

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

CA 52/09
5117459

BETWEEN KELLY RUTH DUNCAN
 Applicant

AND RESTAURANT BRANDS
 LIMITED
 Respondent

Member of Authority: Helen Doyle

Representatives: John Harland, Advocate for Applicant
 Robyn Commins, Advocate for Respondent

Investigation Meeting: 5 February 2009 at Christchurch

Submissions received: 25 February 2009 from Applicant
 17 February 2009 from Respondent

Determination: 23 April 2009

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Kelly Duncan was employed part time by Restaurant Brands Limited (Starbucks) at its Cashel Street store in Christchurch as a barista. Ms Duncan was employed for approximately two years until she resigned from her employment on 16 January 2008 giving one week's notice.

[2] Ms Duncan says that she wants the Authority to resolve employment relationship problems with Starbucks that her privacy was breached, that Starbucks failed to follow its own procedures, that she was subjected to bullying and that she was unjustifiably constructively dismissed.

[3] Starbucks does not accept that Ms Duncan was unjustifiably constructively dismissed or that she was bullied or harassed. It further denies that there was a breach

of Ms Duncan's privacy and says that the manager of the Cashel Street store followed good management practice and policy.

Issues

[4] The Authority is required to determine the following issues:

- Did Starbucks breach Ms Duncan's privacy;
- Did Starbucks breach its procedures in dealing with Ms Duncan;
- Was Ms Duncan bullied;
- Was Ms Duncan's resignation on 16 January 2008 caused by a breach of duty on the part of Starbucks;
- If there was a breach of duty on the part of Starbucks, was it of sufficient seriousness to make it reasonably foreseeable to Starbucks that Ms Duncan would not be prepared to continue to work under the prevailing conditions;
- If there were breaches and/or Ms Duncan was unjustifiably constructively dismissed, then what remedies is she entitled to and are there issues of contribution?

Did Starbucks breach Ms Duncan's privacy?

[5] The relevant period which the Authority is investigating is between 1 and 16 January 2008. This was the period when a new store manager Shin Fang was transferred from another Starbucks store to work at the Cashel Street store. Mr Fang said that he went through the employee files during the management changeover and he became aware at that time that Ms Duncan had previous written warnings on her file.

[6] The complaint about a breach of privacy concerned in the main a comment that was made during a meeting between Ms Duncan, Mr Fang and a shift supervisor Janice on 6 January 2008 about Ms Duncan's previous written warnings. Mr Harland submitted that there was a breach of Ms Duncan's privacy. The warnings were not challenged by Ms Duncan until after 16 January 2008 although Mr Harland said that

the correct process was not followed in respect of either warning. One written warning was dated 18 April 2007 and the other 17 October 2007. Starbucks was entitled to collect and hold information about warnings issued following disciplinary meetings with Ms Duncan. The warnings were only referred to I find, generally by Mr Fang at the 6 January 2008 and they were not relied on because there was no disciplinary outcome from the meeting.

[7] I agree that employee files should be stored in a way to ensure that access to them and to the personal information contained on the files is restricted. At Starbucks the evidence was that managers and shift supervisors did have access to the files. The evidence does not support that Mr Fang discussed the reasons for Ms Duncan's warnings.

[8] I have also considered the venue of the meeting on 6 January 2008 in the Starbucks store. There was no evidence to satisfy me that other employees or customers actually overheard the discussion. It is preferable to hold discussions with employees in an area which eliminates or at least reduces this possibility. In conclusion however I do not find that Mr Fang mentioning the fact that Ms Duncan had previous warnings enables a conclusion in all the circumstances to be reached that there was a breach of Ms Duncan's privacy.

Did Starbucks breach its procedures in dealing with Ms Duncan?

[9] There is an issue about which employment agreement applied to Ms Duncan because the terms and conditions relating to her personally could not be located. I find that in all likelihood it was the generic standard Starbucks Individual Employment Agreement 2005. As Ms Duncan was not a union member then she could not have been covered by the collective employment agreement. Schedule A to the generic individual employment agreement which would have contained Ms Duncan's pay rate and other information personal to her could not be found.

