

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

[2016] NZERA Wellington 137  
5607111

BETWEEN            OWEN SHAW  
                                 Applicant  
  
AND                    NEW PLYMOUTH CLUB INC  
                                 Respondent

Member of Authority:    Trish MacKinnon  
  
Representatives:        Sandy Dodunski, Counsel for Applicant  
                                 Paul Robertson, Counsel for Respondent  
  
Investigation Meeting:    17 and 18 August 2016 at New Plymouth  
  
Submissions Received:    At the investigation meeting  
  
Determination:            18 November 2016

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1]    Mr Shaw claims he was unjustifiably dismissed (constructively) by the New Plymouth Club Inc (the Club) which had employed him since December 2010. He submitted his written resignation on 25 March 2015 immediately after an incident in which he claims to have been verbally abused by the head chef. Mr Shaw says he informed his employer on a number of occasions about the verbal abuse and bullying he was experiencing in the kitchen where he worked as a demi-chef but his employer took no steps to investigate his concerns.

[2]    The Club, which operates a bistro open to the public, denies Mr Shaw was constructively dismissed. It says he did not inform it sufficiently of problems he was experiencing in the kitchen for it to investigate his concerns. The Club says it only became aware of Mr Shaw's claim to have been bullied and verbally abused after his

employment had ceased and he had engaged a lawyer to bring a personal grievance on his behalf.

[3] The Club initially raised an issue as to whether Mr Shaw had raised his grievance within the statutory 90 day period.<sup>1</sup> However, during the course of the investigation meeting it conceded the grievance had been raised in time.

### **Relevant Law**

[4] The Court of Appeal in *Auckland Shop Employees Union v Woolworths (NZ) Ltd* considered the kinds of case that could be treated as constructive dismissals.<sup>2</sup> It held they included, but were not limited to, cases where:

- a. an employer gives an employee the option of resigning or being dismissed;
- b. an employer has followed a course of conduct with the deliberate and dominant purpose of coercing an employee to resign; and
- c. cases where a breach of duty by the employer leads an employee to resign.<sup>3</sup>

[5] Ms Dodunski, counsel for Mr Shaw, submits categories (b) and (c) are relevant to his situation.

### **Issues**

[6] The main issues for the Authority to determine are:

- a. whether the Club embarked on a course of conduct with the deliberate and dominant purpose of coercing Mr Shaw to resign; or, if it did not,
- b. whether Mr Shaw's resignation resulted from the Club's breach of duty to him.
- c. what remedies are appropriate if it is determined Mr Shaw was constructively dismissed.

[7] Other relevant considerations are whether Mr Shaw made his concerns known to his employer sufficiently to allow the employer to investigate them. If he did make

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<sup>1</sup> Section 114(1) of the Employment Relations Act 2000

<sup>2</sup> [1985] 2NZLR 372

<sup>3</sup> n2 at 374 & 375

his concerns sufficiently clear, it will be necessary to consider whether, and how adequately, the Club investigated and addressed his concerns. Issues as to contribution may also require consideration.

### **The Authority's investigation**

[8] Mr Shaw and his wife, Clare Shaw, and one former employee of the Club, provided evidence to the Authority for Mr Shaw. Evidence for the Club was provided by its current President, Bill Foley; an executive committee member, Don Taylor; the Club's manager, Peter Grey; the head chef, Grant Smith; the sous chef, Bernard Gurry; and two other employees.

[9] I have not referred to all the evidence brought to the Authority but have set out the material facts and made findings on issues relevant to determining Mr Shaw's claims in accordance with s.174E of the Employment Relations Act 2000 (the Act).

### **Brief background**

[10] Mr Shaw signed his most recent employment agreement on 20 January 2015. That agreement referred to his employment having commenced on 16 December 2010. However, he had also worked in the Club's kitchen before that date, when its restaurant was managed by an external company contracted by the Club.

[11] The current head chef, Mr Smith, had also previously worked in the kitchen with Mr Shaw while the restaurant was managed by the external company. He had worked with Mr Shaw for at least seven years. Problems and discontent in the kitchen had resulted in the former head chef's employment ending mid-2014. Mr Smith then assumed the management of the kitchen until a permanent head chef could be found.

