

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2011] NZERA Christchurch 14
5306650

BETWEEN BRONWEN JOY KYLE
 Applicant

A N D HA & FM BRITTENDEN
 PARTNERSHIP
 Respondent

Member of Authority: James Crichton

Representatives: Bob Gillanders, Advocate for Applicant
 Joseph O’Neill, Counsel for Respondent

Investigation Meeting: 26 January 2011 at Dunedin

Date of Determination: 31 January 2011

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant (Ms Kyle) alleges that she was unjustifiably dismissed from her employment by the respondent (Cinnamon Café) by reason of a constructive dismissal while Cinnamon Café maintains that Ms Kyle tendered her resignation on 7 February 2010, when it was accepted.

[2] Ms Kyle was employed by the Cinnamon Café in February 2008. It is common ground that at the time of her appointment, Ms Kyle was a café worker (working under the direction of a manager, the daughter of the business partners owning the Cinnamon Café), but by the middle of the winter of 2008, there was a change in Ms Kyle’s status. She says that she was appointed manager at that time and while that title is not disputed by Cinnamon Café, the extent of her duties is in dispute.

[3] Initially the employment relationship seems to have been both successful and uneventful.

[4] Events leading to the end of the employment relationship commenced on Wednesday, 3 February 2010 when there was an argument between Ms Kyle and one of the owners of the Cinnamon Café, Ms Brittenden. The argument revolved around the management of a staff member. Ms Kyle objected to the fact that this staff member had spoken disrespectfully to her and she sought support from Ms Brittenden (as owner) for the staff member to be remonstrated with.

[5] Ms Brittenden declined to take the action requested and effectively reiterated what she says she had regularly indicated previously, namely that that staff member should be left to her (Ms Brittenden) to manage.

[6] It appears this response did not satisfy Ms Kyle who said something to the effect *Sue I can't work like this any more*, whereupon Ms Brittenden responded *well fuck off then*. Ms Brittenden's evidence was that she was not seeking to send Ms Kyle away but simply to make the point to her that she needed to stop going on about the issue which, as far as Ms Brittenden was concerned, was dealt with. Ms Brittenden says that at the relevant time, she was busy making sandwiches in the café and simply did not have time to enter into a long argument on the matter.

[7] Ms Kyle continued to work for the balance of that day but went home distressed. Ms Brittenden received a telephone call that evening from Ms Kyle's partner. Ms Brittenden describes that telephone discussion as a series of questions asked by Ms Kyle's partner to which she responded to the best of her ability. One such question was whether Ms Brittenden had said to Ms Kyle's partner (as Ms Kyle claimed) that Ms Kyle was no longer the manager. Ms Brittenden told me that she *probably did say that* during the course of the conversation with Ms Kyle's partner. She says she remembers some of the discussion with Ms Kyle's partner revolving around whether Ms Brittenden could still trust Ms Kyle. Ms Brittenden and her husband were planning an overseas trip but Ms Brittenden was increasingly anxious about leaving Ms Kyle in charge because her perception was that Ms Kyle was becoming increasingly difficult and demanding. Ms Brittenden remembers saying to Ms Kyle's partner something to the effect that she was no longer comfortable about going on holiday at all because of Ms Kyle's mood swings.

[8] Later that same evening, Ms Kyle herself called wanting to know what Ms Brittenden had been telling her partner. During the course of this conversation, it was evident that Ms Kyle's partner was in the background and that Ms Kyle and her partner were having some sort of argument while the telephone call was going on between her and Ms Brittenden. Ms Brittenden told me that Ms Kyle was very angry in the telephone discussion and clearly thought that the conversation that Ms Brittenden had had with her partner earlier that evening was a breach of her privacy. The conversation concluded with Ms Kyle telling Ms Brittenden *you can do the fucking breakfast yourself then*. A consequence was that Ms Brittenden had to cope the following day without Ms Kyle.

[9] There was no indication during Thursday, 4 February 2010 what Ms Kyle's intentions were the following day (Friday, 5 February 2010) and Ms Brittenden went into the café late on Thursday evening to prepare for the following day. She found a message on the café's answerphone from Ms Kyle which had been recorded late that night indicating that she was *not feeling too flash* and would ring Ms Brittenden over the weekend to talk to her about Monday.