[10] The complaint about Starbucks failing to follow its procedures concerned the meeting on 6 January 2008. It is necessary to set out a little about the events that preceded that meeting as well as the actual discussion on 6 January 2008.

[11] At Starbucks all employees are called *partners*. There are also shift supervisors who also perform barista-type work but are in charge of managing employees during particular shifts. On 5 January 2008, Ms Duncan was working with

a shift supervisor Janice. Ms Duncan spilt some water on the floor and Janice asked her to mop the floor. Ms Duncan put a cloth on the excess water and Janice asked her again to mop the floor. Ms Duncan responded *I am not going to mop the floor when there are customers to be served.*

[12] Janice said that she decided she would not have any further discussions with Ms Duncan but that when her shift had finished, she could not get over that someone had refused to do something that she had asked them to. Janice felt the tone in Ms Duncan's voice and her reaction when asked to do something was of concern. Janice telephoned Mr Fang and advised him of what had occurred. Mr Fang asked whether Janice could go into the store the following day to talk to Ms Duncan with him present.

[13] On Sunday, 6 January 2008 at approximately 3pm, Mr Fang and Janice were both at the Cashel Street store. It was not their rostered shift time. Ms Duncan was advised by the shift supervisor that day that Mr Fang wanted to have a word with her. Ms Duncan, Mr Fang and Janice sat down in the café. Having heard the evidence, I find it was likely that the conversation commenced with a discussion about Ms Duncan's mood the previous day. Ms Duncan responded and advised that she was stressed and she was not the only one. Janice was then given an opportunity to talk to Ms Duncan about how she felt the previous day when Ms Duncan would not clean up the water with a mop when requested. Ms Duncan told Janice that she was talking down to her like a 12 year old and she said there were customers waiting. Janice apologised to Ms Duncan if it had seemed like she was talking down to her. During the meeting, Mr Fang referred to the fact that Ms Duncan needed to do things when she was asked to. There were some examples of the sort of tasks that she may be asked to attend to and some discussion about the previous manager and in a general sense, the staff. Mr Fang said he was of the view that the meeting was information gathering and to confirm the importance of policies and procedures in the store.

[14] Mr Fang mentioned Ms Duncan's previous warnings. Ms Duncan gave evidence that she took that as a threat and that she told Mr Fang that any discussion about those and performance issues should take place in private and not in front of another staff member. I find at that point Janice then asked Mr Fang to let her and Ms Duncan have a discussion. Janice and Ms Duncan then talked about issues and Janice emphasised how they needed to get on in the future and apologised for the way

in which Ms Duncan felt Janice was talking to her. In terms of the water incident, the evidence supports that they both agreed it was a miscommunication.

[15] Ms Duncan was upset by the meeting and she telephoned her sister who had previously been an employee and supervisor at Starbucks. Ms Duncan's sister telephoned the area manager, Rachel Partridge. Ms Partridge thought the main concern that Ms Duncan's sister was raising was the shifts. I accept Ms Partridge's evidence that Ms Duncan's sister did not ask for a copy of Ms Duncan's employment agreement at that stage. There was no reason why Ms Partridge would not have complied with that request had it been made. I find it also more likely that had that request been made then Ms Duncan would have, and I am not satisfied that she did, raised it at the meeting with Ms Partridge on 8 January 2008.

[16] Having spoken to Ms Duncan's sister, Ms Partridge appropriately telephoned the store and spoke to Ms Duncan. Ms Duncan complained about the meeting she had had with Mr Fang and Janice and said she felt harassed by it and that she was wearing her apron and was not prepared for it. Ms Duncan also expressed her concern that she had asked the previous manager for more shifts and they had not been allocated to her on the roster. Ms Partridge offered to look into the situation. Ms Partridge advised Ms Duncan that she would talk to Mr Fang and would also try to get her additional shifts at other stores.