[12] On 8 September 2014 Mr Grey commenced his employment with the Club as Facilities Manager, tasked with overseeing the management of all aspects of the Club's business, including its bar, Bistro and kitchen. Mr Gurry started his employment as sous chef on 17 September 2014.

[13] Mr Smith was formally appointed to the position of head chef in January 2015.

**Evidence of the parties**

[14] Mr Shaw's evidence is that Mr Smith became irritable and stressed when he assumed the management of the kitchen. He said around this time the Club's committee began to put more pressure on the kitchen over the quality and cost of the food it was providing patrons. In Mr Shaw's view Mr Smith began "*nit-picking*" over his performance in the kitchen from this time. They were also working long hours and were short staffed.

[15] When Mr Gurry started as sous chef, Mr Shaw said his problems in the kitchen worsened. He claims to have been subjected to "*barrages of degrading verbal abuse*" from Mr Gurry from the outset of his employment. Mr Shaw said he brought the abusive language to Mr Smith's attention and was told to ignore it.

[16] Mr Shaw claims, in addition to the verbal abuse, Mr Gurry would slam pots and pans around the kitchen and barge into Mr Shaw on occasions when he was moving around the confined space. He alleged Mr Gurry would put hot pans on the bench without telling staff the handles were hot with the result that they would get burned. He said Mr Gurry would talk badly to other staff as well. Under cross examination Mr Shaw agreed when six or seven people were on duty in the kitchen it was inevitable they would sometimes bump into each other.

[17] Mr Smith said he was aware of a certain amount of "*rough talk*" between Mr Shaw and Mr Gurry but it was his impression they were equal participants in their banter and each "*gave as good as he got*". He said Mr Gurry had such conversations with other employees as well. He recalled Mr Shaw telling him on one occasion he did not like some of the things Mr Gurry said to him. Mr Smith said he then spoke separately with them both about their language.

[18] He said he told both Mr Gurry and Mr Shaw to stop the bantering conversations which in his view were childish but not overly serious. He thought there was a reduction in such conversations after his intervention and said Mr Shaw made no further complaint to him on the matter. Mr Smith also said he had no idea Mr Shaw saw Mr Gurry's behaviour as bullying and he had not ever raised that concern with him.

[19] Mr Smith said he had no knowledge of, or complaints about, any other behaviour by Mr Gurry in the kitchen. Two other kitchen employees who gave evidence also said they had never witnessed any of the non-verbal behaviour Mr Smith alleged. Both agreed there was banter and a some swearing in the kitchen, but neither had ever had any indication Mr Shaw was upset by it or that he objected to it. Both observed the exchanges between staff were good-natured and Mr Shaw participated in it.

[20] Mr Smith said he would have taken more action if he had known Mr Shaw was formally complaining about Mr Gurry's treatment of him. If he had been doing so, Mr Smith would have expected Mr Shaw to submit a complaint of that nature in writing. He referred to Mr Shaw having made a formal written complaint about the former head chef in 2014 at a time when there were major problems in the kitchen between that person and other employees.

[21] Mr Smith said he became concerned about Mr Shaw's performance in the kitchen after he assumed the management of the kitchen following the former head chef's departure. Those concerns related to the speed with which Mr Shaw prepared food, and the standard of his preparation. He observed Mr Shaw did not cope well with the pressures of working in a busy kitchen, and this became worse in the later stages of Mr Shaw's employment when he struggled with a damaged knee for which he later underwent surgery.

[22] Mr Smith said he spoke with Mr Shaw about his concerns several times, telling him his feedback was for the purpose of helping him improve so the kitchen and bistro ran smoothly. He said Mr Shaw did not take any such feedback well. Despite this it was Mr Smith's evidence that he considered Mr Shaw to be a close friend as well as a colleague with whom he sometimes socialised outside the workplace.

[23] Mr Gurry denied bullying or verbally abusing Mr Shaw and said a certain amount of banter and joking between staff was a means of reducing stress in a busy kitchen environment. In his view this was what occurred in the Club's kitchen. He said on several occasions he and Mr Shaw participated in bantering which included swearing and jokes about the other person. Mr Gurry said Mr Shaw participated equally in this and they both laughed through their exchanges.

