

Employment relationship problem

[1] In early September 2018 Rebecca Young started working as a café assistant at the Muffin Break café in Botany Town Centre. The café franchise was operated by Bourson Limited (Bourson or the company). De Kai (Larry) Lu was the sole director of the company at that time.

[2] Ms Young had difficulties getting an employment agreement and the breaks required by statute. She went through a disciplinary process she saw as unfair. In late January 2019 she resigned from Muffin Break.

[3] Ms Young brings several personal grievance claims which Bourson denies.

[4] An investigation meeting was held on 26 November 2020. I heard evidence in person from Ms Young, her mother Catherine Young and Mr Lu. Two additional witnesses gave evidence over the phone; the store manager and a co-worker. Bourson lodged other witness statements from co-workers but indicated some were unwilling to speak or were overseas. Others could not be contacted by telephone. By agreement, these statements were set aside.

[5] An attempt to hear submissions by telephone was unsuccessful when Mr Lu could not be contacted. Written submissions were later received from both parties.

[6] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has not recorded everything received from the parties but has stated findings of fact and law, expressed conclusions and specified orders made as a result.

Issues

[7] The issues for determination in this case are:

- (a) Was Ms Young subject to unjustified actions by Bourson to her disadvantage regarding:
 - (i) sending her home on two occasions;
 - (ii) failing to allow statutory breaks; and
 - (iii) running a disciplinary process and giving a warning?
- (b) Was Ms Young constructively dismissed by Bourson and if so, was that unjustified?

- (c) If Ms Young establishes any personal grievance claims, what remedies if any, should she receive?

What happened at the start?

[8] Ms Young is not that long out of school and therefore had limited work experience. She had worked previously for a few years at McDonalds, including as a barista. She was looking for a job as her daughter was a little older. She saw a Trade Me advertisement for the Muffin Break job. It was described as full time.

[9] Bourson operated two cafes some distance apart with Mr Lu covering both. He was at the Botany café for an hour or two on some days each week. There was also a café manager on site much of the time.

[10] Mr Lu met with Ms Young. At the interview she was offered the job. Full time hours and the wages were agreed. Ms Young indicated that she needed notice of weekend work as she had to arrange for someone to care for her daughter.

[11] Ms Young started work without a written employment agreement. She asked for a contract. On 13 September 2018 she was sent a link to a drop box containing a contract but it was a template which did not contain some important details like the parties' names and her pay rate.

[12] Ms Young sought an agreement with the details completed. She spoke to someone from the franchise's head office who was visiting the cafe and eventually on 26 November 2018 received a hard copy document. However, this still contained many or all of the same gaps as the previous version. Mr Lu says he had forgotten about needing to personalise and complete a written agreement.

[13] According to Ms Young, the work initially went quite well. She built up relationships with customers. However, Ms Young felt things started going downhill when she asked head office about her agreement.

Did Bourson suspend Ms Young?

[14] On 27 November 2018 Ms Young went in to the café to work. She had not signed the agreement yet as she wanted her father to have a look at it. Mr Lu was not at the café but he had told the manager to check if Ms Young had signed the agreement.

[15] The manager told Ms Young that she was not allowed to start work as she had not signed the contract yet. The manager's evidence was that Mr Lu told her this although she was not sure whether this was general guidance or specifically about Ms Young.

[16] Ms Young phoned Mr Lu. Her impression was that he said she could not work until she had signed the agreement. She thought that might be unpaid time. Mr Lu said she could take the day off and he would come in the next day to sign it. He tried to describe the 'having the day off' and 'signing the next day' as unrelated ideas but I did not find this compelling. He acknowledges that pay for the day off was not mentioned and he did not know whether he was going to pay her or not. He suggested Ms Young agreed to have the day off but I do not find that likely when it was not clear that she would be paid.

[17] Ms Young did not see any difficulty with her keeping on working whilst she got advice and until she signed the agreement. She had by this point been working for over two months without any written agreement.

