touching or pushing of Mr Z on either occasion. It was an important fact because, on JTK's account, it had been necessary for the duty manager present (Ms Whyte on 30 July and Ms Gurnick on 20 August) to push Mr Z away on two occasions. Seeing that had not occurred or been necessary gave Ms Hogan a useful insight into the nature of what happened compared with how it had been described, by JTK at least, afterwards. Ms Hogan's conclusion was also consistent with what Ms Whyte and Ms Gurnick said had happened.

[91] Significantly too there was nothing to suggest Ms Hogan and Mr Elliot then doubted JTK's account of the words or language that Mr Z had used or that they were not clear and unequivocal that it was not acceptable for him to have spoken to JTK in that way. Rather, what JTK said about that aspect of the events was accepted entirely.

[92] Reviewing and relying on the CCTV footage as Murphy's did, without doubting JTK's account of what was said, was within the range of responses open to a fair and reasonable employer in those circumstances.

Reasonable to give verbal cautions, not a written warning

[93] JTK submitted Murphy's had not responded adequately to her concerns because Ms Hogan and Mr Elliot "continued the approach of informal chats" with Mr Z, rather than imposing a formal written warning. Her evidence did not establish, however, that the approach taken was ineffective. From the 20 August meeting onwards, up until JTK's last shift on 10 September, there were no further instances of inappropriate language or conduct from Mr Z. While this may, in part, have been because she was not assigned to work on 'the pass' with the kitchen, there were instances discussed in JTK's oral evidence where she had interacted with Mr Z at work during that period without difficulty or rancour. One instance was where they both assisted an unwell customer.

⁴ *Harris v The Warehouse Ltd* [2014] NZEmpC 188, at [117].

[94] While some employers may have dealt with the concerns about Mr Z's conduct by issuing a written warning, the law allows for a range of responses in how an employer could fairly and reasonably deal with such situations.⁵ Murphy's decision to deal with Mr Z in the way that it did, in part because of information about his personal and health circumstances, was within the range of responses reasonably open to it in balancing its responsibility to firmly address the concerns raised by JTK as an employee.

Reasons for not contacting Police

[95] JTK submitted she was treated unfairly because she was told or at least "it was heavily implied" that she would no longer be able to work for Murphy's if she filed a report with the Police about Mr Z's behaviour towards her.

[96] Ms Hogan had, in her discussion with JTK on 24 August, talked about the prospect that a report to the Police by JTK about Mr Z might result in some form of interim non-association order preventing him working at Murphy's. She was concerned that could leave the restaurant without a senior chef, which was a problem because another chef had left recently and recruiting a replacement was difficult. She was identifying a potential practical problem that could then affect the work of JTK and other staff employed to work in the restaurant and the kitchen.

[97] Assessing the evidence overall, however, that was not the sole or decisive reason that JTK chose not to contact the Police. JTK had been clear in her communication with Mr Elliot and, on 30 July, with Ms Cole that she did not feel unsafe while at work. As JTK said in her evidence, both Ms Cole and JTK's flatmates had encouraged her to contact the Police if she had real concerns that Mr Z's behaviour posed a threat to her safety outside the workplace. She did not lack support if she believed that was a necessary or useful thing to do.

[98] However, as revealed in JTK's oral evidence, she had real doubts about the value of making a report to the Police. This arose from a personal experience of making a complaint to the Police in other circumstances some years earlier. This was, realistically assessed, more influential on what she felt was necessary or useful than whatever Ms Hogan said.

⁵ See *Angus v Ports of Auckland Ltd* [2011] NZEmpC 160 [39]-[40] and [59].

Not discouraged from pursuing complaint at work

[99] JTK submitted Murphy's should have done more to assist her in making a "formal complaint" to the company about Mr Z's conduct. The evidence available through the text messages Mr Elliot and JTK exchanged at the time showed he had firmly encouraged her to speak directly with Ms Hogan, both on 8 August and 23 August. JTK had said she would get back to Mr Elliot on 9 August but did not do so then or in the immediate following weeks because she was diverted by family matters she had to attend to.

