

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

WA 81/09
5113849

BETWEEN ANDREW JOHNSON
 Applicant

AND TPF RESTAURANTS
 LIMITED T/A BURGER KING
 Respondent

Member of Authority: G J Wood

Representatives: Ian Hard for the Applicant
 Parvez Akbar for the Respondent

Investigation Meeting: 30 April and 1 May 2009 at Wellington

Determination: 12 June 2009

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Mr Johnson claims that he was disadvantaged in his employment and unjustifiably constructively dismissed, as a result of harassment and an unsafe working environment. Burger King denies Mr Johnson's claims.

The Facts

[2] Mr Andrew Johnson commenced work in May 2007 as a crew member at Burger King's Lower Hutt restaurant, although he did not sign an individual employment agreement until June. From the commencement of his employment, Mr Johnson worked all the shifts that he could possibly get, in order to pay for an overseas trip. His parents thought that Mr Johnson was working far too long hours, but they were unaware, until he was about to leave, of the fact that he was saving up for, and did take, a trip to Europe.

[3] After that, Mr Johnson's hours reduced to a level closer to 40 hours per week. Mr Johnson was, however, selected for a preponderance of night shift work, because of his relatively greater experience and age than the rest of the staff. Many of the shifts involved unsociable hours, ending in the early hours of the morning.

[4] As far as Burger King's management were concerned, Mr Johnson's employment had continued without any significant problem until 15 December 2007. On that day, Ms Kylie Ewing, the Lower Hutt store manager, informed Mr Johnson of a disciplinary meeting to investigate allegations that he had arrived late for his shift, gone on a break without the manager's permission and had been swearing at fellow workers in the presence of customers.

[5] A disciplinary meeting was set for 18 December at the restaurant's premises. Mr Johnson attended with his father, Mr Bill Johnson, who is an experienced criminal barrister. Mr Johnson Snr and his wife were concerned at various reports they had received from their son about the workplace environment at Burger King Lower Hutt. To date they had done nothing about them because Mr Johnson Jnr did not want the matters pursued with Burger King. At the time of the disciplinary meeting, however, Mr Johnson Snr decided that if his son was to be disciplined for what he saw as minor matters, then Burger King ought to be aware of what had been raised with him, as being of more serious concern. In particular, the concerns known at the time related to Mr Johnson Jnr having been locked in a freezer and being afraid for his life, swearing and other abusive language being commonplace in the workplace, and that Mr Johnson Jnr had been assaulted by a female employee on a previous occasion.

[6] At the outset of the meeting, Mr Johnson Snr raised concerns that the disciplinary meeting was to be held in the public seating area of the restaurant. Ms Ewing explained that, for various reasons, the meeting could not take place anywhere else. After Ms Ewing had introduced the assistant manager and explained what the purpose of the meeting was, Mr Johnson Snr stated that he wanted to talk off-the-record about concerns he and his son had about the workplace. Mr Johnson Snr then raised those concerns highlighted above. Ms Ewing denied that the freezer incident had ever occurred.

[7] Mr Johnson Snr then noted that members of the public could probably overhear what was occurring as they waited for their burgers. He was again told there was no where else that the matter could be dealt with.

[8] Ms Ewing wanted to deal with the disciplinary issues that she had called the meeting over. She asked Mr Johnson Jnr a question about these matters, but Mr Johnson Snr told him not to answer, *on legal advice*. Ms Ewing made it clear that she would not address Mr Johnson Snr's other concerns at that meeting, and that she only wanted to deal with the disciplinary issues. Mr Johnson Snr made it clear for his part that he wanted to talk about the other issues, which he saw as part of the background to disciplinary matters, but on an off-the-record basis.