[10] Ms Brittenden tried to ring Ms Kyle on her landline during Sunday, on two occasions, but got no answer. Ms Kyle confirmed to me that there was no answerphone on the landline. Ms Brittenden had lost her SIM card so was unable to access her directory of cellphone numbers.

[11] The final contact between the parties before the employment relationship ended was Ms Kyle's call to Ms Brittenden on Sunday evening, 7 February 2010. Ms Brittenden says the conversation was very short and that without much preamble at all, Ms Kyle said something to the effect *I've decided I can't come back to Cinnamon Café. I demand my final holiday pay tomorrow. I don't suppose you'll be too upset*. Ms Brittenden told me that she felt she had very limited opportunity to discuss matters with Ms Kyle who she described as *hostile and obstinate*.

[12] Mr Gillanders, for Ms Kyle, promptly sought to resurrect the employment but Cinnamon Café's position was that Ms Kyle had resigned her position and that it had accepted the resignation and needed to move on and fill the vacancy created by Ms Kyle's departure.

Issues

[13] The only issue for determination in the present case is whether Ms Kyle resigned her employment of her own motion or whether her resignation was forced on her because it was, in effect, a constructive dismissal.

Was Ms Kyle constructively dismissed from her employment?

[14] I am satisfied on the evidence before the Authority that Ms Kyle was not constructively dismissed from her employment by Cinnamon Café. I think the evidence discloses that she resigned her position having become dissatisfied with it.

[15] Looking at the legal test for constructive dismissal, the cases are clear that typically, constructive dismissals fall into three categories: those cases where the employer proposes that the employee resign their employment or be dismissed; cases where the employer sets about getting rid of the employee with a course of conduct designed to effect the employee's departure; and those cases where a breach of duty from the employer is of such seriousness as to suggest a repudiation of the employment agreement with the reasonably foreseeable consequence that resignation would follow from the alleged repudiation.

[16] There is nothing in the evidence here to suggest that Cinnamon Café sought to extract a resignation from Ms Kyle in lieu of which she would be dismissed. Nor is there anything in the evidence to support a conclusion that Cinnamon Café had the dominant purpose of getting rid of Ms Kyle. Indeed, quite the reverse is the case; all the evidence suggests that, despite the complaints about Ms Kyle's mood swings and difficulty from time to time, Cinnamon Café sought to retain her services because she was good at what she did and it was doubtful about the prospect of getting anybody to replace her adequately.

[17] That leaves the final kind of constructive dismissal where there is a breach of duty or a number of breaches of duty by the employer of such seriousness as to suggest a repudiation of the employment agreement such that resignation is reasonably foreseeable.

[18] In the present case, there really is nothing which would suggest that breach of duty. Certainly there are examples of intemperate behaviour from both parties, but in

my opinion nothing of the level of seriousness to warrant categorisation as a breach of the employer's duties.

[19] It is true that Ms Brittenden told Ms Kyle to *fuck off* and Ms Kyle wants me to interpret that expression as *a sending away* in the legal sense, that is, that Ms Brittenden intended by that remark to drive Ms Kyle from the workplace.

[20] But that is not how the facts appear to the Authority. I accept Ms Brittenden's evidence that she was busy at the time the words were spoken, that she was not in a position to have the conversation that Ms Kyle wanted to have, and that she was fed up with Ms Kyle persisting with the issue. I accept Ms Brittenden's point that she simply wanted Ms Kyle to go away and leave her alone so that she could get on with making the sandwiches. I do not think that she sought to have Ms Kyle leave the workplace by that intemperate remark. Furthermore, Ms Brittenden points out (quite correctly) that Ms Kyle remained at work for the balance of that day; if Ms Kyle had felt that she was being sent away by the remark made by Ms Brittenden, one would have imagined she would have left immediately.

[21] Another possible basis on which it might be alleged that the employer has committed a breach of its duty is the contention that the employer ought to have dealt more appropriately with the whole question of who was in charge of staff. Undoubtedly that is true. The arrangement in this café was loose enough, in terms of the arrangements between the parties, to make everybody unsure about precisely who was responsible for what. It seems common ground that Ms Kyle was called the manager by Ms Brittenden and it seems equally common ground that there was no real definition of that role. Moreover, as effectively the owner, Ms Brittenden obviously had the final say.