[24] He said he had no idea Mr Shaw did not enjoy their banter as he had never voiced any concerns about it to him and had never raised any issue with him over the language he used. He acknowledged Mr Smith had spoken with him about his language on one occasion and said he toned it down after that but sometimes slipped back. Mr Gurry expressed surprise that Mr Shaw would take offence at his swearing as Mr Shaw himself frequently swore in the kitchen. It was Mr Shaw's evidence that he only started swearing after Mr Gurry was employed in the kitchen.

[25] Mr Gurry, who was responsible for the running of the kitchen when Mr Smith was not there, also gave evidence of raising concerns over Mr Shaw's performance with him. His concerns were similar to Mr Smith's and concerned the speed and quality of Mr Shaw's work, and his susceptibility to stress in the kitchen. He said his comments were not received well by Mr Shaw who took them as personal attacks and was reluctant to make changes to the way he worked. Mr Gurry was also aware of the pain Mr Shaw was experiencing while he awaited knee surgery, and believed this may have slowed him down in the kitchen and added to his stress levels.

[26] Mr Shaw's evidence was that, after he perceived Mr Smith had failed to act on the concerns he had expressed to him, he then approached Mr Grey, the newly appointed Club manager. He says this happened within two or three weeks of Mr Grey's appointment in September 2014. Mr Shaw claims Mr Grey's response was to tell him that was a kitchen issue that he should sort out with Mr Smith.

[27] Mr Grey recollected his interactions with Mr Shaw differently. He said Mr Shaw had made some complaints to him about operational matters in the kitchen but had made no complaints about his treatment by other staff. One example he gave was of Mr Shaw complaining that certain ingredients required for a dish he had been assigned to prepare had not been ordered.

[28] As those complaints were related to the day to day running of the kitchen, for which Mr Smith was responsible, Mr Grey said he told Mr Shaw to approach Mr Smith about such matters. It was Mr Grey's evidence that, if Mr Shaw had indicated he was concerned about his treatment by other staff, he would have investigated his complaints and taken disciplinary action against those involved if necessary.

[29] Mr Shaw said that, after realising his concerns were not being acted on by Mr Grey, he approached an Executive Committee member, Mr Taylor, and raised his

concerns with him. This occurred around 20 November 2014. Mr Shaw said he told Mr Taylor about the abuse and the language that was going on in the kitchen. When Mr Taylor asked if he had discussed the matter with Mr Grey, Mr Shaw told him he had, and outlined Mr Grey's response.

[30] There were differences between Mr Shaw and Mr Taylor's recollections of the contents of their November 2014 conversation. Mr Taylor recalled having a conversation with Mr Shaw at that time and asking him how things were going in the kitchen. He said he often had conversations with staff members and he asked Mr Shaw about the kitchen because he had been aware of the problems with the previous head chef. Mr Shaw had told him staff were not being treated well.

[31] As Mr Shaw did not elaborate on what he meant by this, Mr Taylor said he understood him to be talking generally about staff treatment in the kitchen rather than expressing concerns specifically about how he was being treated. Their conversation was interrupted by other people coming into the area where they were talking and Mr Shaw returning to his kitchen duties. Mr Shaw maintained in his evidence that he had voiced specific concerns to Mr Taylor.

[32] Mr Taylor said it was the Club's policy that Executive Committee members would have no direct involvement with staff issues and, accordingly, he recommended Mr Shaw take the matter up with Mr Grey. Mr Taylor also raised the matter at the next committee meeting but only identified Mr Shaw as a staff member rather than by name. He said he had little information to give regarding the concern the employee (Mr Shaw) had expressed and the Club committee resolved Mr Taylor should tell the staff member to take up the matter with Mr Grey.

