

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2012] NZERA Wellington 103
5369644

BETWEEN SHARON JOHNSTON
Applicant

AND THE SILKY OAK
CHOCOLATE COMPANY
LIMITED
Respondent

Member of Authority: P R Stapp

Representatives: Dave McLeod, Advocate for Applicant
Dave Robb, Advocate for Respondent

Investigation Meeting: 21 June 2012 at Napier

Date of Determination: 14 September 2012

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The employment relationship problem is about Ms Johnston's refusal to clean a microwave oven after it had been used by other people at her workplace. Ms Johnston's issue is about not being allowed to explain that she did not want to clean it after it had been used by other people. Ms Johnston alleges that a pad and a pen were thrown across the table at her and that a demand was made for her to put a resignation in writing. Ms Johnston wrote: "*I quit*" in response, left work and did not return. Ms Johnston received a letter from her employer asking her to reconsider her resignation and putting her on notice of allegations about her behaviour for disciplinary action. Ms Johnston went to a representative for advice and her representative wrote to Silky Oak Chocolate Company Limited (Silky Oak) saying that Ms Johnston's employment

had been terminated because a demand had been made for her to resign in writing and that that she was put under pressure to leave and work out notice.

[2] Silky Oak denies Ms Johnston's claims and says that she left voluntarily after being asked to explain why she refused to clean the microwave oven, which was a lawful instruction. Silky Oak did not deny that Ms Johnston had been requested to put her resignation in writing.

The issues

[3] The first issue is how did the employment end, including whether or not Ms Johnston resigned voluntarily? Second what was her decision based on and how was Ms Johnston's final decision made?

[4] The factual issues are:

- a) Did the employer demand that Ms Johnston resign in writing?
- b) Was a pen and pad thrown across the table?
- c) Was pressure put on Ms Johnston to resign and was the cause of any pressure due to four meetings held in the work place on 23 and 24 January 2012?

How did the employment end?

[5] Ms Johnston was employed by Silky Oak as a shop assistant in Napier. Silky Oak is a small chocolate maker and retailer involving a café and a shop, production and packing and despatch.

[6] Jeanette Darwen is a co-director in the business, and Erica Darwen is employed as the manager. On 23 January 2012 Jeanette Darwen (Ms Darwen) requested Ms Johnston to clean the microwave oven. After Ms Johnston decided that she would not clean it Ms Darwen decided to pursue the issue further with Ms Johnston, and they met two more times on 23 January 2012 and once on 24 January 2012 over Ms Johnston's reaction to not to clean the microwave.

[7] In the 24 hours prior to Ms Johnston's employment ending Ms Johnston was involved in four separate meetings that started with the initial discussion on the morning of 23 January. Then on the same day there was a meeting held at 2.30pm and another meeting held at 3.45pm. At both these meetings Ms Darwen says she was

trying to understand why Ms Johnston had taken the stand that she had because the cleaning was contained in her duties, despite learning that someone else had cleaned the microwave oven in the mean time. I hold that at the end of 23 January Ms Johnston decided to go home early and Ms Darwen decided to pay her until her usual finish time at 5pm (Ms Johnston's notes on the events sent to her representative dated 25 January 2012). Ms Johnston returned to work the next day.

[8] The meeting in the morning on 24 January 2012 essentially involved the same matter and was tense. In the heat of the moment and during a discussion about the duties Ms Johnston mentioned that she would accept a written warning and work out her notice.

[9] Ms Erica Darwen says that Ms Johnston said to them that she was "*drawing a line in the sand*" in regard to cleaning the oven after other people when she was asked why she had refused to clean the oven. Ms Johnston denies making the comment, but accepts that she was wrong at the time for not cleaning the oven. Also, she accepts that at the time she said that she would accept a warning. She says she was trying to explain to Ms Darwen the situation she found herself in having to clean after other people, but says that she was not being listened to by Ms Darwen. Ms Darwen took Ms Johnston's comment about handing in her notice to mean that she was considering resigning, and said to her that if she was going to resign to put her resignation in writing. This is a requirement of the employment agreement. They disagree about whether or not Ms Darwen stood over her and threw a pad and pen across the table and made a demand that Ms Johnston had to resign in writing. In any event Ms Johnston then collected her belongings to go home for the day because she was upset.