[9] The parties had soon reached an absolute stand-off. Ms Ewing had made it clear that she was not going to talk about anything other than the disciplinary matters and Mr Johnson Snr had made it clear that he wanted to talk about problems at the workplace. The parties were not only in effect talking past each other, but had become quite heated. Ms Ewing made the comment that it was her restaurant and Mr Johnson Snr responded by saying it was not her law. Ms Ewing then stood up and left the meeting. It was clear, on the basis of the differences between the parties, that little or no progress would have been made in the prevailing circumstances.

[10] Mr Johnson Snr then wrote, on 18 December, raising a personal grievance on behalf of his son, claiming that *he has been discriminated against and been subject to detrimental treatment; that he has been harassed in his employment; and that his right to privacy has been breached*. He raised the issue of excessive shifts, which I note could not be the responsibility of Burger King, given the circumstances highlighted above. He then referred to verbal and physical abuse from fellow employees. It was submitted that, given these matters, the disciplinary matters pursued against Mr Johnson were insignificant and/or explainable, even if established. The letter then went on to claim that the allegations constituted an attempt at a constructive dismissal and that Mr Johnson Jnr was not accorded a fair, full and private hearing of those issues at the meeting on 18 December.

[11] On behalf of Burger King, Ms Tracey Miller, its human resources manager, replied, stating that Burger King wanted to investigate Mr Johnson's serious allegations, but that it needed more detail. Ms Miller also noted that Burger King would also need to reconvene the disciplinary meeting with Mr Johnson, as those outstanding issues needed to be discussed and resolved.

[12] Mr Johnson Snr replied, noting that there had been no response to the concerns over Ms Ewing's behaviour on 18 December, that the details of the allegations were

generally known to the assistant manager, that neither he nor his son saw any advantage in attending further meetings held in public with Ms Ewing, that she should not be involved in any adjudication role and that independent counsel would contact her with the details of the allegations, but that the treatment received on 18 December must be addressed.

[13] In the meantime, Mr Johnson continued to attend work, albeit that concerns were raised about the timeliness of his arrival on some days. On 29 December 2007, Mr Johnson Jnr had his lip pierced before his shift. He had inserted a stud or studs into that piercing. Burger King issues a crew information brochure to staff that deals with *crew appearance* policies. It states that employees will be privately counselled and sent home if their appearance does not meet Burger King's standards. The standards in relation to piercings are that they are only permitted in ears and that there are to be no other visible piercings. While it is standard policy for Burger King staff to be given the crew information brochure on engagement, Mr Johnson denied receiving one and there was no evidence that he had ever received the brochure.

[14] The duty manager was concerned about the piercing, but allowed Mr Johnson to work his shift, albeit not on the front counter. There was, however, discussion of the piercing being removed by the use of pliers, but this was not a serious suggestion, nor one that emanated from management. It was clear from the reaction of management and staff that the issue was an important one and that such piercings were not acceptable, albeit that management did not take the action, ostensibly available to it under the policy, of sending Mr Johnson home.

[15] Mr Johnson Jnr had also raised concerns with his mother about the way he was being treated by a female member of staff. He stated that she would either kiss him or hit him, depending on her mood, and that towards Christmas this behaviour had progressed to genital touching. At the same time Mr Johnson Jnr made it clear, as he did at the investigation meeting, that he wanted no action taken against the young woman in question, who still works at Burger King Lower Hutt.

[16] Mr Johnson Jnr has made very serious allegations here, namely of physical and sexual assaults, for which proof is required to a requisite serious standard. Having heard both the protagonists and other staff who worked with them, I conclude that the allegations have not been made out. There were no witnesses to the allegations and they are inconsistent with Mr Johnson's later contacts with the

woman, even after he had left Burger King. In any event, there is no evidence that Burger King was ever made aware of the most serious of these allegations until claims were filed with the Authority in April 2008. Furthermore, the specifics of the allegations were not in fact provided until the investigation meeting. That is not to say that unacceptable juvenile conduct did not occur from time to time, such as swearing and sexual “jokes”. Again, however, there was no evidence these were initiated or condoned by Burger King’s management.