[33] Mr Taylor said to the best of his recollection he had spoken about the matter with Mr Shaw in the days following the committee meeting. He acknowledged, however, during the investigation meeting that his recollection may have been mistaken. He also acknowledged Mr Shaw may have provided him with more detail about his concerns than he had previously recalled. What is not in dispute is that the minutes of the committee meeting at which Mr Taylor raised the issue record he had:

... reported that a staff member had confided in him re not happy with situation in the Bistro. He is to tell the staff member to take it up with the manager.

[34] Mr Shaw confirmed he was aware of the minutes as a copy was posted in the kitchen and brought to his attention.

[35] Mr Shaw gave no evidence of any incidents between his conversation with Mr Taylor in November 2014 and the event Mr Shaw described as the "*last straw*" that prompted his resignation four months later.

### ***Events of 25 March 2015***

[36] Mr Smith had a rostered day off on 24 March 2015. He texted Mr Shaw in the morning about a particular group that had a regular booking. The group, which Mr Shaw said had been unhappy with the food they had been served the previous week, had asked to be served savouries at their meeting that day. Mr Smith said he informed Mr Shaw the Club's regular wholesale food supplier would be delivering the savouries that morning. Mr Shaw's recollection was that Mr Smith told him the savouries were in the freezer and that the supplier would also be making a delivery that morning.

[37] On checking the freezer, Mr Shaw said he found there were no appropriate savouries there. He explained the situation to Mr Grey and told him he would need to purchase savouries for the group. Mr Grey suggested they wait until the wholesale food supplier had arrived before purchasing savouries. The delivery did not arrive in time and Mr Grey made the purchase from a nearby bakery at a cost of approximately \$95. Mr Shaw said he knew Mr Smith would be unhappy about the purchase and he asked Mr Grey to support him the following day when Mr Smith returned to work.

[38] The next morning when Mr Smith arrived at work Mr Shaw said he "*exploded*" when he saw from the receipt how much had been spent on the savouries. In Mr Shaw's version of events, Mr Smith used abusive language to him and berated him for not using the savouries in the freezer. Mr Shaw said he believed Mr Grey was in his office at the time but did not come out to support him during this discussion with Mr Smith.

[39] Mr Shaw claims this incident was the last straw for him. He said he had received no support from Mr Grey despite telling him that Mr Smith would react badly to the purchase of the savouries. Mr Shaw said he "*had raised all the bullying behaviour*" he had been subjected to with Mr Smith, Mr Grey and Mr Taylor and "*they had all done nothing*".

[40] Mr Grey acknowledged Mr Shaw had expressed concern the previous day over the head chef's likely reaction to the expenditure on savouries. He said he was quite happy to be present at any discussion between Mr Shaw and Mr Smith over the purchase of the savouries but he did not know about the discussion until after it had happened, and was unsure whether he had even been in his office at the time. If he had, he said that because of the distance of his office from the kitchen he would not have seen or heard the conversation taking place between Mr Shaw and Mr Smith.

[41] Mr Smith denied he had exploded on viewing the receipt. He said he was not happy when Mr Shaw explained why the savouries had been purchased and he acknowledged making his frustration clear to Mr Shaw but said he did not swear at him or use abusive language to him.

[42] Mr Shaw handed in his resignation letter to Mr Grey that day. He said he told Mr Grey it was the bullying and abuse he was subjected to in the kitchen that was the reason for his leaving. He said he told Mr Grey that Mr Smith had exploded and Mr Grey's response was to ask him to put everything in writing.

[43] Mr Grey's evidence was that, because Mr Shaw's resignation letter cited "*personal reasons*" for his decision, he assumed Mr Shaw meant he was resigning because he could not cope with the demands of working in the kitchen, given his particular circumstances. Mr Grey said working in a kitchen was challenging for anyone because of the physical demands of the job and the constant pressure to perform.

[44] He said those challenges would be greatly exacerbated for Mr Shaw given he had a damaged knee joint that caused him constant pain. He was aware Mr Shaw was awaiting surgery and believed him to be anxious about that. Given those circumstances Mr Grey said he thought Mr Shaw's resignation was entirely reasonable and appropriate.