[17] The evidence does not support that the meeting on 6 January 2008 was a disciplinary meeting that required the formal disciplinary process to be followed. Objectively assessed, it was a meeting that Mr Fang held with Ms Duncan so that he could talk to her about her interaction with Janice over the spilled water. Although Ms Duncan considered that matter to be at an end after her shift, Janice was upset enough by Ms Duncan's reaction and tone that she felt the need to raise the matter with Mr Fang.

[18] Mr Fang accepted in evidence that he had referred to Ms Duncan's previous warnings but could not recall the context in which he had done so. Having heard the evidence, I find it likely that the warnings were referred to in the context of Ms Duncan needing to do what her supervisors asked her to and comply with policies and procedures. Ms Duncan may well have found the reference to the warnings threatening, but I am not satisfied that that was the intention.

[19] I accept that, having had two earlier meetings at which the outcome was a written warning, Ms Duncan may have elevated the status of this meeting in her mind to the level of a disciplinary meeting. That does not mean that it was. It is appropriate that employers be able to talk to employees about everyday matters without every meeting being considered disciplinary in nature. It is understandable that Mr Fang would be concerned when approached by Janice and want as a result to talk to Ms Duncan. I do not consider the visit to the store by Mr Fang and Janice on their day off to talk to Ms Duncan was somehow sinister as seems to be suggested.

[20] There was an issue raised as to whether Janice should have been at the meeting, but her presence seemed to me to be sensible because Janice and Ms Duncan had to continue to have a working relationship in the future. Ms Duncan may well have referred to the possibility of taking a personal grievance, she is entitled to make that sort of statement. Even if it could be said to have been unnecessary for Mr Fang to make any reference to previous warnings, not every deviation from what was otherwise an unexceptional discussion can form the basis of a personal grievance claim. There was no disciplinary outcome from the meeting and there was no corresponding disadvantage to Ms Duncan. I do not find in conclusion that there was a breach by Starbucks of its procedures in terms of that meeting.

Was Ms Duncan bullied?

[21] The evidence supports that Ms Duncan was spoken to by Mr Fang on three occasions before her resignation. The first was about whether her shoes and earrings were appropriate. As to when that discussion took place I find, given that the pay roll records do not reflect that Ms Duncan was paid for any work on 4 January 2009 it is more probable than not that that discussion took place on 5 January 2008. The second occasion that Mr Fang spoke to Ms Duncan was on 6 January at the meeting which I have referred to earlier and there was one other occasion in all likelihood about Ms Duncan wanting to get additional shifts.

[22] I turn to the shoe and earring discussion. Mr Fang raised his concern in this regard with Ms Duncan. Ms Duncan looked at and discussed and debated Starbucks' policy on appropriate footwear and jewellery with Mr Fang. She clearly felt able to challenge Mr Fang in terms of his application of it and drew his attention to the footwear of other employees.

[23] Having heard the evidence, I am not satisfied that Mr Fang's request or raising of the issue was so completely unreasonable that he should never have done it. Mr Fang explained that his main concern was safety of footwear rather than strict adherence to the policy. Ms Duncan did agree to wear socks. I accept what may have appeared somewhat unfair to Ms Duncan was that some other employees had shoes coloured other than black. Mr Fang however was satisfied that their footwear was safe in terms of spills from hot water and that sort of thing. I do not find on the basis of that interaction about footwear and earrings that the threshold is reached where I can conclude Mr Fang was bullying, discriminating or harassing Ms Duncan in terms of the application of the Starbucks policy.

[24] The meeting on 6 January 2008 was arranged for the purpose of talking to Ms Duncan about her interaction with the shift supervisor the previous day. Other more general matters were talked about around the broad aspect of policy and procedure. I am not satisfied that Mr Fang, in raising an issue of concern with an employee in these circumstances, could be said to have bullied Ms Duncan. An employer must be able to talk informally to an employee and communication in an employment relationship to bring matters to an employee's attention and resolve them in a low key way should be encouraged and not discouraged.

