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Anto v Planet Spice Limited WA178/10 (Wellington) [2010] NZERA 872 (3 November 2010)

Last Updated: 25 November 2010

IN THE EMPLOYMENT RELATIONS AUTHORITY WELLINGTON

WA 178/10
File Number: 5161022

BETWEEN

Alexander Anto Applicant

AND

Planet Spice Limited

Respondent

Member of Authority: Denis Asher

Representatives:

Daniel Vincent, Sarah Sorsby and

Nicholas Davies for Mr Anto

Alyn Higgins for the Company

Investigation Meeting Wellington, 11 October 2010

Submissions Received By 18 October 2010

Determination:

3 November 2010

DETERMINATION OF THE AUTHORITY

The Problem

[1] Was Mr Anto unjustifiably constructively dismissed or can the respondent (the Company) rely on his oral notice of resignation? Has the Company unjustifiably disadvantaged Mr Anto in any other way? What if any remedies are payable to him?

The Investigation

[2] Mr Anto's original statement of problem was filed on 13 August 2009. Following agreement reached during a subsequent telephone conference, this employment relationship problem was originally set down to be investigated on 18 February 2010: that date was vacated because of the non-appearance of an interpreter booked earlier by Authority support staff. The investigation was rescheduled to 12 May but had to be vacated for the reasons that are set out in my directions memorandum dated 13 May 2010.

[3] Mr Anto subsequently obtained legal aid and an amended statement of problem was filed on his behalf on 21 September.

Another telephone conference resulted in the 11 October investigation when it was completed with the assistance of an interpreter.

[4] I note here Mr Anto's evidence during the investigation that he has been employed for the past 3-months, albeit not as a chef.

Background

[5] The relevant background details are largely not in dispute.

[6] The Company operates an Indian restaurant and tandoori. It is managed by the directors' daughter, Darshna Patel and her husband, Praful "Bill" Rama.

[7] Mr Anto was employed by the Company as a full-time, permanent tandoori chef, in May 2007.

[8] Mr Anto is from Madras, southern India. His first languages are Hindi/Tamil. Languages spoken at the restaurant include Gujarati, Hindi and English.

[9] A written, English-language employment agreement exists between the parties; it was signed off by Mr Anto on 23 December 2007 and included a declaration that he had read and understood the conditions of employment set out therein and fully accepted them, and that he had been advised of the right to seek independent advice in relation to the agreement and had reasonable time to do so.

[10] Mr Anto resigned on 2 February 2009. He says he was constructively dismissed: the Company denies his claim.

[11] A grievance was filed by Mr Anto on 6 May. **Discussion**

[12] The events surrounding the termination of Mr Anto's employment are very much in dispute and necessitate credibility findings in respect of the parties' conflicting evidence.

[13] By way of relevant background, Mr Anto alleges that, on occasions, his employers raised their voices at him and shouted instructions, that his ethnicity was questioned and he was told on a number of occasions he did not look Indian and he did not know how to cook. Mr Anto says he approached the Human Rights Commission on 20 February 2009 in respect of his concerns about possible racism but elected not to take the matter further.

[14] Mr Anto specifically alleges that, on 29 January 2009, he was directed to cook whole, skewered fish in the tandoor oven: some of the fish fell into the oven and Mr Anto burnt his arms when he reached into the oven in an attempt to retrieve them.

[15] Mr Anto says that, as a result of this incident, he was shouted at angrily by Bill Rama, pushed by him and given little aid despite his serious burns. The Company agrees Mr Anto suffered burns, but says they were as a result of his own, unprompted actions and that he was provided with every assistance including an offer he could go home.

[16] On 2 February there was another incident or dispute, this time over cooking tandoori chicken. Mr Anto agrees he told his employer, in English, that he wanted to resign. He claims what he said was prompted by the way he had been treated throughout his employment and by the events on 29 January and 2 February in particular. He also says he was told if he wanted to resign he could finish on 23 February. Mr Anto accepts that he circled the date on a calendar; his employer having pointed to it, he says. Ms Patel says Mr Anto circled the date on his own initiative, signalling he was leaving in 3-weeks time and not the 4-weeks notice required by his employment agreement.

[17] Mr Anto claims that, on 4 February, while at work, he was introduced to a person described by his employers as the new chef: the respondent denies this allegation and denies knowing and employing anybody of the name given by the applicant.

[18] Mr Anto says that, after his advice on 2 February, he was often asked by his employers to put his resignation in writing.

[19] What is clear is that Mr Anto sought assistance from the Citizens Advice Bureau (CAB) on 10 February, as a letter of that date from the CAB to the Company (and seemingly provided the following day) makes clear. It states, amongst other things, in respect of the events on 4 February, that:

Mr Anto's employer became very angry and shortly after this Mr Anto told his employer that he would resign.

Subsequently Mr Anto thought about his action and has decided that he would like to stay at his job, given the economic situation and the lack of situations in his field of expertise.

[20] However, as Ms Patel makes clear at par 38 of her witness statement, by 11 February when Mr Anto first advised the respondent of his wish to withdraw his resignation, the tandoori chef role had been offered to another person "... who was relocating to Wellington for the job and ... I couldn't withdraw this offer" (above).