[45] Mr Shaw's resignation letter was handwritten, dated 25 March 2015 and addressed to Mr Grey. It stated:

*It is with much regret, but due to personal reasons, I, OWEN SHAW, Commis Chef at the New Plymouth Club wish to tender my resignation as of today, 25-3-2015.*

*My last working day will be April 15<sup>th</sup>.*

*Yours etc*

[46] In the copy of the resignation letter produced for the Authority's investigation "April 15<sup>th</sup>" had double lines drawn through it and had been replaced by "June 14<sup>th</sup>". The alteration was initialled by Mr Shaw. I shall return to this shortly.

[47] Mr Grey said he explained to Mr Shaw that if, after he had recovered from his surgery, he wanted further work he should contact him to discuss the possibility of the Club re-employing him on a more limited basis. He said he had in mind Mr Shaw's assistance with specific catering jobs or the preparation of food for specific events at the Club. Mr Grey said he understood Mr Shaw to have indicated that would be of interest to him and he would contact Mr Grey if he found himself ready and able to take on such work.

[48] Mr Grey said it was during the meeting of 25 March 2015 that Mr Shaw indicated to him for the first time any concerns he had about the kitchen other than those relating to operational matters. The only issue Mr Shaw referred to was the savouries incident with Mr Smith that morning. However, he said Mr Shaw did not indicate this was the reason for his resignation or give him enough detail about what had occurred for him to take the matter further.

[49] Mr Grey said he explained to Mr Shaw that he (Mr Shaw) would have to record in writing what he said had happened if he wanted Mr Grey to investigate that incident. Once he had that, Mr Grey said he would put Mr Shaw's concerns to Mr Smith and seek his response. Mr Grey said he understood Mr Shaw was going to do that but, when he did not, Mr Grey believed he could take the matter no further.

[50] Mr Shaw and Mr Grey agree that Mr Grey did not immediately accept Mr Shaw's resignation, but they disagree on the detail. Mr Grey said he accepted it upon receipt of Mr Shaw's amended letter of resignation when he changed his last working day to 14<sup>th</sup> June at Mr Grey's request. Mr Grey said he made the suggestion as it would be more advantageous from a taxation perspective for Mr Shaw to be paid until 14 June than to receive a lump sum on 15 April 2015.

[51] Mr Foley, the Club President, confirmed Mr Grey had brought this matter to the Club's Finance committee for approval. Mr Shaw's recollection was that Mr Grey had said he would not accept the resignation at that time but they would discuss it after Mr Shaw had had his knee surgery on 24 April 2015.

[52] After his meeting with Mr Grey on 25 March 2015 Mr Shaw returned to the kitchen and informed Mr Smith he had just resigned. Mr Smith said Mr Shaw had confided in him several weeks earlier that he was planning to resign and he had advised him against doing that. He believed from that earlier discussion that Mr Shaw carried a letter of resignation with him.

[53] Later that afternoon Mr Shaw, Mr Smith and Mr Gurry sat down and discussed Mr Shaw's resignation. According to Mr Smith, Mr Shaw expressed concern at that time about the negative feedback he had been receiving about his performance, and his view that he was being blamed for everything that went wrong in the kitchen. Mr Smith said he impressed upon Mr Shaw that none of the feedback was personal and that it was intended to help him improve in order for the kitchen to run as it should.

[54] Mr Smith said he believed Mr Shaw intended to return to work at some time after his knee surgery as that was something they had previously discussed. He said Mr Shaw had indicated his intention of going on to casual duties after he turned 65, a few months later.

[55] Mr Grey recalled having three further meetings with Mr Shaw after 25 March 2015. The first occurred shortly after Mr Shaw had submitted his resignation and was attended also by Mr Shaw's wife, Clare. Mrs Shaw's recollection was that the meeting occurred about three days after her husband had resigned. His intention had been to work out his notice period. However, she said Mr Shaw had telephoned her at work on the morning of 26 March and had been very upset to the extent he could hardly talk to her. She said she understood from him he "*had had enough, that he couldn't get ready for work*". Mrs Shaw was so concerned about him she went straight home and, due to Mr Shaw's state, she sought medical help for him immediately.