[18] On 28 November Mr Lu texted, saying he would be in the shop at 12 noon and Ms Young should come in then. She was to start at 10am but went in at 12 on Mr Lu's request. Mr Lu filled in the agreement. Ms Young said he still had to pay her for the days she was rostered on. Mr Lu said he needed to confirm with the head office whether he could withhold pay in these circumstances.

[19] They then disagreed about whether the trial period clause in the agreement applied or was lawful. Ms Young refused to sign the agreement as it was her understanding that the trial period was unlawful. Mr Lu disagreed. She said she was going to seek legal advice. Mr Lu said that she could not work until she signed the agreement.

[20] Ms Young describes herself as very upset. Within the hour she texted someone at head office about what was going on and asked about pay. Shortly after that Mr Lu called to apologise and say Ms Young would be paid for her time and that the trial period was indeed invalid. He asked her to come back and sign the contract. Ms Young went in, the trial period clause was crossed through and the agreement signed.

[21] In conclusion Ms Young was sent home twice by Mr Lu on behalf of Bourson when she would otherwise have been working. She not unreasonably concluded this

was because she would not sign the agreement immediately. This amounted to a suspension from work.

[22] There is a legal requirement for employees to be offered an intended employment agreement.¹ Employees are entitled to seek independent advice about proposed employment agreements.²

[23] To be effective trial periods must be in agreements entered into in writing prior to the employee beginning work.³ I can only assume that Mr Lu thought the agreement must be in place before Ms Young continued working. It was however far too late for a valid trial period to be entered into as she had been working at the café for over two months by this point.

[24] Bourson acted unjustly by suspending Ms Young. This was to her disadvantage as she was unable to work and believed she was not being paid until she signed. She was later paid for that time. Ms Young establishes her grievance.

What breaks did Bourson give Ms Young?

[25] The initial claim was that Ms Young was not permitted the breaks required by statute. However, she also suggested that her shift lengths were reduced as a result of her complaining about breaks, so I have looked at that claim too.

[26] Ms Young's understanding was that she was entitled to a half hour lunch break and two 10-minute breaks. Initially she appears to have got those breaks. But then one of the 10-minute breaks was cut. She says Mr Lu told her that she was not allowed to take a second 10-minute break if she needed to go to the bathroom during the shift. The bathroom trip effectively became the second break. Ms Young is unclear when that began.

[27] Ms Young says that she told Mr Lu that she was entitled to a second 10-minute break. She claims that from 3 December 2018 he started rostering her for only six and a half hour shifts so she was not entitled to a second 10-minute break. She claimed previously not to have worked shifts of fewer than seven hours.

¹ The Act, s 63A(2)(a).

² The Act, s 63A(2)(b).

³ The Act, s 67A and *Blackmore v Honick Properties Ltd* [2011] NZEmpC 152.

[28] Mr Lu suggested that Ms Young took an excessive number and/or excessively lengthy bathroom stops. He was not directly aware of this given his limited attendance at the café and what he reported seemed unlikely. She denied excessive stops. From her description they appeared within the normal range, given also the walk to the bathroom area.

[29] Mr Lu decided to turn her second break into a toilet break. He understood from head office that this was acceptable. However, once Ms Young challenged this he checked with head office and found he had misunderstood. The second 10-minute break was reinstated.

[30] The Act requires employees with work periods of between six and eight hours to be given two 10-minute paid rest breaks and a 30-minute meal break.⁴ The phrase “work period” is defined to begin when the employee starts work and end when the employee finishes work and includes all breaks, paid or not.⁵

[31] Bourson did not provide Ms Young with proper rest breaks as it was required to do under the Act. This was an unjustified action to Ms Young’s disadvantage as she did not have the breaks she was entitled to. As she was paid for the time but lost her rest, she does not have a claim for lost wages but I will consider compensation below under remedies.

Was rostering used as a punishment?

[32] While Ms Young may have perceived that the rostering was being used to target her, the actual rosters do not support entirely that picture.

[33] The café’s hours of work records show Ms Young working mostly seven hour shifts with the occasional five hour shift from late October until late November 2018. She then worked mostly longer shifts for a couple of weeks before moving to 6.5 hour shifts from the week ending 9 December.