[25] Ms Duncan was perfectly entitled to tell Mr Fang that his mentioning of the warnings was upsetting to her. Ms Duncan did raise her concerns with Ms Partridge and Ms Partridge talked to Mr Fang about them. I do not find however that the reference to a warning in all likelihood intended to confirm the importance of following procedure and policy was bullying.

[26] Mr Harland speculated that Mr Fang had reason to want Ms Duncan to leave. There is no evidence, however, to support that and that is one of the difficulties that Ms Duncan has with her claim. If Ms Duncan heard things from other people, then there was an opportunity to raise that with Ms Partridge and through her they could have been raised with Mr Fang. Mr Fang was entitled to be directly confronted with these concerns rather than have Ms Duncan come to the conclusion that they were true.

[27] I accept that the lack of any guaranteed hours of work and guaranteed shifts in the Starbucks' generic individual employment agreement may make it difficult for employees who, for whatever reason, get offside with the manager setting the rosters.

I also think it unfortunate that Mr Fang on one hand suggested that Ms Duncan try to get another shift from another employee and when she was successful advised that a swap was not possible. I have no reason however not to accept that Mr Fang declined the shift change for a business reason.

[28] Mr Fang said, and I accept his evidence, that the previous manager set Ms Duncan's roster for the first period that he was Store Manager as they are set two weeks in advance. He was not aware that Ms Duncan had requested extra shifts/hours of work because she was on holiday. Ms Partridge did attempt to find other shifts for Ms Duncan when she became aware of her concerns. She found further shifts at another store on 9 and 10 January 2008. The payroll records do not support that Ms Duncan's usual shift pattern was reduced after Mr Fang became store manager. Mr Fang did not accept he had changed the roster for the week Ms Duncan resigned. The payroll records and the shifts do not support that he did.

[29] I do not find that Ms Duncan was bullied, harassed or discriminated against by Mr Fang. I am not satisfied that he took deliberate steps to change or reduce her shifts. Mr Fang had only been the manager of the store for a very short time and evidence, particularly of deliberate shift change or reduction, would require consideration of rosters over a longer period.

Was Ms Duncan's resignation on 16 January 2008 caused by a breach of duty on the part of Starbucks?

[30] Ms Duncan was asked at the Authority investigation meeting for the reason that she resigned on 16 January 2008. Ms Duncan responded that her resignation was because of earlier events and that she was stressed and upset at the time she resigned. When asked when the events that the Authority is required to consider started, Ms Duncan confirmed that it was on 4 January 2008. I have found that the first discussion between Mr Fang and Ms Duncan was on 5 January 2008. Ms Duncan could not recall any discussion with Mr Fang between 6 and 16 January 2008.

[31] Ms Duncan resigned because she was unhappy working at Starbucks Cashel Street. Some of this had to do with the change of management, some of it had to do with the rumours and second-hand accounts of discussions with Mr Fang and some of it was to do with other employees who were friends leaving the store. Ms Duncan told Ms Partridge about her unhappiness.

[32] I was surprised by Mr Harland's submission that Ms Partridge's approaches were not offered in good faith. Objectively assessed, I find that Ms Partridge took a number of very good steps to try to resolve Ms Duncan's concerns. Those steps are important and I shall set them out.

[33] Ms Partridge met with Ms Duncan and another employee, Tegan, and Tegan's mother on Tuesday, 8 January 2008. There was a discussion during that meeting about the concerns that Ms Duncan and Tegan had. I find it likely that Ms Partridge advised Ms Duncan and Tegan that the Cashel Street store was not in a good state and that Mr Fang was there to try and improve customer satisfaction levels. Ms Partridge was advised that Ms Duncan and Tegan thought they were being treated unfairly and that they would be taking advice from the Department of Labour. Ms Partridge said that she advised Ms Duncan and Tegan that it was still early days for Mr Fang because he had only been at the store for six or so days.

