

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Grant Coombes (Applicant)
AND Soung Yueen Supermarkets (Respondent)
REPRESENTATIVES Samuel Cuddon, Advocate for Applicant
Neville Fong, in person for Respondent
MEMBER OF AUTHORITY Janet Scott
INVESTIGATION MEETING 7 December 2004
DATE OF DETERMINATION 18 January 2005

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

Mr Coombes submits he was constructively dismissed by the respondent and that he has a personal grievance. To remedy his alleged grievance he seeks lost remuneration, compensation under s.123 (c)(i) of the Act and costs.

Mr Fong for the respondent submits that Mr Coombes was not dismissed but that he resigned voluntarily, worked out two weeks notice and left on amicable terms.

Background

Mr Coombes commenced employment with Soung Yueen Supermarkets on 23 February 2004. He was engaged as a Butcher Manager and was solely responsible for the respondent's butchery business. He was based at the company's Otahuhu premises. Outwardly the employment progressed on an amicable and cooperative basis but it would be fair to say that neither party was entirely happy in the relationship.

On 14 June 2004 Mrs Fong, who had had an ongoing concern relating to the meat presentation and quantity of meat prepared and presented by Mr Coombes, raised with him once more her concern that the meat set out for sale in the meat cabinet was not of good quality. She pressed Mr Coombes to address the issue and put it right. Mr Coombes muttered¹ that he'd "*just about chucked the job last week*". Mrs Fong advised her husband of this and Mr Fong arranged for an advertisement to be

¹ Mr Coombes denies making this comment.

placed in the Herald on 15 June 2004 seeking a butcher/manager to replace Mr Coombes with a view to having applications available should Mr Coombes make good his threat to resign.

On 15 June Mr Coombes' wife noticed the ad in the Herald and brought it to Mr Coombes' attention.

Mr Coombes went to work and resigned his employment the same day. It is his position that it was humiliating to see his job advertised and it looked as if he was about to be sacked.

Mr Coombes now claims his resignation amounts to a constructive dismissal. He submits the Fongs' action in advertising for a butcher manager was the last straw in his employment which was marked by Mrs Fong verbal abusing him, shouting and yelling at him and directing him to put banned preservatives in meat and to mix (and present for sale) good mince with mince past its expiry date². Mr Coombes submits the Fong's butchery department was a disgrace and they refused to listen to his advice preferring to follow unsafe, unethical and unlawful procedures to standard New Zealand safe procedures.

Case Law

The applicant bears the onus of proving (on the balance of probabilities) that the termination was, as matter of law, a dismissal and not a resignation. NZ Amalgamated Engineering etc IUOW v Ritchies Transport Holding Limited [1991] 2 ERNZ 267.

In Wellington Clerical Workers' Union v Barraud & Abraham Ltd [1970] 70 BA 347, Horn SM (as he then was) held that:

"An apparent resignation can also amount, notwithstanding the words used, to a dismissal. For example, if the employer's actions or words oblige or strongly tend to induce an employee to proffer a resignation, the result can still be a dismissal in reality."

In Western Excavating Ltd v Sharp [1978] 1 All ER 713 at 717 per Lord Denning MR, Lawton and Everleigh LJJ concurring it was held that:

"If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer's conduct. He is constructively dismissed. The employee is entitled in those circumstances to leave at the instant without giving notice at all or, alternatively, he may give notice and say he is leaving at the end of the notice. But the conduct must in either case be sufficiently serious to entitle him to leave at once. Moreover, he must make up his mind soon after the conduct which he complains of; for, if he continues for any length of time without leaving, he will lose his right to treat himself as discharged. He will be regarded as having elected to affirm the contract."

² Two of a number of complaints made by Mr Coombes regarding inappropriate practices relating to meat management and retail practices adopted at Soung Yuen Supermarket.

For Mr Coombes to establish that his resignation was in fact and law a dismissal she needs to show there was a breach of duty by the respondent of such magnitude that it entitled him to terminate the contract of employment.