[34] The employment agreement refers to Ms Young’s estimated hours of work being 35 to 40 per week over an estimated five to six days a week.⁶ On the basis of an

⁴ The Act, s 69ZD(4).

⁵ The Act, s 69ZC.

⁶ Employment agreement, Annexure 5.

average 37 hours per week, if five days were worked the average shift length would 7.4 hours. If six days worked the average shift length would be 6.17 hours.

[35] I consider it likely that Ms Young was influenced by the fact she had had a couple of weeks of longer shifts before the shifts were standardised as 6.5 hours.

[36] Mr Lu gave evidence that the shifts of the wider staff group were shortened due to building at the mall which blocked the front entrance, resulting in less business for the café. Mr Lu also noted that the café was busiest on the weekends and had Ms Young been prepared to work more weekends she could have got more hours.

[37] There is no indication of the information about reduced hours across all staff being passed on to Ms Young. It was not unreasonable for her to get the impression that the change of hours was as a result of her disagreement with her employer. Bourson breached its duty of good faith to pass that information on to her.

[38] I am not able to conclude that Ms Young's shifts were unjustifiably shortened as a result of her complaining about losing the second 10-minute break. That shift length was within the time span envisaged by the employment agreement and Ms Young had worked some even shorter shifts previously.

What disciplinary process occurred?

[39] On 2 December 2018 Mr Lu phoned Ms Young at Muffin Break, asking her to meet with him the next day.

[40] Ms Young says when she tried to find out what the meeting was about, he responded "don't worry about it". Mr Lu denies this. Ms Young assumed it was a meeting for all the café staff, not just her.

[41] Mr Lu says he mentioned the meeting being about her performance. I do not accept that. Ms Young was focused on her rights and sought information and assistance from her parents about work issues. I do not consider that she would have gone into a formal performance or disciplinary meeting without preparation and probably support.

[42] On 3 December Mr Lu arrived shortly before the 11.15 am meeting time. Without formally starting a meeting Mr Lu told Ms Young that she was not allowed to make coffees. She asked why not. He replied that it was because she was not qualified. He required staff to have coffee-making training from him before providing coffee to

customers although it was not clear that this was enforced by the café's manager or supervisor. Mr Lu refers to health and safety obligations.

[43] Ms Young responded that unlike other staff, she had a barista's certificate. Mr Lu had not seen the certificate and in any event, had not provided the full training. He confirmed she was not to make coffee.

[44] Mr Lu then arranged for the two of them to meet at one of the tables for customers. The café was situated within an open space in the mall. Ms Young describes it as busy at the time with most of the tables full. Mr Lu denies that it was busy but did not notice or cannot remember what proportion of the tables were occupied.

[45] Mr Lu says he chose a corner table for privacy. He says it was two or three metres from the café's kiosk or counter. Ms Young says there were people walking between the tables to get to other parts of the mall.

[46] Mr Lu did not ask mall management if they had a room he could use or hire. He felt he did not need to as he chose a more private table and the café's business was down due to the front entrance being closed. He also did not seek to meet outside the mall.

[47] Mr Lu asked a café supervisor to sit down with him. At that point it became apparent to Ms Young that the meeting was just for her, not all staff

[48] Mr Lu started to discuss Ms Young having her phone on the café's shop floor. She protested, asking why she was the only one getting in trouble about that as others also kept their phones with them. Mr Lu replied they had his permission. However, he acknowledges that he did not ask her for their names and did not follow up with the manager whether others were using their phones inappropriately. He said other staff had seen Ms Young using her phone in the café. She felt he had staff spying on her.

[49] At this point Ms Young asked why the supervisor was there and Mr Lu replied, as a witness. Ms Young asked what about her support person to which Mr Lu replied that she could get one but he carried on talking. Ms Young replied that she felt victimised and harassed. Mr Lu said he was giving her a written warning and that if she used her phone again there would be serious consequences.

