

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

CA 34/10
5130718

BETWEEN

RACHEL YOUNG
Applicant

AND

LSG SKY CHEFS NEW
ZEALAND LIMITED
Respondent

Member of Authority: Helen Doyle

Representatives: Stephen John Bradshaw, Counsel for Applicant
Garry Pollak, Counsel for Respondent

Investigation Meeting: 16 September 2009 at Queenstown

Submissions Received: 21 September 2009 for Applicant
9 October 2009 for Respondent

Determination: 16 February 2010

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Rachel Young was employed by LSG Sky Chefs New Zealand Limited (Sky Chefs) in Queenstown, having commenced working for Caterair New Zealand Limited, the predecessor to Sky Chefs in 1998. Ms Young is a qualified chef holding the City & Guilds 706/1 and 706/2 qualifications. She was party to an individual employment agreement with Caterair and the terms and conditions therein continued in terms of her employment with Sky Chefs.

[2] Sky Chefs provide food to airline customers and strict food safety regulations must be adhered to. Food prepared may not be delivered for up to 36 hours after preparation and a poisoning incident aboard an international flight could have serious

consequences. Sky Chefs complies with a globally recognised food safety programme called HACCP which recognises the critical points of food safety and monitors them by requiring regular audits on food safety and process controls.

[3] Ms Young's employment agreement contains a clause headed Food Hygiene. This clause recognises that there is an obligation on all parties to maintain the highest levels of hygiene and that a failure to maintain or meet hygiene standards shall constitute serious misconduct which may result in termination of employment.

[4] On Friday, 14 March 2008 an audit was carried out on the Queenstown site by Mr Alexander Lang who is the Sky Chefs auditor from Germany and Michelle Brown who is the Sky Chefs quality and HACCP control manager from Christchurch. Sky Chefs received the results of the audit which was described by the general manager for Christchurch and Queenstown, David Dear, as *shocking* and requiring immediate and significant remedial action.

[5] Mr Dear spoke to Ms Young on 17 March 2008 about the audit. Mr Dear indicated to Ms Young that a formal disciplinary process would follow. A letter was given to Ms Young on 20 March 2008 for her to attend a disciplinary meeting.

[6] Ms Young who had never before been accused of any sort of misconduct in the nine and a half years she had worked at the Queenstown facility was shocked and upset at Mr Dear's comments and worried about the possible consequences in terms of any disciplinary action. She considered herself to be a diligent and hardworking employee. Ms Young continued working until the end of March 2008 but she found the work environment became more stressful and that other employees sent to Queenstown were constantly looking over her shoulder.

[7] In the last week of March, Ms Young developed shingles and became worried about her health. She said that she was so nervous she was often dry reaching and sometimes tearful.

[8] On 1 April 2008 Ms Young went to see a doctor who prescribed medicine for the shingles and also anti-depressants. Ms Young was thereafter on sick leave and was off work until 23 May 2008 when Sky Chefs was notified by Mr Bradshaw that Ms Young considered her employment with the company had been unfairly terminated by way of an unjustified, constructive dismissal. At that time Ms Young had not attended a meeting in terms of the disciplinary process.

[9] Ms Young seeks lost wages in the sum of \$38,000, compensation for humiliation and distress in the sum of \$40,000 and legal costs.

[10] Sky Chefs does not accept that Ms Young was unjustifiably constructively dismissed and says that the audit results were such that an internal investigation had to be undertaken urgently and that it was appropriate Ms Young be advised that some of the failings related to the area in which she worked and that the result of any investigation could lead to disciplinary action up to and including termination.

Issues

[11] Ms Young says that the acts and omissions of Sky Chefs led to her becoming both physically and mentally unwell and that she had no option but to resign from her position with the company. I have considered the allegations as falling within the third situation listed by Cooke J in the Court of Appeal judgment of *Auckland Shop Employee's Union v. Woolworths (NZ) Ltd* [1985] 2 NZLR 372 where in a constructive dismissal claim there is an alleged breach or breaches of duty of the employer.

[12] I need to consider the following:

- Was the resignation caused by a breach of duty on the part of Sky Chefs? This involves an examination of all the circumstances of resignation.
- If it was caused by a breach then was the breach of sufficient seriousness to make it reasonably foreseeable by the employer that Ms Young would not be prepared to work under the prevailing conditions.
- If Ms Young was unjustifiably dismissed, then what remedies should she receive and are there issues of mitigation and contribution?

Was the resignation caused by a breach of duty on the part of Sky Chefs?