[56] At the meeting with Mr Grey approximately two days later, Mrs Shaw said her husband, who was afflicted with a stutter at the time, told Mr Grey he had resigned because of the bullying in the kitchen. Mr Grey's evidence is that "*Mr Shaw*

(or possibly Mrs Shaw) explained that Mr Shaw had suffered some sort of breakdown which was the result of bullying /abuse going on in the kitchen." Mr Grey said this was the first time he knew of Mr Shaw's belief that he had been bullied or abused on an ongoing basis while working in the kitchen. He said, despite his prompting, neither Mr nor Mrs Shaw gave any specific details about what had allegedly been happening in the kitchen. They did not identify the alleged perpetrator(s) or what had been done that Mr Shaw perceived as bullying or abuse.

[57] Mr Grey said he explained to Mr Shaw he needed to put a complaint in writing with specific details such that Mr Grey could investigate. In evidence he said that, apart from it being good practice to have a written account of a complaint, he found it difficult to understand what Mr Shaw was saying during their meeting as he was both stuttering and struggling to articulate his concerns. When Mr Shaw did not provide details in writing, Mr Grey believed he was unable to take the matter further.

[58] He said he thought Mr Shaw may have repeated his concerns in a later meeting in which he (Mr Grey) again asked for the complaint to be put in writing so he could understand what Mr Shaw alleged had happened and investigate it. Mr Grey said it was his understanding Mr Shaw was going to do this but, again, nothing eventuated.

[59] Mr Grey's final meeting with Mr Shaw took place on 9 June 2015 during which Mr Shaw handed him a letter, addressed to him, and to the President and Committee of the Club, which stated Mr Shaw's explanation for his "*abrupt resignation from my place of work at the New Plymouth Club which I used to thoroughly enjoy.*" The explanation provided was:

*After much continuous put down, unwarranted blame and huge amount of verbal abuse from two other chefs employed in the kitchen, I felt I regrettably had no other alternative measure to take.*

[60] Mr Shaw's letter stated that, although he had spoken to Mr Grey about this, to his knowledge nothing had been addressed and would therefore not be resolved. The letter had then been amended to say that Mr Shaw had raised the problem with Mr Grey on the day of his resignation. Mr Grey said Mr Shaw amended the letter after he had read it and taken issue with the veracity of Mr Shaw's statement, urging him to state accurately what had happened. He said he was still unhappy after Mr Shaw amended the letter as it remained inaccurate. He was emphatic Mr Shaw had not

raised this matter with him on the day of his resignation although he had referred to the incident over the savouries with Mr Smith.

**Was Mr Shaw constructively dismissed?**

[61] Ms Dodunski submitted on behalf of Mr Shaw that he made verbal complaints on several occasions to Mr Smith, Mr Grey and finally to Mr Taylor. The failure by the Club to investigate his complaints was a breach of duty to provide Mr Shaw with a safe working environment akin to the situation in *Waikato District Health Board v Clear*<sup>4</sup>. In her submission his resignation was reasonably foreseeable by a reasonable employer.

[62] Additionally counsel submits there was a sustained course of conduct, consisting of nit picking, constant bickering, verbal abuse and derogatory language in the kitchen that was deliberately targeted at Mr Shaw. The perpetrators were, in her submission, Mr Smith and Mr Gurry who were acting with a common purpose of coercing Mr Shaw to resign. I have considered those submissions and will set out below why I reject them.

[63] It was clear from Mr Foley's evidence the Club intended Mr Grey to raise the standard of the kitchen and the food it prepared for Bistro customers. The restaurant was in decline and was receiving complaints about the food it served. The departure of the former head chef had resolved some interpersonal problems in the kitchen but it had added to the pressure on the remaining staff. At a time when they were being urged to lift their game to keep customers better satisfied they were short-staffed.

[64] This undoubtedly created pressure on Mr Smith who had to assume new management responsibilities in the kitchen which had just lost one qualified chef. The pressure was also felt by other kitchen staff including Mr Shaw who had problems of his own to contend with due to his damaged knee. Mr Shaw acknowledged under cross examination his surgery had been postponed three times before he submitted his resignation in March 2015. His denial that the pain he was experiencing slowed him down in the kitchen may reflect his stoicism more than the reality of his situation.