In Auckland Shop Employees IUOW v Woolworths (NZ) Ltd [1985] ACJ 963 the Court of Appeal held that constructive dismissal included, but was not limited to, cases where:

- (i) *An employer gives an employee a choice between resigning or being dismissed;*
- (ii) *An employer has followed a course of conduct with the dominant purpose of coercing an employee to resign;*
- (iii) *A breach of duty by the employer leads an employee to resign.*

In Auckland Electric Power Board v Auckland Local Authorities Officers Union [1994] 1 ERNZ 168 Cooke P in delivering the judgement of the Court of Appeal stated:

"In such a case as this we consider that the first relevant question is whether the resignation has been caused by a breach of duty on the part of the employer. To determine that question, all the circumstances of the resignation have to be examined, not merely of course the terms of the notice or other communication whereby the employee has tendered the resignation. If that question of causation is answered in the affirmative, the next question is whether the breach of duty by the employer was of sufficient seriousness to make it reasonably foreseeable by the employer that the employee would not be prepared to work under the conditions prevailing: in other words, whether a substantial risk of resignation was reasonably foreseeable, having regard to the seriousness of the breach. As to the duties of an employer, there are a number potentially relevant in this field. How some should be defined precisely is a matter no doubt still open to debate: see the discussion in the Auckland Shop Employees case. But in our view it can now safely be said in New Zealand law that one relevant implied term is that stated in the judgment of the Employment Appeal Tribunal, delivered by Browne-Wilkinson J, in Woods v W M Car Services (Peterborough) Ltd quoted in the Auckland Shop Employees case. As the Judge put it:

"In our view it is clearly established that there is implied in a contract of employment a term that employers will not, without reasonable and proper cause, conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee. Courtaulds Northern Textiles Ltd v Andrew [1970] IRLR 84. To constitute a breach of this implied term it is not necessary to show that the employer intended any repudiation of the contract: the tribunal's function is to look at the employer's conduct as a whole and determine whether it is such that its effect, judged reasonably and sensibly, is such that the employee cannot be expected to put up with it: see British Aircraft Corporation Ltd v Austin [1978] IRLR 322 and Post Office v Roberts [1980] IRLR 347. The conduct of the parties has to be looked at as a whole and its cumulative impact assessed: Post Office v Roberts"".

However, case law also dictates that it is necessary to be satisfied that the conduct complained of is repudiatory in nature and not simply inconsiderate behaviour which causes the worker unhappiness. Such circumstances were discussed by Judge Williamson in Wellington etc Clerical Workers IUW v Greenwich [1983] ACJ 965:

“It is essential to examine the actual facts of each case to see whether the conduct of the employer can fairly and clearly be said to have crossed the borderline which separates inconsiderate conduct causing unhappiness or resentment to the employee from dismissive or repudiatory conduct reasonably sufficient to justify termination of the employment relationship”.

Also relevant in this case are the findings of the Chief Judge in *NZ Woollen Workers v Distinctive Knitwear NZ Ltd* [1990] ERNZ Sel Cas 791, 803.

“.....conduct falling short of a breach of contractual term including any duty implied into it by law cannot entitle the worker to cancel the contract by resigning. For example, in this case there was evidence given by workers that Mrs Malcolm sometimes snapped at them or spoke to them in a manner which they regarded as inappropriate. That evidence if accepted, by itself, in the absence of any element of unfairness or oppressive conduct, is not enough. The law does not compel parties to a contract to do more than perform it and it does not require them to perform it politely, nor is this Court empowered to enforce courtesy in the workplace, no matter how desirable in that environment that quality undoubtedly is”

Findings

Credibility

The evidence of Mr and Mrs Fong was candid and it was compelling in its sincerity. I find their evidence to be more credible than that of Mr Coombes. Accordingly where there are disputes in the evidence between the parties it is the evidence of the respondent’s witnesses that I prefer.

Findings

In arriving at my determination in this matter I have had regard to the evidence submitted, my assessment of the credibility of the witnesses and relevant case law.

Mr and Mrs Fong are small retailers. They admit to knowing little or nothing about butchering and the management of the butchery department. I find it is their practice to hire a good butcher, pay him well and let him run the butchery department as if it were his own business. The evidence shows they imbue an enormous amount of trust in the relationship they have with their single butcher employee. In return they expect meat cabinets containing a plentiful supply of well-presented product that will walk out the door with their customers – happy to have acquired good products at very competitive prices.