[17] On 30 December 2007, Mr Johnson was ill because of an ear infection. He obtained a medical certificate for an absence of several days. No doubt this did not endear him to Burger King’s management, because he was needed to work on New Year’s Eve, no doubt a very busy evening and one for which it was difficult to recruit staff. Furthermore, the pressures at work were causing great stress for Mr Johnson.

[18] Mr Johnson was due to return to work on 3 January 2008. When he did so, he was told he was not allowed to work that day unless he took the piercing out. When Mr Johnson Jnr rang his father to tell him this, Mr Johnson Snr spoke to the duty manager. He noted that his son had already worked with the piercing and that he had had a conversation with Ms Ewing earlier that day about the medical certificate and no reference had been made to the issue of the piercing.

[19] Mr Johnson Snr was told that his son could not work with the piercing. Mr Johnson Snr pointed out that he would need to go to a medical professional to have the stud removed and that this could not happen in five minutes. Mr Johnson Snr was then told that it was his son’s responsibility to find a replacement worker. Mr Johnson Snr repeated that his son had previously been able to work with the piercing. He told the manager that Burger King’s treatment amounted to a constructive dismissal. Mr Johnson Jnr thought so too and decided, after being sent home, that he would not work at Burger King again.

[20] On 5 January, Ms Ewing telephoned wishing to speak to Mr Johnson Jnr. She spoke to Mr Johnson Snr. Once again, Mr Johnson Snr and Ms Ewing were unable to communicate politely or effectively. Ms Ewing wanted to deal with the piercing issue, but Mr Johnson Snr did not want to hear about that, particularly due to the way that Ms Ewing was speaking to him, and so he hung up.

[21] Mr Johnson Snr wrote to Ms Ewing on 8 January, stating that Mr Johnson

is willing to work but the present situation prevailing is making it impossible to do so in terms of his self-respect. Until this situation is resolved by meeting with representatives of the company, other than yourself, he does not feel disposed to place himself in the way of further humiliation and stress.

[22] On behalf of Burger King, Ms Miller responded on 14 January, noting that no particulars had been provided over Mr Johnson Jnr's allegations, and that in the interim it had investigated the issues based on the general remarks made to date, but it could not verify any of the allegations. I accept that Burger King did make a limited investigation into the allegations through Ms Ewing, who I conclude was not the best person to have collated the material in the circumstances. That investigation disclosed tensions between Mr Johnson Jnr and the woman he complained about, but no actual knowledge by management of any abuse or assaults.

[23] There is no doubt that Mr Johnson Jnr's belief that he was locked in the freezer with the prospect of death was genuinely of huge concern to him, but I accept the evidence of Burger King staff that he was shown, during his induction, the escape button in the freezer and thus that what happened to him was an unfortunate accident.

[24] I conclude that there was a culture of swearing in the workplace. Mr Johnson took part in this, no doubt so as to try and fit in. While such a culture is unacceptable in a workplace with such direct contact with the public, I accept that Burger King's management took a number of steps to deal with the issue, such as having anti-swearing policies, holding meetings about the policies and disciplining offenders, such as it tried to do with Mr Johnson himself.

[25] In her letter of 14 January Ms Miller declined to take any further action until more specific information was provided. Ms Miller then noted that there was an incomplete disciplinary process which Burger King wished to advance, together with an explanation for Mr Johnson's absence from work since 4 January. Mediation was suggested on an urgent basis.

[26] Mr Johnson Snr responded noting that he had instructed Mr Hard. A mediation meeting occurred but it did not resolve matters. On 25 February, Ms Miller wrote again asking about progress. The next thing that happened was that the matter was filed in the Authority, and despite a number of efforts to resolve matters thereafter, the problem has remained unresolved.