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<sup>4</sup> [2010] NZCA 305

[65] I find it more likely than not that what Mr Shaw believed to be the beginning of "*nit picking*" and pressure from Mr Smith resulted from a combination of factors. These were the Club's seeking to improve the food served in the Bistro; Mr Smith's recent taking on of management responsibilities and wanting to implement the required improvement; the kitchen operating with fewer than optimal chefs; and the Mr Smith's health issues. I do not find these were evidence of bullying or abuse by Mr Smith of Mr Shaw.

[66] From Mr Shaw's perspective Mr Gurry's arrival in September 2014 exacerbated matters although, as it meant there was one more qualified chef in the kitchen, his arrival would have reduced some of the pressure of being short-staffed. I do not accept Mr Shaw's evidence that Mr Gurry bullied and abused him and I find it more likely that Mr Shaw participated equally in their verbal sparring at least in the early stages of Mr Gurry's employment.

[67] I accept the evidence from a number of witnesses that a commercial kitchen is an environment in which robust language is prevalent and I do not view Mr Gurry's behaviour as being exceptional. He did not strike me as being a particularly sensitive person and I find it likely that, in the absence of any indication from Mr Shaw that he was upset by his swearing, he had no idea he was causing concern to his co-worker.

[68] It was obvious to me during the investigation meeting that Mr Gurry and Mr Shaw have very different personalities. Mr Gurry tends to the loud and brash whereas Mr Shaw does not. The clash in temperament and generation may have resulted in a heightened degree of verbal exchanges between them. This does not necessarily indicate that Mr Gurry was acting with malice towards Mr Shaw or that he had any intention of pushing Mr Shaw into resigning.

[69] There is no requirement for employees to like each other but a degree of professionalism and cooperation is required at work particularly when their working environment is confined, as it is in a kitchen, and where their work impacts on each other. However, if Mr Shaw believed himself to be bullied and abused by Mr Gurry, it was incumbent on him to bring this to his employer's attention. I find he did not do so with sufficient clarity for his employer to identify the problem and to address it.

[70] I prefer Mr Smith's evidence to Mr Shaw's regarding the concern Mr Shaw expressed about Mr Gurry's language. Mr Shaw concern was expressed more as a

general objection to the level of Mr Gurry's swearing than as a personal concern about his treatment by Mr Gurry. Mr Smith acted on that concern by talking to Mr Gurry and telling him to tone down his language and by telling both Mr Gurry and Mr Shaw to stop the bickering and juvenile talk in which they were both engaging. He said his impression was that there was an improvement after that, and he did talk again to Mr Gurry when he observed his level of swearing increase.

[71] I also prefer Mr Grey's evidence over Mr Shaw's regarding the concerns Mr Shaw raised with him over kitchen matters. This is not because Mr Shaw presented as any less credible a witness – he did not. He did, however, present as a rather diffident and anxious person who would find it difficult to state his case clearly. While he may have believed himself to be making a complaint against a fellow employee, the way in which he articulated that is likely to have been oblique.

[72] When I questioned Mr Shaw about the concerns he had raised with Mr Grey he told me he had "*mentioned*" to Mr Grey "*things were a bit over the top*" in the kitchen. Without further elaboration Mr Shaw could not reasonably have expected Mr Grey to infer from that comment that he was being bullied and abused in the workplace. I accept Mr Grey had no knowledge of Mr Shaw's belief that this was happening until after he had submitted his resignation.

[73] While Mr Shaw may have approached Mr Taylor on or around 20 November 2014 with the aim of advising him about his situation, I find it likely he did so in a manner that was similarly vague about who he was alleging to be doing what to whom. Mr Taylor, who attended from the start of the investigation meeting and was the last witness to give evidence, wavered somewhat in his recollection of what Mr Shaw had said to him in November 2014.

[74] However, I find it unlikely Mr Shaw had given him any more detail than he had given Mr Grey of the situation in the kitchen. If he had, Mr Taylor is likely to have informed the committee meeting of the information he had been given. The evidence of the committee meeting minutes for 24 November 2014, and Mr Foley's evidence of what he recalled Mr Taylor to have told the committee, suggests Mr Taylor did not have specific details of what the situation in the Bistro was that concerned Mr Shaw.