[50] Ms Young describes saying “You are trying to find reasons to fire me, aren’t you?” and Mr Lu replying that she could think what she wanted. He could not remember saying that.

[51] During the meeting Ms Young had developed a headache and a sore stomach. She asked to go home but Mr Lu wanted more detail. He said he could not see any reason for her to go home. When she reiterated that she felt sick, he agreed she could go after he printed out a warning letter. Ms Young phoned her mother to come to get her.

[52] Mr Lu left to arrange for the warning letter to be produced. Ms Young was upset and crying a lot. She was comforted by a customer who she knew a little from the café.

[53] Mr Lu returned with a letter identifying three occasions when Ms Young was said to have used her phone during work time. A first warning was given and Ms Young instructed to put away her phone in her locker and not use her personal phone at work at all. If the conduct was repeated she may receive a second warning or be dismissed.

[54] There were unfair aspects to this process. There were limited venue options but meeting at the café, particularly at that time of day, was unfortunate. Ms Young had not been given any notice of what the meeting was about despite her attempt to find out. She was not told it was a disciplinary meeting. She was only offered the possibility of a support person part way through the meeting when she raised it. The particular incidents were not fully explored. Ms Young had limited opportunity to respond and was trying to deal with process issues such as what kind of meeting it was.

[55] Ms Young says Mr Lu had agreed at the interview or early in her employment that she could keep her phone with her in case there was an emergency at her child’s day care. She accepts that every now and then she went on her phone for other things but says all staff did that. The co-worker gave evidence that she had been spoken to by the manager about her phone use but seemed not to have been given a formal warning.

[56] Bourson’s unjustified action was to Ms Young’s disadvantage as she was issued a written warning without having received a fair and reasonable process.

What happened with Ms Young's personal grievance claim?

[57] Ms Young wrote to Mr Lu raising a personal grievance claim about the company not acting in good faith and being involved in victimising, intimidating and threatening behaviour. Events including the delay in providing an employment agreement, sending her away for not signing the agreement, breaks, not being allowed to make coffee and the disciplinary process were outlined.

[58] Mr Lu initially tried to arrange to have a chat with Ms Young about the grievance but she told him that would make her very uncomfortable and it would be best to talk at mediation.

[59] A lengthy and detailed response was provided by the company's lawyer on 14 December 2018. Included were Mr Lu's misunderstandings about things such as appropriate break times and Ms Young remaining at work whilst the employment agreement was discussed or being paid if she went home. Mr Lu was said to regret these misunderstandings but taken steps to comply with his obligations. Mr Lu denied treating Ms Young any differently from other staff or victimising her or the like.

When did Ms Young resign?

[60] Ms Young describes everything as being different after she raised her grievance, with none of the workers wanting to talk to her. She felt like she was alone. She had also found it stressful having to raise her concerns with Mr Lu.

[61] Ms Young thinks that her co-workers were scared to talk to her for fear of Mr Lu finding out and publishing them as they were in the country on work visas. However, I was unable to find any evidence to substantiate this theory behind their motivation.

[62] The co-worker who gave evidence no longer worked for Bourson and appeared frank in her evidence. She was not in that visa group and referred to cultural differences between staff. She described other staff as not liking Ms Young's approach to work, feeling that she was not pulling her weight. The co-worker said no one wanted to be friendly to Ms Young. She described Ms Young as an outcast. The co-worker did not believe this had anything to do with Mr Lu. She had not witnessed any conflict between Ms Young and Mr Lu and did not consider that Mr Lu picked on anyone.

[63] In her witness statement Ms Young describes herself as, by 23 January, hating going into work. She felt she was not coping as she was frequently emotional. She went to the doctor and got two weeks off work for what she refers to as mental stress.

[64] I found Ms Young's narrative of this time period somewhat confusing. Her witness statement makes no mention any particular work events around this time other than her handing in her resignation.

[65] Mr Lu described Ms Young walking out of work, swearing, at lunchtime on 22 January 2019 because he would not give her the weekend of 26 and 27 January off work. He refers to her working only a few weekend days in January 2019. He followed her from the café and found her on her phone. He told her she could not just run off. She replied that she needed to cool off and left. She did not return to the café to finish her shift.

