

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2011] NZERA Auckland 374
5321745

BETWEEN HONGNA ZHANG

AND FLY 8 SHOP LIMITED

Member of Authority: Yvonne Oldfield

Representatives: May Moncur for applicant
 Richard Chen for respondent

Investigation meeting and 6 May 2011
submissions

Determination: 25 August 2011

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Ms Zhang worked for the respondent as a barista in the Coffee Club café in Takapuna from March 2010 until August 2010. On 27 August after an argument with the duty manager, Ms Feng, she left the café and did not return. The respondent's director, Mr Ma, says he tried to reach Ms Zhang on her mobile that night but had no success and did not try again. There was no contact by or on behalf of Ms Zhang until 13 September 2010 when her representative raised a personal grievance of unjustified dismissal.

[2] Ms Zhang's position is that Ms Feng dismissed her in the course of the argument. Ms Feng disputes this. Mr Ma knew nothing of the argument until after Ms Zhang had left but says that Ms Feng had no authority to dismiss anyone and he believes Ms Zhang was aware of that. Ms Zhang says that she would not have quit because her boyfriend was not working and they both relied on her wage. There has been no suggestion by the respondent that a dismissal was justified at that time. The sole issue for determination is therefore whether Ms Zhang was dismissed or abandoned her employment.

Was Ms Zhang dismissed?

[3] Ms Zhang first went to work at the Coffee Club in Takapuna in early 2008. In March of 2010 the respondent obtained the franchise direct from the franchisor. Ms Zhang and several other staff were taken on by the respondent.

[4] At any one time the café was staffed by a duty manager, barista, chef and one person on the floor. For much of the week Mr Ma took the role of manager himself. When he was not present, supervision of the café fell to a duty manager of whom there were two, Ms Feng and one other, rostered on at different times. Ms Zhang told the Authority that Mr Ma was a reasonable person who treated her well but she had experienced conflict with both the duty managers. She had once gone as far as complaining to Mr Ma because the other (male) duty manager had taken her to task for failing to comply with the dress code. On that occasion Mr Ma seems to have resolved the problem between Ms Zhang and the duty manager and the matter went no further.

[5] On 27 August Ms Zhang arrived at work at her usual start time of 7.45 am. She and Ms Feng became involved in an argument when Ms Feng directed Ms Zhang to put aside what she was engaged on and clean the cake cabinet. The argument was conducted in the Chinese language (the first language of both women.) Ms Zhang provided the following English account of what happened:

“[Ms Feng] was getting more upset and then she told me to leave the shop. She said, ‘you are leaving now; and don’t bother to come back.’ I was shocked and felt very embarrassed.

I went outside to cool down with disbelief that she had dismissed me. I wanted to fix the situation and keep my job.

After a couple of minutes I went back inside the shop and asked [Ms Feng] whether I had really been dismissed and for what reason.

[Ms Feng] said at the time “I have been upset with you for a while, but have just not had the opportunity to say it.” In this way the dismissal was confirmed. I knew I had lost my job.

I asked [Ms Feng] to contact [Mr Ma] the director with a hope that [Ms Feng] might withdraw her decision. [Ms Feng] said to me, “No, I don’t need to. [Mr Ma] listens to me.”

[6] Ms Feng denies all this. She says that when she asked Ms Zhang to clean the cabinet, Ms Zhang:

“suddenly became very angry...I first asked her calm down because lots of customer in the shop at that moment. She refused talk with me and kept her voice high. After made a cup of coffee for herself, [Ms Zhang] took her bag and left...I told her that she could not leave without any notice to general manager. And then she came back, I told her peacefully that “if you want, I just treat nothing happen, nothing will be changed.”

However she suddenly used lots of aggressive words toward me that serious hurt me. I was shocking by her behaviour and cannot control my tears. I came to toilet to cry. When I returned, I found [Ms Zhang] disappeared.”

[7] There is no dispute that Ms Zhang left the shop at around 9.00 am. Mr Ma arrived a little later to find Ms Feng in tears and be told that Ms Zhang had left. He said he called Ms Zhang twice that evening but got neither voicemail nor a ring tone. He said he did not try again after that because he had talked Ms Zhang out of leaving once before and did not think it was worth trying again. Instead, this time, he left her to make her own mind up.