There was no written contract between the parties. The contractual arrangements between the parties were relatively loose. Mr Fong did, I find, offer Mr Coombes a job as Butcher/Manager at \$18 per hour. They discussed Mr Coombes’ income in his previous job and Mr Coombes advised he took home \$650 net per week. This was acceptable to Mr Fong and it was understood by the two men when they entered into the employment arrangement that Mr Coombes would work an expected 46.5 hours per week which extrapolated out (at \$18 per hour) to a take home pay of approximately \$650 net per week.

However, such was the attitude of trust evidenced by Mrs Fong³ in the relationship that she did not demand slavish obedience to clock hours. Her view is that the job is there to be done and done well but once the days’ work was completed to the necessary standard (in terms of the presentation of a

³ Mrs Fong managed the Otahuhu store and Mr Fong had little involvement in the day-to-day operations of this store.

quality product with back up supplies readily available) the butcher was free to depart for the day. This is the attitude she took to Mr Coombes employment and it was specifically agreed he could leave when the day's work was completed.

Sadly, Mr Coombes did not deliver the goods as expected. Mr Coombes written evidence deposed that he worked between 36-38 hours per week. On questioning he revealed himself that he worked approximately 29 hours per week. Mr Fong submits he actually worked around 26 per week. I find that Mr Coombes did not rise to the occasion to meet the expectations inherent in the high level of trust reposed in him by the Fongs to manage the butchery business and in doing so to meet the only requirement that mattered – to present an excellent product that would walk out the door only to be replaced by more well presented product from the good back up supplies left on hand by Mr Coombes. Mr Coombes attitude, I find, was to cut and present as little product that he could get away with and call it “*job and finish*”.

As a result of Mr Coombes poor attitude the quality of the presentation of meat products was below par and the availability of back up supplies deficient. Given the poor presentation of meat customers did not buy product and meat ‘*use by*’ dates expired resulting in significant quantities of expensive product having to be binned. Mrs Fong sought Mr Coombes’ input to provide a solution to the problems that were emerging. There were debates about the use of preservatives to prolong the life of the meat. Mrs Fong made inquiries about this. She received advice that suggested some butchers do add preservatives to meat although it is a banned practice. I accept her evidence that she never directed Mr Coombes to add banned preservatives to meat and I find that Mr Coombes was not directed to mix banned preservatives with meat and that preservatives were never added to meat during his tenure with the company.

I find, however, that Mrs Fong frequently raised with Mr Coombes her expectation that he address and resolve issues with meat deteriorating and sitting in the display cabinet after the expiry dates on the packaging. Mrs Fong took the approach (consistent with the overall trust placed in her butcher/manager) - this is the problem I am seeing, please, please will you find a solution. Mrs Fong also raised with Mr Coombes the matter of the necessity to ensure a plentiful supply of packaged meat was available to replenish the meat cabinet after he had left for the day. On the nature of Mrs Fong’s communications with Mr Coombes I find specifically that he was not subject to shouting, yelling and abuse by Mrs Fong.

Mr Coombes did not act to address the issues raised and rectify them. He was turned off by Mrs Fong’s expressions of concern and said he wasn’t talking about issues and didn’t want to discuss/argue issues with her. Mrs Fong didn’t see there was any issue for argument – she was raising genuine issues of concern with a view to having the professional tradesman they had hired resolve those concerns.

These issues were never adequately addressed by Mr Coombes. Unfortunately, Mrs Fong never explicitly directed Mr Coombes to pull up his socks. I find Mrs Fong took the approach of respecting Mr Coombes’ skills, experience and judgment and relied on requesting him to find appropriate solutions to the problems with the presentation of meat, its deterioration on the shelves and the availability of back up stock. As I have found, Mr Coombes did not respond and now complains that he received no warnings.⁴

⁴ If the matter before me were dismissal for poor performance the respondent would have some difficulty in persuading me of justification for that dismissal when there was no history of counselling or warning given to Mr Coombes in relation to his performance. However, this is an alleged constructive dismissal and the history of the performance issue is only relevant as going to the overall state of the relationship between the parties within which I am searching for any evidence of repudiatory conduct on the part of the employer.