[66] Ms Young was uncertain whether these events had occurred or at least at that time. Ms Young says that not getting a weekend off does not sound like a reason she would walk out of work. However, when I asked her about whether there was any particular event causing her to resign she broadly described everything getting to her. Another question about what caused it come to an end, lead to a response that she did not know.

[67] Ms Young did recall at one point asking Mr Lu for what she describes as a cool down period as she was getting worked up. He refused. I could not ascertain whether this was on 22 January or not.

[68] An unsigned letter to Ms Young, without an identified physical or email address, was lodged in the Authority. It included an invitation to a meeting about swearing and leaving the workplace. Mr Lu thought he had sent it but I was unable to establish that the letter was actually sent. Ms Young did not seem to have received it.

[69] Ms Young did not come into work on 23 or 24 January. Late on 24 January she emailed Mr Lu to say she would not be returning to work. The email refers to her having nothing but grief whilst employed and it being unbearable, affecting her personal life and mental health. She refers to feeling like the black sheep being treated differently. She describes there being no improvement in Mr Lu's behaviour to her, with him scolding her and ordering her back to work.

[70] Mr Lu emailed back saying he was sorry she felt that way as they had tried to help her. He accepted her resignation. Ms Young did not reply.

[71] Ms Young's health continued to deteriorate after she left and she describes the Muffin Break situation as having taken so much out of her. Fortunately she was able to find other work promptly.

Was Ms Young dismissed?

[72] Ms Young claims that she was constructively dismissed.

[73] The three categories of constructive dismissal set out by the Court of Appeal in *Auckland Shop Employees Union v Woolworths (NZ) Limited* are where:

- (a) the employee is given a choice of resignation or dismissal;
- (b) the employer has followed a course of conduct with a deliberate and dominant purpose of coercing an employee to resign; and
- (c) a breach of duty by the employer leads an employee to resign.⁷

[74] Ms Young's representative described it as a situation of the final straw leading to resignation.

Did Bourson intend Ms Young to resign?

[75] I am not satisfied that Bourson set out on a course of conduct with a deliberate and dominant purpose of coercing Ms Young to resign. Although there had been some disagreements or tensions Mr Lu did not intend her to resign.

Did Bourson breach its duty, causing Ms Young to resign?

[76] For this category of constructive dismissal it is not sufficient for the employer's conduct to be inconsiderate and cause some unhappiness to the employee.⁸ What is required is dismissive or repudiatory conduct; a breach of the employer's duty to the employee. If that is established, I then examine:

- (a) Whether the conduct caused the resignation; and

⁷ *Auckland Shop Employees Union v Woolworths (NZ) Limited* [1985] 2 NZLR 372 (CA) at 374-375,

⁸ *Wellington etc Clerical Workers etc IUOW v Greenwich* (1983) ERNZ Sel Cas 95 (AC).

- (b) Was the breach of duty sufficiently serious to make it reasonably foreseeable by the employer that the employee would not be prepared to work under the conditions prevailing? Was there a substantial risk of resignation?⁹

[77] There were several breaches of duty by Bourson as outlined above, establishing to disadvantage grievances.

[78] But did they cause Ms Young's resignation? Although I have sympathy for Ms Young's situation, I do not accept that the breaches were the substantial cause of her resignation or that Bourson can be said to have reasonably foreseen there being a substantial risk of resignation.

[79] There are two main factors which lead me to this conclusion.

[80] First, there was a major additional reason for Ms Young leaving, namely the interpersonal difficulties between café staff. These were a significant factor in her decision to leave. She gave evidence of feeling alone. The co-worker gave compelling evidence of Ms Young being in a very difficult situation with other staff. Ms Young came to be treated as an outcast. However, Mr Lu was not aware of these tensions. Ms Young had not complained to him about them or about feeling alone. Even her resignation email does not refer to her co-workers' behaviour.

[1] The second factor is the timing of her earlier difficulties with Mr Lu and the resignation.