[13] From 1 April 2008 Ms Young was on sick leave until Mr Bradshaw's letter was received by Sky Chefs on or about 23 May 2008 which advised that Ms Young considered her employment terminated by way of a constructive dismissal on or about 31 March 2008. The reasons for that view set out in that letter were :

Put briefly your company's treatment of Rachel during and following the audit on or about the 14th March 2008 was unfair and improper to the extent that it has significantly affected Rachel's health to such an extent that she is unable to return to work.

Ms Young said that that was not the only reason for the resignation at that time and referred to matters surrounding an injury in 2006 and pressure that she felt to return to work and difficulties she experienced with the previous executive chef.

[14] I find it more likely than not that the reason for Ms Young's resignation was the audit process of 14 March 2008 and the disciplinary investigation meeting that was to follow rather than the other matters that occurred earlier in the employment. The shoulder injuries, for example, occurred in July 2006 almost two years before Ms Young's resignation was received. The evidence supports there was a gradual return to work programme starting with light duties. The executive chef who made the disparaging comments to Ms Young was not an employee at the Queenstown facility when Ms Young resigned and that cannot have influenced the decision to resign.

[15] I now turn to specifically consider whether there were breaches of Sky Chefs' obligations to Ms Young during and following the audit.

[16] Sky Chefs accept that the audit and the disciplinary investigation that was to, but did not occur, would have in all likelihood caused some stress to Ms Young. Mr Bradshaw has submitted that Sky Chefs should have been aware that Ms Young had earlier suffered a first bout of shingles and that this condition is caused mainly through stress. It was alleged that Ms Brown *yelled* at Ms Young during the audit process on 14 March 2008. This seems to have arisen because Ms Young entered the kitchen area during the audit on 14 March without a hair net, although I accept there may have been a reason for this and that there was an issue with cheese labels. That matter was never put to Sky Chefs before Ms Young resigned so that they could investigate it further. I am not satisfied that this alleged conduct could in the absence of knowledge of and investigation by Sky Chefs be seen as a breach of obligations to Ms Young.

[17] I am satisfied that when the results of the audit were advised to the General Manager Christchurch/Queenstown, Mr Dear, he found they were concerning. The audit showed that Queenstown had significant failings and was considered to be high risk, both to the business and to the safety of people consuming meals.

[18] This was illustrated by a document produced for the Authority investigation meeting showing the rating of Queenstown internationally for that period and regionally. Out of 140 international branches, Queenstown received the seventh worst rating and was the worst regionally for its size. After the audit, as I understand the evidence, ratings were again favourable and at the very high level Mr Dear expected.

[19] Immediately on receiving the audit results, Mr Dear flew to Queenstown with the Christchurch Executive Chef, John van Wijk, and Neil Pickard, the company's maintenance contractor.

[20] Mr Dear said in his evidence that he identified some of the concerns related to areas for which Ms Young was responsible and he decided to interview her to ascertain what went wrong and the reasons, responsibilities and any corrective actions required from that point on.

[21] Mr Dear made a brief file note about the discussion on 17 March 2008 with Ms Young. Mr Dear advised Ms Young the audit was *shocking* and the *worst result ever* and there was some discussion about the workload and the concerns that had been indicated by the audit. Mr Dear indicated to Ms Young that a formal disciplinary process would proceed and that she would be advised of this in due course. I accept that Ms Young was concerned to be advised that she would be required to participate in a formal disciplinary process with respect to the audit. There was also a lot of activity in the Queenstown facility with an out of town chef and maintenance person that would have made for a stressful environment. Ms Young said that she was also fearful that she would no longer be in charge of the kitchen as a result of a conversation she had overheard from a chef brought down from Auckland at this time.

[22] I have then considered Mr Dear's brief discussion with Ms Young about a disciplinary investigation and the use of the term *shocking* and/or *worst result ever* to describe the audit outcome. With the great benefit of hindsight, a gentler discussion may have been more appropriate but at that time Mr Dear was shocked by the audit and there was some basis for that. I am not satisfied that this brief discussion amounted to a breach of duty. Mr Dear was simply advising Ms Young of the result of the audit and that there would be a disciplinary investigation about which she would be advised in due course.

[23] I am not satisfied that Sky Chefs were aware or should have been aware that Ms Young was vulnerable in terms of her health to the extent that the discussion or the letter of invitation to a disciplinary meeting should never have occurred. On 20 March 2008, Ms Young was given a letter dated 18 March 2008 inviting her to attend a disciplinary meeting on 26 March 2008. Ms Young at that time had as her representative Barbara Anderson from the Service and Food Workers Union. Ms Anderson telephoned the Human Resource Manager of Sky Chefs, Marie Park and advised that the meeting date would need to be changed as she could not make the time and also requested more information which was emailed to her by Ms Park about the allegations.