[21] Ms Patel's statement also makes clear that, from the respondent's perspective, the applicant reconfirmed his resignation on 3 subsequent occasions when she reminded him of her original request for written confirmation of his oral resignation advice: Ms Patel said the applicant did not attempt to dispute his resignation on those occasions but instead confirmed he would put it in writing (par 44). She says she sought his notice in writing by way of confirmation of what he had reiterated on 3 occasions (oral evidence to the Authority).

[22] Ms Patel replied to the CAB's letter by her own letter dated 13 February 2009 (attachment to statement in reply) and addressed to Mr Anto. The reply is consistent with the evidence contained in her written statement, some of which is summarised above. In particular, in it Ms Patel reminds Mr Anto of her advice that since the afternoon of 2 February she "*began searching for a chef to replace you in 3 weeks time ...I have taken time out to interview several chefs ... and have now offered the position to someone who is relocating himself and his family to Wellington for this job*" (above). As it happened, immigration process resulted in some delay before that person was able to take up his employment.

Findings

[23] The issue for determination is whether the employer unjustifiably constructively dismissed Mr Anto by unfairly and unreasonably treating him in such a way that led to his oral resignation? Or, can it rely on that resignation? In other words, did the respondent breach its obligations to Mr Anto such that a substantial risk of resignation was reasonably foreseeable: see the Court of Appeal's judgement, *Auckland Electric Power Board v Auckland Provincial District Local Authorities Officers IUOWInc* [1994] NZCA 250; [1994] 1 ERNZ 168.

[24] By way of application of the principles set out in the *AEPB* judgement (above), I am satisfied that Mr Anto was not unjustifiably constructively dismissed as a result of the events leading up to his oral advice of resignation, and that the respondent was able to fairly and reasonably rely on his notice of resignation. I reach these conclusions for the following reasons.

[25] I do not accept Mr Anto's claims in respect of certain background events leading up to his termination. In particular, I do not accept that he was shouted at, that his ethnicity was questioned and he was told he did not know how to cook. I make this credibility finding for the following reasons. These claims were never raised by way of earlier grievance allegations, but emerged only in the context of this alleged unjustified constructive dismissal. Mr Anto was vague in his evidence as to the date of these alleged incidents. The allegations are not consistent with Mr Anto's acceptance that the Patels provided him with considerable support in respect of accommodation and financial matters. They are also not consistent with the evidence of another Company employee's, whose credibility - for similar reasons - I prefer to Mr Anto and that of another staff member who gave evidence on his behalf.

[26] In reaching this conclusion, I note also the applicant's contradictory evidence. In reply to a question from Mr Higgins, on behalf of the respondent, as to background matters that allegedly bothered Mr Anto but which had not been raised previously by him, Mr Anto's interpreted answer was, "*I was happy to work there*". This statement is at odds with written statements to the contrary by Mr Anto about the treatment he endured from managers leading up to the termination of his employment, particularly para 13 of his statement where he said, "*Generally, I found it a very difficult place to work*".

[27] I am also satisfied that, in respect of the events on 29 January and 2 February, Mr Anto was given legitimate instructions by his employer as to what dishes he was to prepare, and how he was to prepare them. The parties agree that Ms Patel and Mr Rama decided to make changes to the restaurant's menu, who say they consulted Mr Anto about the changes: the applicant denies their claim. A finding is not required as to whose version of events is to be preferred as I am satisfied the changes sought were not only consistent with Mr Anto's training and skills as an experienced tandoor chef, but were changes fairly and reasonably required, from a business perspective, by the managers of the restaurant.

[28] It is clear Mr Anto was not happy with the changes and that the incident on 2 February resulted directly from him reverting to previous practices - practices he had been instructed to abandon. While Mr Anto claims he had issues with the set up of the kitchen (par 28 of his statement) there is no evidence of him ever raising these concerns before or on 2 February, or even after that date before his evidence was presented to the Authority.

[29] To repeat what I have concluded above: the instructions from the respondent's managers as to changes in the menu were fair and reasonable, and were not disputed despite notice of them predating Christmas 2008 (Mr Anto's evidence), until the "*To Whom It May Concern*" letter of 10 February from the CAB (attachment to original statement of problem).

[30] By that date I am satisfied Mr Anto had resigned his employment on his own initiative and the Company's managers had committed to a new employment contract in respect of his replacement: the respondent could therefore fairly and reasonably refuse Mr Anto's request that it withdraw his oral notice of resignation.

[31] Mr Anto's admitted action of circling the date on the calendar of his final day is supporting evidence, I find, of him freely initiating his resignation.

[32] Finally, I am satisfied from the tenor of the CAB letter of 10 February, that Mr Anto's resignation was at his own initiative, and not as a result of his treatment by Ms Patel and Mr Rama, but - having reflected on "*the economic situation and the lack of situations in his field of expertise*" (above) he had second thoughts and sought -unsuccessfully - to undo his own actions.

[33] Finally, for the reasons given above, I do not accept this was a situation in which an employer took advantage of unwitting or unintended words of resignation: *Boobyer v Good Health Wanganui Ltd* unreported, Goddard CJ, 24 Feb 1994, WEC 3/94.

[34] I find against Mr Anto's claims of disadvantage for the same reason I find against his claim of unjustified constructive dismissal: they are not credible and lack specificity.

Determination

[35] I find against Mr Anto's allegation he was unjustifiably constructively dismissed and unjustifiably disadvantaged.

[36] Costs are reserved.

Denis Asher

Member of the Employment Relations Authority

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