[22] The reality is that this was a very small workplace with typically a total of three workers in it, one of whom was in effect the owner and one of the other two was designated the manager. In the absence of an employment agreement setting out who was responsible for what, even in a workplace of this size, it seems axiomatic that difficulties of the sort that arose here, would arise.

[23] However, that does not mean that Cinnamon Café has committed a breach of duty of such seriousness as to suggest a repudiation of the employment agreement with Ms Kyle. The arrangements are muddled rather than giving evidence of

breaches of such seriousness as would suggest a repudiation of the agreement. As I have already noted, all of the evidence suggests that, despite the difficulties generated by Ms Kyle in an interpersonal sense, she was a fine worker who produced excellent results and Cinnamon Café wished to retain her services, at least until it became clear that she no longer wished to provide them.

[24] It is difficult to analyse the various contacts between the parties from 3 February down to 7 February 2010 without concluding that the dominant reason for the employment relationship coming to an end was Ms Kyle's developing conviction over that period that the small team at the Cinnamon Café found her difficult to work with. She chose to absent herself from the workplace for two full days without any proper explanation, she spoke rudely to her employer on the evening of 3 February, left a message in the dead of night on Thursday, 4 February that she would not be working on 5 February, and did not make contact with the employer until Sunday night, 7 February. She effectively left her employment without lawful excuse and chose not to return, placing the onus, in the process, on Cinnamon Café to somehow lure her back.

[25] Employment relationships are required to be conducted in this country in a good faith environment and both parties have to exhibit that good faith. Having failed to fulfil her work obligations for two working days, it is, I think, unreasonable of Ms Kyle to expect her employer to propose some basis on which her unspecified concerns can be addressed.

[26] It was apparent from the way the evidence came out in the investigation meeting that Ms Brittenden was quite unsure about precisely what it was that she was supposed to be addressing with Ms Kyle. Indeed, it became apparent that, notwithstanding the documents filed on behalf of Ms Kyle, she had never proposed to Ms Brittenden that they attend mediation and there was even doubt about whether she had been explicit in any of the conversations about *sorting things out*. Even if that could be allowed, I think the Authority can reasonably conclude that the extent of the conversations between the parties was so brief, terse and hostile as to preclude the identification of just what it was that Ms Kyle wanted *sorted out*.

[27] There is no doubt that Mr Gillanders proposed mediation, but that was after the employment had come to an end and Cinnamon Café took the view then that, as the relationship had come to an end, talking about it further would not have availed.

[28] Ms Kyle also would, I think, want the Authority to rely on the conversation that her partner had with Ms Brittenden in which it is common ground that Ms Brittenden told Ms Kyle's partner that Ms Brittenden had lost confidence in Ms Kyle and that Ms Kyle was not the manager any more. That is a specific concern which Ms Kyle could properly have. But she seems not to have contemplated addressing that issue at all and to have simply resigned her employment in apparent reliance on the fact that she had been demoted without discussion.

[29] Commenting on this issue, I think first of all that Ms Brittenden made whatever observation she did in the heat of the moment. Second, as I noted above, if this was a particular issue of concern to Ms Kyle, as it may have been, good faith behaviour would require Ms Kyle to raise the matter and seek to have it dealt with. She could have gone to see Mr Gillanders before she resigned and had him address the issues in the context of a continuing relationship, but despite her drawing attention in her evidence to what her partner told her about that conversation with Ms Brittenden, she seems to have taken no steps whatever to address the issue with her employer or, indeed, as I mentioned above, to address any other issue. When she rang her employer on Sunday night, 7 February 2010, having been away from the workplace for two days without adequate explanation, she seems to have simply announced that she was not coming back and to have demanded that her final pay be available to her the following day.

[30] In those circumstances, I am not persuaded this is a constructive dismissal, although both parties must take some responsibility for the breakdown of the employment relationship. On balance, I am satisfied that the far greater share of that responsibility must be borne by the employee. In a constructive dismissal allegation, of course, it is for the employee to prove the allegation, and in the present case, I am not satisfied that that has happened.

Determination

[31] Ms Kyle has not persuaded me that she has been unjustifiably dismissed by reason of having been constructively dismissed. That being the case, her claim fails in its entirety.

Costs

[32] Costs are reserved.

James Crichton
Member of the Employment Relations Authority