[100] Murphy's, through Mr Elliot, had acted fairly and reasonably by encouraging JTK to speak directly to Ms Hogan about her concerns.

Earlier instance ignored

[101] There was an earlier confirmed instance of a kitchen worker leaving her job with Murphy's because she was unhappy with Mr Z's conduct. In an email to Ms Hogan on 1 June the worker referred to "unwanted sexualised talk and verbal abuse" by Mr Z while working in the kitchen. Ms Hogan had responded to that email saying she would have investigated the concern if the worker had talked to her or Mr Elliot about it before resigning.

[102] While this showed a need to check Mr Z's behaviour, it was also part of the context in which JTK's concerns was accepted and acted on promptly by Mr Elliot on 30 July and 20 August.

Adequate steps to protect JTK's safety

[103] In her witness statement JTK said she "was not protected in any sense of the word" from Mr Z's conduct and Murphy's had allowed harassment and abuse by Mr Z to "persist". However, as JTK accepted in her oral evidence, she received support and protection from Mr Elliot and several duty managers in relation to each instance of concern.

[104] Ms Close had shifted JTK to a different work area and checked if she wanted to have the rest of the shift off after the 30 July incident. Ms Oliver offered to escort JTK to her car at the end of her shifts if she felt uneasy. On 30 July and 20 August Ms Whyte and Ms Gurnick respectively had intervened firmly when Mr Z behaved

inappropriately. Her work area was changed so she did not have to work at ‘the pass’ and encounter Mr Z as often at work. Mr Elliot had contacted her throughout those weeks to check how she was doing. In her oral evidence JTK described herself as “generally very happy” with how Mr Elliot had responded to her concerns because he appeared “genuinely worried and had my best interests at heart”.

[105] As JTK accepted in her oral evidence, the measures taken from 20 August resulted in no further instances of verbal abuse or other inappropriate behaviour towards her by Mr Z.

Conclusion

[106] While JTK was subjected to inappropriate behaviour by Mr Z, Murphy’s took sufficient steps to address her concerns when they were raised to guard against further instances directed at her or other employees. In doing so, Murphy’s had met its obligation, in this instance, to sufficiently investigate and act on harassment or abuse in the workplace.

[107] While JTK understandably felt upset by what had happened, Murphy’s was not required to cocoon her from every unpleasant interaction that might arise in the workplace.⁶ Rather, once aware of the inappropriate behaviour, Murphy’s could be expected to act promptly and effectively to address it. By 20 August at least, Murphy’s action made clear that behaviour by Mr Z would not be tolerated. Throughout JTK’s concerns were taken seriously and acted on by Murphy’s general manager and, on a day-to-day basis, the duty managers supervising the workplace.

[108] Referring back to relevant terms of the employment agreement, Murphy’s had listened to the complaint raised, looked into what had happened and then taken appropriate action. The arrangements about JTK’s work and the cautions given to Mr Z were practicable steps to ensure a safe work environment.

[109] While JTK experienced some unhappiness about what had happened and chose to resign, how Murphy’s had acted did not indicate it would not meet its obligations as an employer to address such problems.⁷ Consequently there were no grounds sufficient to hold her resignation was really caused by Murphy’s breaching duties owed to her

⁶ *Attorney-General v Gilbert* [2002] 1 ERNZ 31 at [83].

⁷ *Wellington Clerical IUOW v Greenwich* (1983) ERNZ Sel Cas 95, 104.

and, therefore, her employment had not ended by what amounted to a constructive dismissal.

Outcome

[110] For the reasons given, JTK's application to the Authority about her personal grievance is declined.

Costs

[111] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[112] If they are not able to do so and a further Authority determination on costs is needed, any party seeking costs may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of this written determination. From the date of service of that memorandum, the other party has 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

[113] The parties could expect the Authority to determine costs, if asked to do so, on its usual notional daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.⁸

Robin Arthur
Member of the Employment Relations Authority

⁸ See www.era.govt.nz/determinations/awarding-costs-remedies.