

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Hazel & Amanda Gower (Applicant)
AND Eurest NZ Limited (Respondent)
REPRESENTATIVES Ken Nicolson, Counsel for Applicant
David France, Counsel for Respondent
MEMBER OF AUTHORITY Leon Robinson
INVESTIGATION MEETING 23 August 2005
SUBMISSIONS RECEIVED 13 September 2005
19 September 2005
DATE OF DETERMINATION 21 October 2005

DETERMINATION OF THE AUTHORITY

The problem

[1] Mrs Hazel Gower (“Mrs Gower”) and her daughter Ms Amanda Gower (“Ms Gower”) say they were unjustifiably dismissed. The employer Eurest NZ Limited (“Eurest”) says by their actions, they resigned their employment.

[2] The parties were unable to resolve the differences between them by the use of mediation.

The facts

[3] Mrs Gower commenced employment as a Catering Service Assistant at the Café Ritazza North Shore Hospital on or about 1 October 2004. The terms of the employment were recorded in an individual employment agreement. Mrs Gower was employed full-time and her duties included cashing up and closing up the café at the end of the day.

[4] Ms Gower commenced employment as a Kitchen Hand on or about 21 October 2004. The terms of the employment were recorded in an individual employment agreement. Ms Gower was employed full-time.

[5] Both employments were subject to a one month probationary period.

[6] Mrs Gower tells the Authority that when she first started her employment, she made it clear to the site manager Ms Leela Wati (“Ms Wati”) that she had a commitment to pick up her children from school at 3.00 pm. Mrs Gower says there was an “arrangement” that she would then return to

Mrs Gower

No Amanda can't pick up the kids, we came together in my car and my car is a manual and she is only licenced to drive an automatic. I will still have to get the kids myself I have no option but you have an extra staff member on until 4pm so you are covered!

[13] Mrs Gower says she was then dismissed when Ms Wati said *“Well in that case you're fired as well.”* Mrs Gower says she was shocked and felt totally humiliated and upset. She says that she and Ms Gower then left.

[14] Mrs Gower says the following day, Ms Wati phoned her and said *“I need you to bring your keys into me otherwise I wont pay you any money owing to you”*.

[15] Ms Wati recalls matters differently. She says she phoned Mrs Gower at 7.30 am that morning to check whether Mrs Gower had someone to pick up her kids. She says Mrs Gower told her *“No”*. She agrees that she enquired again of Mrs Gower when Mrs Gower commenced work. Again Mrs Gower told her *“No”*. Ms Wati says she reminded Mrs Gower of the warnings during the week and that same morning of the need for alternative arrangements. She says she told Mrs Gower she was unable to approve Mrs Gower leaving junior staff unsupervised.

[16] Mrs Wati was anxious as she had to leave to attend to the banking and retrieve her own children. She suggested to Mrs Gower that Ms Gower retrieve the children. Mrs Gower replied that they had come to work in a manual vehicle and Ms Gower could not drive manual. Mrs Wati says that Mrs Gower became very argumentative and *“started ranting and raving that there was no way she was going to leave her children on their own with no one to pick them up, regardless of what I [Ms Wati] said”*.

[17] Ms Wati recalls the exact words of her reply to Mrs Gower were *“if you leave the premises today without my permission you won't have a job to come back to.”* She says that at no stage did she ever say or imply that this instruction would apply to Ms Gower.

[18] According to Ms Wati, Mrs Gower then said *“I don't care about work, my kids can't be left alone”* and then walked to the till where Ms Gower was working. Ms Wati says Mrs Gower then said very loudly *“let's go, she can look after the place herself”* and then they both walked out and Mrs Gower said as they left *“she can stuff her job I am going”*.

[19] Although they were both rostered, Mrs Gower and Ms Gower did not attend for work the following day on 25 November 2004.

[20] Mrs Wati says she phoned Mrs Gower in the afternoon. She says she asked Mrs Gower if she and her daughter were returning to work. Apparently, Mrs Gower did not respond. Ms Wati says she then asked for the keys back. She was concerned about cash on the premises. She denies demanding the keys back and telling Mrs Gower she would not be paid if the keys were not returned.

[21] Ms Wati denies dismissing Mrs Gower and Ms Gower. She tells the Authority she does not have the authority to do so.

[22] Ms Shelly Merlo (“Ms Merlo”) a catering assistant tells the Authority she recalls the day when Mrs Gower and Ms Gower “walked out”. She says she heard raised voices and Mrs Gower was *“swearing and carrying on using the “f” word”*. She says she also heard Mrs Gower said she was not leaving her daughter to walk home on her own. According to Ms Merlo, Mrs Gower said to Ms Gower *“come on Amanda lets go”* before they left the café. Ms Merlo says Ms Wati *“definitely never said Hazel was fired or anything like that”*.

The determination

[23] This investigation is notable for the stark conflicts of evidence. The parties were in dispute about almost every aspect of the factual background. It is necessary therefore that I make a credibility finding. I regard Ms Merlo's evidence as corroborative of Ms Wati's evidence and I prefer Ms Wati's evidence where it is in conflict with Mrs Gower.

[24] I regard it inherently unlikely that Ms Wati would have dismissed Ms Gower in the arbitrary and peremptory fashion Mrs Gower alleges. I also accept that Ms Wati did not have the authority to dismiss.

[25] Although Ms Gower denies that Ms Wati ever counselled her about her poor performance, I am not persuaded that Ms Wati dismissed Ms Gower at all.

[26] Mrs Gower says she had a "right" or "colour of right" to go and pick up her children as a contractual term of her employment. I do not accept that. Any alleged oral term she relies on is ineffective. The written individual employment constituted the full and entire agreement between the parties and no oral terms were included. The agreement expressly precludes such terms by clause 26 as follows:-

26. *Completeness and Variations*

a. The terms and conditions set out in this agreement and the Compass Employee Hand book are deemed to be a complete record of the agreement between the parties and may only be varied by mutual consent. Any variations will be recorded in writing. You will be subject to and must observe and comply with all rules, policies and procedures in force from time to time as set out in the Eurest Quality System. Eurest is entitled from time to time to amend, cancel or introduce such rules, policies and procedures as it considers necessary. You will be advised of all such changes as and when they occur.

[27] I consider that on the balance of probabilities, it is more likely than not, that Mrs Gower and Ms Gower left the café or "walked out" of their own volition because Mrs Gower was not permitted to leave the premises to retrieve her children. That situation appears to me more likely and probable than the arbitrary and peremptory dismissals alleged by the applicants.

[28] For the above reasons, I find that Mrs Gower and Ms Gower were **not** dismissed. It is unnecessary having made that finding, to consider any issues of justification. **The Authority is unable to assist Mrs Gower and Ms Gower.**

Costs

[29] In the event costs are sought, I invite the representatives to reach an agreement between them, but if they are unable to do so, Mr France is to lodge and serve a memorandum as to costs within 14 days of the date of this Determination. Mr Nicolson is to lodge and serve a memorandum in reply thereafter but within 28 days of the date of this Determination. I will not consider any application outside that timeframe.

Leon Robinson
Member of Employment Relations Authority