[10] Ms Johnston wrote: "*I quit*" and left and did not return. That same day (24 January 2012) Ms Darwen, on taking advice, wrote to Ms Johnston advising her of a number of "serious" allegations and that upon returning to work, if she decided not to resign, there would need to be a disciplinary meeting. This was because Ms Darwen took issue with Ms Johnston's decision not to clean the microwave oven and claimed at the time that Ms Johnston had not followed a lawful instruction. Ms Darwen's letter on 24 January also gave Ms Johnston the opportunity to reconsider quitting.

[11] On 25 January 2012 Ms Johnston's representative wrote to Ms Darwen informing her that Ms Johnston's employment had been terminated after a demand that she resign and that she would not be returning to work and would not be

attending any disciplinary meeting. Ms Johnston also provided her representative with notes of her version of the events.

[12] On 27 February 2012 Ms Johnston's representative raised a personal grievance for constructive dismissal.

What was Ms Johnston's reason for resigning?

[13] Ms Johnston's representative confirmed in writing that Ms Johnston's employment had ceased. This would have been based on Ms Johnston's information and version of the events (letter dated 25 January 2012). This relates to her claim that there was a demand made for her to resign in writing and that that she was put under pressure to leave and work out notice.

[14] Ms Johnston said to me that she did not have any understanding about why she quit, except that she now says that she had taken advice and relied on a constructive dismissal.

[15] It was submitted that Ms Johnston resigned because the number of meetings was excessive to wear her down. This was never at the forefront of her mind at the time. She never raised any issue about this at the time and went to the meetings as requested.

[16] Because the meetings were informal and called to have a discussion on the matter they can hardly be excessive, I hold. This is especially so given Silky Oak is a small medium sized employer and it is run by a co director and manager and the meetings were relatively short in duration and there was never any suggestion that they involved disciplinary action until that was activated in the letter dated 24 January. Thus I hold that it was reasonable for them to be considered as discussion and or exploratory meetings.

[17] I hold that Ms Johnston got upset during the meetings because the matter was not sorted at the time and she believed that no one was listening to her about her reasons for not cleaning the oven. It is more likely than not that in the tension of the situation she did explain that she was drawing a line in the sand about cleaning up after others given she had not cleaned the microwave her self and says that no one was listening to her. I am supported in this conclusion by Ms Johnston's own notes

that refer to her saying drawing a line in the sand. The Darwens say they heard the comment.

[18] It was Ms Johnston who mentioned leaving and working out her notice first.

Notice in writing

[19] Silky Oak was relying on the employment agreement in making the request for Ms Johnston to put her notice in writing. It was entitled to ask for any resignation to be put in writing because of the provision in the employment agreement and since Ms Johnston had mentioned working out her notice and decided to go home. In best practice a further cooling down period would have been better and with the involvement of both parties' representatives a more conciliatory approach could have been taken to the problem later.

Silky Oak's reaction

[20] While it could seem that Silky Oak's reaction to invoke disciplinary action next was inflammatory and an overly procedural approach to the matter given it was only over cleaning a microwave, its approach could not be seen as excessive and threatening in the context of the events to make it foreseeable that Ms Johnston would resign. That approach happened after Ms Johnston had left her employment. It may have been an influence in her decision not to return, but that is an entirely different matter given the timing and in any event does not help her as she was prepared to accept some penalty for her action earlier. Ms Johnston was not prepared to give any acknowledgement that she was sorry when there was an issue about others doing their own cleaning. It is more likely than not that her attitude on this became the point of difference between both sides. Also it is more likely than not that both parties were not listening to each other properly because of the way in which the discussions developed and Ms Johnston's decision to leave work on 23 and 24 January because she was upset.