I find that on or about 12 June 2004 Mrs Fong resorted to pleading with Mr Coombes to address problems with the quality of meat she observed on sale in the meat cabinets. She observed that her business would fail if there were no improvement. I find that Mr Coombes only response was to mutter “*I just about chucked the job last week*”.

I find that Mrs Fong reported this statement to Mr Fong. Mr and Mrs Fong were alarmed – they feared that Mr Coombes was planning to leave them at short notice leaving them without a butcher. The Fongs should have of course approached Mr Coombes and clarified what he meant by his statement but it was not unreasonable for them to be alarmed. Mr Coombes use of the word “*chucked*” carried a sense of a sudden or impetuous action towards his stated intention of leaving his job.

I find Mr Fong advertised a position for a butcher/manager in the Herald on 14 June 2004. Mrs Coombes noticed the advertisement and pointed it out to her husband. Mr Coombes, who was aware of his employer’s concerns regarding his performance read the ad as portending his dismissal and decided to jump ship first. Mr Coombes chose not to acknowledge the fact he knew the Fongs had advertised a butcher/manager position. He simply resigned and worked out the two weeks notice he gave. Both parties acknowledge the two weeks passed amicably and each party thanked the other when Mr Coombes departed having worked out his notice.

It is my conclusion (having considered all the evidence in this matter) that the Mr and Mrs Fong had no intention of dismissing Mr Coombes – Mrs Fong could not even bring herself to address the deficiencies in Mr Coombes’ performance. The purpose of advertising, I find, was to protect their business in the event that Mr Coombes made good his stated threat to “*chuck the job*”.

Conclusion

The respondent’s conduct may be criticised in one or two respects but I find that Mr Coombes was not dismissed constructively or otherwise.

Section 65 of the Employment Relations Act 2000 requires that all individual employment agreements are to recorded in writing. The Act has been in force for four years and there can be no excuse for not complying with it. The disputation that has occurred over the terms of this employment would not have arisen had the agreement been recorded in writing. Another benefit of putting terms in writing is that it allows the parties to address and record their expectations, thus providing a sound basis for building a successful employment relationship.

Mr and Mrs Fong are sincere, well meaning people but they have demonstrated naivety as employers faced with Mr Coombes’ poor performance. Frankly, there was a need for a focussed and consistent approach to managing Mr Coombes through the setting of expectations, monitoring performance, providing feedback and the provision of counselling and warnings if the required performance standards were not met. In the absence of appropriate performance management, Mr Coombes took as much rope as he thought he could get away with.

Mrs Fong’s belief in Mr Coombes professionalism as a tradesmen and the trust she imbued in the relationship was misplaced. Her entreaties to address quality and quantity issues with the meat presented for sale fell on deaf ears with Mr Coombes – whose dismissive attitude to Mrs Fong’s requests remained evident at the Investigation Meeting.

In some circumstances the placing of an advertisement for a sole charge position could be indicative of an intention to dismiss the current occupant of the position. However, I am satisfied on the facts

of this case that I can infer no such intention on the part of Mr and Mrs Fong in advertising as they did. Their action in this regard is consistent with the overall naivety they have demonstrated in managing difficult employment issues but I am satisfied their motive was solely to protect their business in the event that Mr Coombes left suddenly as he had threatened to do.

There was a lack of open and honest communication by both parties to this relationship. Had there been an open and communicative relationship this separation may not have come about as it did albeit I feel the mix of personalities here suggest it was not destined to be a longstanding relationship in any event.

Determination

Mr Coombes was not dismissed from his employment and he is not entitled to the remedies he seeks.

Costs

It would seem the respondent has not incurred legal costs in defending this matter. If that is the case then costs will not be an issue. If I am wrong in this assumption then the parties will need to file submissions and costs will be determined in the usual way.

Janet Scott
Member of Employment Relations Authority