The Law

[27] The law on constructive dismissal is clearly set out in *Auckland Shop Employees IUOW v. Woolworths (NZ) Ltd* [1985] 2 NZLR 372 (CA), where it was held that a resignation can constitute a dismissal in different circumstances, including where an employer is in breach of its duties to an employee and the breach causes the employee to resign. The Court of Appeal in *Auckland Electric Power Board v. Auckland Provincial District Local Authority Officers IUOW Inc* [1994] 1 ERNZ 168 at 172 held 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 that 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.

Determination

[28] I conclude there were no breaches of Burger King's duties to Mr Johnson so as to constitute a sufficiently serious risk of him leaving his employment. First, the workplace was not unsafe. For instance, Burger King could not be held accountable in law for the unfortunate freezer incident. The culture of swearing was not condoned by management and Mr Johnson Jnr took part in it anyway. It follows from the lack of knowledge by Burger King of the sexual and other assault allegations, and the lack of detail provided in support of them, that Burger King can not have breached its duty to protect Mr Johnson in the workplace here either. In any event, if there was any sexual harassment it was by a co-worker and therefore under s.118 there would need to be a complaint to Burger King, then further harassment and then a failure to take all practical steps to prevent a repetition, before there could be liability for Burger King for the actions of the harasser. Finally, there was nothing inherently unfair in having Mr Johnson usually engaged on the late shift.

[29] Second, Burger King was entitled to pursue a disciplinary investigation into Mr Johnson's alleged swearing at work and other issues. It was precluded from doing

so through a combination of a lack of sufficient private facilities for it to conduct the meeting in a professional way and the attitudes of Mr Johnson Snr and Ms Ewing at the disciplinary meeting. Because Mr Johnson did not return to work after the piercing issue, Burger King was unable to pursue that matter with him either. Thus at no time did it ever make any conclusions against him in a disciplinary setting. The problems over the disciplinary meeting were not of sufficient seriousness so as to constitute a constructive dismissal of Mr Johnson Jnr. In particular, it could not be said, and did not appear to be alleged, that Mr Johnson Jnr was so humiliated by the treatment of his father at the disciplinary meeting that he could not carry on working for Burger King.

[30] Third, Mr Johnson was not unfairly treated after being sent home. It could be said that he was leniently treated the first time he showed up with the piercing, but that does not constitute condonation of the issue for all time. Even if Mr Johnson Jnr had not received the crew information brochure, it was not unreasonable for Burger King to have sent him home on the second occasion, even although it could have raised the matter earlier in the day when Ms Ewing spoke to Mr Johnson Snr. While it is unfair of an employer to expect an employee who has been sent home to find their own replacement, nothing turned on that issue. In any event, the matter could easily have been resolved without the need for Mr Johnson to leave his employment. The failure by Burger King to have raised the issue earlier was certainly not of sufficient seriousness that it could be said that Mr Johnson was constructively dismissed after being sent home. It was entitled to assume Mr Johnson would present at work in accordance with its *crew presentation* policy.

[31] No doubt there was a difficult relationship between Ms Ewing and Mr Johnson Snr in particular. I do not accept, however, that Ms Ewing picked on Mr Johnson Jnr as a result and otherwise treated him unjustifiably. It is for employers to set standards of presentation and behaviour in their workplaces and the concerns Ms Ewing raised with him appeared to be genuine ones. Burger King was prepared to investigate Mr Johnson's allegations against co-workers and the workplace atmosphere in good faith. I accept that it would have done so to a much greater degree had more details been given to it by Mr Johnson Jnr or his father.

[32] I also note that Mr Johnson Jnr did not want action taken against his co-worker, who he was trying to get on with, and that it was his choice not to return to

the workplace in all the circumstances. Looking at the matter overall, it can not be said that any breaches of duty by Burger King, which related primarily to the way Ms Ewing interacted with Mr Johnson Snr, were of sufficient seriousness as to make it reasonably foreseeable that Mr Johnson Jnr would not be prepared to work under the prevailing conditions.

[33] I therefore dismiss Mr Johnson's application.

Costs

[34] Costs are reserved.

G J Wood
Member of the Employment Relations Authority