[2] Ms Young thought everyone could see what a huge toll the situation at the café was having on her. Two co-workers had asked her if she was alright. Ms Young's mother details the effects on her daughter but again there is no mention of anything particularly happening in January 2019.

[3] Here the events which establish the disadvantage claims occurred in November and early December. Ms Young raised her grievance and Bourson's lawyer responded comprehensively. Not much else seems to have happened. Ms Young was waiting for mediation. Except perhaps for the warning, this was not a situation of on-going breaches. With such breaches a reasonable period may be allowed during which the

⁹ *Auckland Electric Power Board v Auckland Provincial District Local Authorities Officers IUOW* [1994] NZLR 415 (CA).

employee can be seen as hoping to persuade the employer to observe its contractual obligations.¹⁰

[4] It is not evident that anything untoward happened with the employer in the next month. Any final straw remains hidden unless it was Mr Lu's refusal to allow Ms Young a weekend off. I do not consider his refusal unreasonable given she had only worked about half or less of the weekend shifts in January. What really made Ms Young's life miserable appears to have been the behaviour from other staff which was not driven by Mr Lu.

[81] Ms Young has not established that she was constructively dismissed.

What remedies should Ms Young receive?

[82] Ms Young claims \$5,000 compensation for each unjustifiable action under s 123(1)(c)(i) of the Act. Bourson argues that even if Ms Young establishes personal grievances she should either receive no remedy or any remedy should be reduced by half, due to her contribution to the situation/s.

[83] Ms Young has established three grievances; suspension, failure to provide rest breaks and the unjustified warning.

[84] Regarding the suspension this was a difficult time for Ms Young. She was asserting her rights to seek advice, consider the content of the agreement and clarify the trial period issue. As a result she was sent home from work, uncertain whether she would be paid. Her feelings were injured by this action. I consider \$4,000 an appropriate amount of compensation.

[85] I have considered under s 124 of the Act whether Ms Young's remedy should be reduced due to any contribution by her. I do not find any conduct by her regarding the employment agreement and suspension which was causative of the outcome and blameworthy. She was entitled to act as she did and assert her rights.

[86] Regarding the failure to provide rest breaks, this was a situation had some humiliation for Ms Young. She is entitled to some compensation. I do not regard her

¹⁰*Salmond Smith Biolab Limited v NZ (with exceptions) Food and Chemical etc Union* [1989] 2 NZILR 393.

actions regarding the breaks as blameworthy as she was entitled to question whether her legal entitlements were being met.

[87] Turning to the next grievance, Ms Young found the unexpected 3 December disciplinary meeting very upsetting. The public setting of the meeting disturbed her. She became very tearful which was embarrassing in the middle of the mall. A customer comforted Ms Young until her mother arrived. Mr Lu's initial reluctance to let her go home exacerbated the situation. The sum of \$5,000 sought is an appropriate starting point.

[88] I do consider that a deduction for contribution should be made for Ms Young's conduct leading to the situation where she was given a warning. She acknowledges that she was using her phone at points where she should not have. I make a 20% deduction for this blameworthy behaviour which caused the situation giving rise to the warning.

[89] I order Bourson Ltd to pay within 28 days of the date of this determination the following sums to Ms Young for her personal grievance claims:

- (a) \$4,000 for suspension;
- (b) \$2,000 for lack of breaks; and
- (c) \$4,000 for disciplinary process and warning.

Costs

[90] For Ms Young it was suggested that costs be decided alongside the substantive issues. However, given Ms Young has only had partial success a different approach is needed. Costs are reserved. The parties are encouraged to discuss and resolve that matter. If they are unable to do so Ms Young shall have 21 days from the date of this determination to file a memorandum on costs. Bourson shall have a further 14 days in which to file a memorandum in reply. Submissions claiming costs must include a breakdown the costs and be accompanied by supporting evidence.

[91] The parties could expect the Authority to start the calculation of costs on the basis of the notional daily tariff of \$4,500 for the first day of an investigation meeting.

Nicola Craig
Member of the Employment Relations Authority