[8] Ms Zhang did not dispute that Mr Ma had previously encouraged her to stay at the café but doubts that he tried to call her on the night of 27 August. She says he had previously contacted her on her mobile but this time she sat waiting for a call and none came.

[9] Mr Ma questioned why Ms Zhang did not come to him (as she had done before) if she believed Ms Feng treated her unfairly. Ms Zhang explained that she did not talk to Mr Ma, as she had when she clashed with the other duty manager, because she felt this time there was no point. Ms Feng was Mr Ma’s girlfriend. Ms Zhang believed Mr Ma would back her up. Mr Ma acknowledged that he did have a personal relationship with Ms Feng but said she was just an employee and had no stake in the café. He stressed that Ms Feng was not authorised to dismiss staff.

[10] At the time of these events Ms Zhang had applied for permanent residence. Both she and her employer were under an obligation to inform NZ Immigration if her employment ended. In about mid September, around the same time that her representative raised her grievance, Ms Zhang advised NZ Immigration that she was no longer employed by the respondent. Mr Ma told the Authority he did not tell NZ

immigration that she had left the café because he did not immediately assume that Ms Zhang was not coming back.

[11] Mr Ma said other staff besides the duty managers had complained about Ms Zhang from which he concluded that she was not a good team worker. Nonetheless she was an experienced and skilled barista and he needed her in the café because she made good coffee. He said it caused him additional cost and inconvenience to organise cover for Ms Zhang in the short term and eventually to find a permanent replacement.

Determination

[12] Although the onus is on the employer to justify a dismissal, the employee bears the onus of establishing that there was a dismissal in the first place. In order to find that the respondent dismissed Ms Zhang, I must be persuaded both that Ms Feng said something which amounted to a sending away, and also, that Ms Zhang genuinely and reasonably believed that Ms Feng was authorised to dismiss her.

[13] My assessment of what occurred between the two young women is as follows. Ms Feng suggested that Ms Zhang step out of the café in order to avoid customers hearing the argument. It was not reasonable for Ms Zhang to construe that as a dismissal. When Ms Zhang came back inside after cooling off and asked whether she was dismissed, Ms Feng said only that she had been upset with Ms Zhang for a while without previously having an opportunity to say so. I am not satisfied that this comment can be taken to confirm dismissal.

[14] Ms Zhang did not seek Mr Ma's intervention (as she had in dealings with the other duty manager) because she feared that Mr Ma would back up Ms Feng. This view was understandable given Mr Ma's personal relationship with Ms Feng, Ms Feng's own comments that Mr Ma would support her, the fact that she was the duty manager, and the fact that this was not the first time Ms Zhang had been in conflict with one of the duty managers.

[15] However while it was reasonable for Ms Zhang to suspect that Mr Ma might support Ms Feng, that is not to say that it was reasonable for her to believe that Ms

Feng had the right to terminate Ms Zhang's employment. Ms Zhang knew that Ms Feng had no stake in the business and held the same position as the other duty manager, about whom Ms Zhang had previously complained to Mr Ma, and about whom there has been no suggestion that he had the right to dismiss staff. I am not satisfied that Ms Zhang believed that the Ms Feng had the right to fire her.

[16] Ms Moncur argued, for Ms Zhang, that it was not credible that Mr Ma attempted to contact Ms Zhang and that in any event, he should have made further attempts to do so.

[17] I do not accept this argument. Mr Ma's evidence was that all Ms Feng told him was that she and Ms Zhang argued and Ms Zhang walked out. Other staff present did not speak Chinese and could not comment other than to confirm that there had been an argument. Mr Ma struck the Authority as a reasonable person and a credible witness and Ms Zhang also described him this way. She acknowledged that he had previously talked her into staying at the café, with the implication that he appeared to value her services. Given this background, I am not satisfied that there was anything unfair or unreasonable in the fact that this time, he left it up to Ms Zhang to decide what she wanted to do.

[18] In summary, I am not satisfied that the respondent dismissed Ms Zhang. It follows that I can do nothing more to assist with the employment relationship problem.

Costs

[19] The issue of costs is reserved.

Yvonne Oldfield

Member of the Employment Relations Authority