[21] It is more likely than not that Ms Johnston and the Darwens were not able to reach any understanding on each other's position because of the charged atmosphere and Ms Johnston deciding to go home. In such circumstance I hold that the events were not of such seriousness to cause Ms Johnston to "quit" and subsequently say her employment had ceased at the employer's initiative when there were alternatives including returning to work and to have the matter dealt with.

The claims for constructive dismissal

[22] There is not enough evidence to prove Ms Darwen demanded that Ms Johnston put her resignation in writing. Ms Darwen was entitled under the employment agreement to ask for it, which I hold she did do, but only after she raised first leaving and notice and deciding to go home. It is common ground that Ms Johnston wrote her note, but it remains unexplained how and/or where she got the pad and pen from because of the conflict between her and the Darwens on this matter. What is clear is that notes were being taken by one of the Darwens so the pen and pad were there and this means that there is more than the one possibility that Ms Johnston claims happened.

[23] I am supported in reaching the above conclusion for the following reasons. First there was no alternative put to Ms Johnston to resign or face being dismissed. No one said that and there is nothing in writing to support this happening.

[24] Second, there was no deliberate course of conduct to coerce Ms Johnston to resign. In this regard there is no evidence of any plan and deliberate action to wear Ms Johnston down, I hold. There were meetings and these related to a genuine issue about Ms Johnston not cleaning the oven and the Darwens trying to get a response from her. The Darwens were seeking an explanation from Ms Johnston, and for her to accept that she was sorry which she would not do. There is no evidence that they were trying to coerce Ms Johnston to resign. There certainly was a heated discussion, and I accept that Ms Johnston believes that she was not being listened to with her concerns about having to clean up after others, and Ms Johnston wrote the note after she had raised working out her notice and deciding to go home because she was upset. Indeed the first time Ms Johnston went home Ms Darwen paid her normal pay. Ms Johnston does not have sufficient evidence to establish that the Darwens demanded that she resign in the context that it was Ms Johnston who raised leaving first and deciding to go home. Furthermore Silky Oak's letter enabled Ms Johnston to reconsider her position, and I do not accept that it was disingenuous because of the disputes over the facts, the issues that existed and Ms Johnston's decision to leave work twice (23 and 24 January).

[25] Third, there was no breach serious enough to make it reasonably foreseeable that she would resign given that Ms Johnston had not done what she had been asked and the employer was entitled to raise the issue with her. Having four informal meetings and telling Ms Johnston any resignation needed to be put in writing are not serious breaches I hold.

[26] From the evidence I am not able to conclude that Silky Oak has attempted to deliberately try and cover its tracks for any wrong doing in light of the matter of the pen and pad and Ms Johnston writing her note quitting at the time. Having said that Silky Oak properly provided Ms Johnston with an opportunity to reconsider her action given she mentioned working out her notice first. It may have been a different story if the employer had not followed that course of action given the context of the meetings and the issue involved. It is more likely than not that Ms Johnston initiated her decision and indication to quit first, and then not to return to work after getting advice. An employer is entitled to properly take corrective action as happened here, I hold. Unfortunately that opportunity was lost when Ms Johnston decided that her employment had ended with her representative's letter on 25 January. This is especially unfortunate as the facts relied upon at the time by Ms Johnston's representative have not been supported by the evidence to establish a constructive dismissal.

Nature of the grievance different to the type alleged

[27] Although this was raised by me as an option for consideration no submissions were made on it by the applicant's representative, and I am satisfied that the employment relationship problem rested on whether or not the employer's actions made it foreseeable that Ms Johnston would resign. I hold that Ms Johnston's evidence that she would have returned to work but for the advice she received from her representative means that she can not possibly claim a constructive dismissal, even although I do accept, as she did, that any such return to work, would have been difficult and tense as she would have had to deal with the matter in a disciplinary process. No alternative personal grievance has been alleged. Ms Johnston does not have a personal grievance in such circumstances I hold.

Conclusion

[28] Ms Johnston's claims are dismissed.

[29] Costs are reserved.

P R Stapp
Member of the Employment Relations Authority