[24] The evidence does not support that an outcome in terms of any disciplinary action had been made and although Mr Bradshaw submits that Mr Dear should have discussed the issue of concern more fully with Ms Young that level of discussion should properly have been left until Ms Young was represented. In terms of the letter dated 18 March 2008 I note an employer is obliged to mention the most serious possible outcome to a disciplinary investigation.

[25] Although the disciplinary meeting was to be some 10 days after the discussion with Mr Dear, I am not satisfied that arranging a meeting for that date was such that it could be said to have been a breach of Sky Chefs' obligations to Ms Young and that it should have been sooner. Ms Young's representative could not attend that day in any event.

[26] One of the other matters that Mr Bradshaw refers to is some alleged comments made to Ms Young's manager at the material time, Ben Peters, by Mr Dear about her continued employment in or about November 2007. I do not find that this was a reason for Ms Young's resignation.

[27] I have also considered Sky Chefs' conduct toward Ms Young when she was on sick leave. The disciplinary meeting was postponed when her representative, Barbara Anderson made a request for that and I am not satisfied there was any unreasonable pressure put on Ms Young to return to work or to attend a disciplinary meeting while she was still on sick leave.

[28] Ms Young had sick leave available at that time. There was no real detail in the medical certificates provided to support Ms Young's absence from Sky Chefs as to

her medical condition. By the end of April 2008 though Ms Park knew that Ms Young had shingles. Ms Young recalled Ms Park telephoning her to talk about the situation with her health. On 30 April 2008 Ms Park wrote to Ms Young thanking her for her latest medical certificate that identified she would be off work for an indefinite period and for advising her that Ms Young had shingles. It is further clear from that letter that Sky Chefs were expecting Ms Young to return to work because there was discussion in the letter of the need to give Mr Dear notice so that he could prepare the necessary roster. There was mention of the need to meet in the letter and a suggestion that Ms Young contact Ms Park with the available meeting times that suited her and her representative.

[29] Ms Park was also advised by Ms Anderson after 31 March 2008 that Ms Young was stressed about the disciplinary process and the complaints she was facing. I accept that Ms Park asked Ms Anderson to reiterate with Ms Young that they needed to meet and sort out the issues and that no decisions had been made. There was also some discussion about the possibility of negotiating an exit package for Ms Young from Sky Chefs. That matter really went no further than Ms Park putting a figure of what it would have cost the company to have Ms Park and Mr Dear meet with Ms Young and then there was no further contact between Ms Anderson and the company.

[30] Ms Park said that she did not expect to have a meeting with Ms Young until Ms Young felt well enough to be able to attend such a meeting. On 5 May 2008, Ms Young was provided with a further medical certificate advising that she remained medically unfit from that date and the situation would be reviewed on 5 June 2008. Ms Park said that she was not expecting any contact with Ms Young on the basis of that medical certificate and that she still had some sick leave available to her although that was running out. Before the end of that medical certificate Ms Young had resigned.

[31] A medical certificate dated 12 June 2008 from Dr Valerie Miller at the Wakatipu Medical Centre set out in more detail the situation with Ms Young's health and her medical condition. The first time medical evidence of that detail was received by Sky Chefs was after Ms Young resigned. It was agreed by Sky Chefs that Dr Miller did not need to attend the Authority's investigation meeting and give evidence and I accept the reason for that is her medical advice is not disputed but that

it is on the basis of self-reporting. Sky Chefs accepts that Ms Young may well have become upset and stressed due to what was happening at work but I am not satisfied that there was a breach of its contractual duties toward Ms Young at the time of the audit or afterwards.

[32] Some emphasis was placed on the German auditor's letter to Sky Chefs suggesting that disciplinary action may be of little benefit. I am not satisfied that an independent auditor's view can impact on the decision of Sky Chefs to commence a disciplinary process. It was for that company to make a decision in terms of that matter.

Conclusion

[33] I accept that it is likely Ms Young resigned because she felt stressed and anxious about the pending disciplinary process and the changes in the kitchen following the audit but I am not satisfied that any of the actions of Sky Chefs during this period were such that they amount to a breach of duty.

Determination

[34] Ms Young has not made out her claim that Sky Chefs unjustifiably constructively dismissed her and unfortunately there is nothing further that I can do to assist her as she does not have a personal grievance.

[35] I reserve the issue of costs. Mr Pollak has until Monday, 8 March 2010 to lodge and serve submissions as to costs and Mr Bradshaw has until Monday, 22 March 2010 to lodge and serve submissions in reply.

Helen Doyle
Member of the Employment Relations Authority