[75] I find no evidence to support Mr Shaw's claim that Mr Smith and Mr Gurry followed a course of conduct that was intended to coerce him into resigning. Nor do I find a breach of duty by the Club that led Mr Shaw to resign. Ms Dodunski's submission that his situation was similar to that of Ms Clear in the *Waikato District Health Board* case referred to earlier<sup>5</sup> cannot be sustained. In that situation Ms Clear had made a number of formal complaints over a period of three years. In contrast, Mr Shaw had expressed a concern about Mr Gurry's language, which had been acted on by Mr Smith.

[76] He had also raised some operational matters relating to the kitchen with Mr Grey and had, quite properly, been advised to raise them with the head chef as they were matters within his jurisdiction. If he had concerns about the head chef or sous chef's treatment of him, he did not make those known to Mr Grey or indeed to Mr Taylor in sufficient detail that they could be investigated. The concerns he raised with Mr Taylor related to the kitchen staff generally rather than to particular complaints about his treatment.

[77] I have considered whether the incident Mr Shaw described as the "*last straw*" could constitute a breach of duty by the employer that made his resignation reasonably foreseeable. I accept Mr Shaw's evidence of being concerned about Mr Smith's likely reaction to the purchase of additional savouries. I also accept that Mr Smith was unhappy about the purchase, which he saw as an unnecessary expense that left him with a number of surplus savouries. Mr Smith expressed his unhappiness with the decisions Mr Shaw and Mr Grey had made and told Mr Shaw why he was unhappy.

[78] Mr Smith's response was reasonable in the circumstances although it is likely to have been expressed in a manner that made his displeasure very clear. Mr Smith denied swearing at Mr Shaw or exploding as Mr Shaw had alleged. He acknowledged he may have sworn as he walked away from Mr Shaw, but I accept his evidence that this was not directed at Mr Shaw but was more an expression of his frustration with the situation.

[79] Mr Shaw clearly felt Mr Grey had failed him through not being present to support him during this encounter with Mr Smith. I find that unreasonable as Mr

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<sup>5</sup> n4

Grey had no knowledge the meeting was taking place. Mr Shaw said he believed Mr Grey to be in his office at the time but there was no evidence he was or that he heard the discussion. In the circumstances I do not find either Mr Smith's reaction to the savouries incident, or Mr Grey's absence from the discussion of it, form a breach of the Club's duty to Mr Shaw.

[80] I have also considered whether Mr Grey was remiss subsequently when, in his meeting with Mr and Mrs Shaw on or around 28 March 2015, he was made aware of Mr Shaw's belief he had been bullied in the kitchen during his employment. Mr Grey's insistence in that and his next two meetings with Mr Shaw that any complaint must be put in writing before it could be investigated could be perceived as overly cautious and even unreasonable. As Ms Dodunski submitted, there is no requirement for an employee to put a complaint in writing before an employer investigates it.

[81] In the circumstances, however, I find it was reasonable for Mr Grey to adopt that approach. Mr Shaw had not named those he claimed to have perpetrated the bullying he alleged and nor had he described what he meant by bullying. These were details Mr Grey required before he could commence any investigation.

[82] In the meeting Mr and Mr Shaw had with Mr Grey on or around 28 March 2015, Mr Grey could barely understand what Mr Shaw was saying. While Mr Shaw may have found it difficult personally to formulate a written complaint it was not unreasonable to expect that he could do so with the assistance of Mrs Shaw.

[83] In any event, even if Mr Grey had been remiss in failing to investigate Mr Shaw's claim to have been bullied and abused, which I find he was not, that failure occurred after Mr Shaw had submitted his resignation. It therefore could not be construed as a contributing factor to Mr Shaw's claim that his resignation was in fact a constructive dismissal by his employer.

### **Determination**

[84] Mr Shaw was not constructively dismissed and does not have a personal grievance.

**Costs**

[85] The issue of costs is reserved.

Trish MacKinnon  
Member of the Employment Relations Authority