[34] Ms Duncan worked 9 and 10 January 2008 at another Starbucks store undertaking shifts Ms Partridge arranged. She also undertook about one hour's work on 10 January at the Cashel Street store. Ms Partridge went to see Ms Duncan at the Cashel Street store on 10 January 2008 and asked her if she wanted a follow up meeting and/or a meeting with Ms Partridge and Mr Fang. Ms Duncan did not want to meet with Mr Fang and did not want to have a follow up meeting without Tegan. I find it likely that it was that day that there was a discussion with Ms Duncan about the permanent option of working at one of the other Starbucks stores which were within walking distance to the Cashel Street store. Ms Duncan did not want to do that. Ms Duncan said that she had good friends at the Cashel Street store and did not want to leave them.

[35] I find it likely that on 11 January 2008 Ms Partridge received a call from Ms Duncan's mother to the effect that she believed her daughter was being treated *atrociously and was bullied and harassed*. I think it likely that there was some mention of a personal grievance. I accept that Ms Partridge discussed with Ms Duncan's mother what had been offered to Ms Duncan.

[36] Ms Duncan said that she did not recall seeing Mr Fang on 11 January 2008. I think it likely from the evidence that Ms Duncan was advised of matters by other employees about discussions they had had with Mr Fang. I have formed the view that

it was those discussions with other staff that had left Ms Duncan feeling uncomfortable and believing that her work situation was unfair.

[37] Ms Duncan worked on 12 and 13 January 2008 at the Cashel Street store and then made the decision to resign. Ms Duncan handed Mr Fang her resignation dated 16 January 2008. Mr Fang incorrectly advised Ms Duncan that she had to give two weeks' notice. Ms Partridge received a voice message to the effect that Ms Duncan had resigned and another message from Ms Duncan's sister advising that Ms Duncan had been given an incorrect notice period and that Mr Fang was refusing to provide Ms Duncan with a copy of her employment agreement.

[38] Ms Partridge telephoned Mr Fang who advised that he could not find Ms Duncan's employment agreement in the filing cabinet. A copy of the generic individual employment agreement was provided to Ms Duncan and I am satisfied that Mr Fang did advise Ms Duncan that she need only give a week's notice.

[39] Ms Partridge telephoned Ms Duncan on 16 January 2008 and advised that she would catch up with her on her return to Christchurch as she was in Nelson.

[40] On 17 January 2008, Ms Partridge telephoned to talk to Ms Duncan and asked her if there anything she could do. I find Ms Duncan responded that there was not.

[41] On 18 January 2008, Ms Partridge received another call from Ms Duncan's mother who said that Mr Fang was still bullying her daughter. Ms Partridge telephoned Mr Fang and arranged to meet him at another store so that they could discuss the matter. Mr Fang confirmed to Ms Partridge that he had not spoken to Ms Duncan that day. The only thing he could think of was that Ms Duncan may have overheard a discussion he was having with another person and perhaps had taken it out of context. Ms Partridge then spoke to Ms Duncan and suggested to her that as she was not happy it may be best if she was paid out her last two shifts. Ms Duncan agreed with that and the payment was made.

[42] I do not find that Ms Duncan's resignation, although because of unhappiness was the result of any breach of duty on the part of Starbucks. Ms Duncan's claim that she was unjustifiably constructively dismissed must therefore fail.

Determination

[43] Ms Duncan's claims against Restaurant Brands Limited fail in their entirety and I am afraid that there is nothing further that I can do to assist her in terms of her employment relationship problem.

Costs

[44] I reserve the issue of costs. Ms Commins has until 21 May 2009 to lodge and serve submissions as to costs and Mr Harland has until 11 June 2009 to lodge and serve statements in reply.

Helen Doyle
Member of the Employment Relations Authority