

*Under the Employment Relations Act 2000*

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND OFFICE**

**BETWEEN** Katsunao Nagai (Applicant)  
**AND** Carlton Hotel (Auckland) Limited (Respondent)  
**REPRESENTATIVES** Tae Wok Kwon, Counsel for Applicant  
Katherine Burson, Counsel for Respondent  
**MEMBER OF AUTHORITY** Janet Scott  
**INVESTIGATION MEETING** 30 August 2004  
31 August 2004  
**DATE OF DETERMINATION** 19 October 2004

DETERMINATION OF THE AUTHORITY

**Employment Relationship Problem**

Mr Nagai submits he was constructively dismissed by the respondent and that he has a personal grievance. To remedy his alleged grievance he seeks three months lost remuneration and \$30,000 compensation under s.123(c)(i).

The respondent's position is that the applicant freely resigned his employment from the Carlton Hotel prior to returning to Japan.

**Background**

On 8 January 2001 Mr Nagai commenced part time employment as a teppan chef at the Katsura Restaurant (the Japanese restaurant at the Carlton Hotel). He was employed full time from 5 February. During the period of his employment at the Carlton Mr Nagai held a permit which entitled him to work in New Zealand. That permit expired on 9 February 2002.

On 28 December 2001 Mr Nagai resigned his employment with the Carlton with effect from 13 January 2002.

On 20 January 2002 Mr Nagai submitted a personal grievance to the respondent alleging that the conditions he worked under at the Carlton Hotel were unbearable due to the actions of the Head Chef for Katsura Restaurant. Among the concerns raised by Mr Nagai was an issue relating to payment for overtime worked. This issue had not previously been raised by Mr Nagai with hotel management. On investigation it was discovered that Mr Nagai had not been paid double time for

hours worked on the sixth working day (of his working week). The matter was immediately rectified by the Hotel. Mr Nagai was advised of this by letter dated 30 January written by the Hotel's HR Manager, Shayleen Barlow.

In the same letter Mr Nagai was advised it was difficult for the Hotel to investigate his other complaints without him being available for a full discussion. Mr Nagai was invited to contact the Hotel to enable his concerns to be dealt with through the grievance process set out in the Collective Employment Agreement (CEA).

In the event Mr Nagai's concerns have been dealt with through the formal statutory procedures governing the resolution of employment relationship problems.

As I understand Mr Nagai's concerns they relate to issues of rostering and notification of rostered hours and threats by Mr Suzuki to withhold support for work permits. Thus Katsura chefs were left in a state of fear regarding job security and certainty of income. It was claimed on Mr Nagai's behalf that these were weapons used by Mr Suzuki to tame chefs.

It was also submitted by Mr Nagai that he was bullied and humiliated by Mr Suzuki in the workplace.

The evidence canvassed the above issues submitted by Mr Nagai. It also canvassed the matter of three anonymous letters submitted to Hotel management in September/October 2001 which set out complaints about Mr Suzuki and requested that the Hotel dismiss him. At the time the issues raised in the letters were being investigated by Hotel management Mr Nagai denied having any involvement in the submission of these anonymous complaints. He now acknowledges that he wrote one of the letters.

**Note:** Following the Investigation Meeting counsel for Mr Nagai sought to have admitted further affidavit evidence from Mr Igami (a witness for Mr Nagai). After hearing from the parties on this question I decline to consider the affidavit evidence submitted because it does not affect or change my view as to Mr Igami's credibility and it is otherwise irrelevant to the determination of the matter before me.

## Legal Principles

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."*

For Ms Donnelly to establish that her 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 her 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"*

## **Discussion and Findings**

### **Credibility**

In giving his oral evidence Mr Nagai was assisted by a professional interpreter. Taken overall however I did not find Mr Nagai a credible witness. Mr Nagai prefaced his allegations about Mr Suzuki's management and the working conditions at the Carlton with the following statements. "Working conditions were below the standard of any civilised society" and "Suzuki treated the chefs in the kitchen like his slaves". When it came to specifics, however, most of the complaints made did not measure up to the grandiose manner in which they were heralded. Some complaints had been addressed by Hotel management when they were raised e.g. the posting of rosters and the payment of T2 for work on the sixth day. The making of such sweeping allegations which are not borne out on analysis does nothing for Mr Nagai's credibility.

Further, where quite specific and serious allegations were made e.g. that Mr Suzuki had threatened not to support his application for a work permit Mr Nagai seems to have adopted the view that a statement to this effect is all that is required to prove such a serious allegation. He provided no supporting evidence despite others having apparently heard Mr Suzuki make this threat.

Neither could I find (as I was invited to do) that Mr Igami was an independent witness. Mr Igami admitted in his oral evidence to being aggrieved over matters relating to his own employment with the Carlton.

The evidence of the respondent was clear, consistent and demonstrated a consistent, timely and principled approach to staff management and the resolution of employment issues arising in the workplace.

Where there is conflict in the evidence it is the evidence of the respondent's witnesses that I prefer.

### **Findings of Fact**

In arriving at my findings in this matter I have had regard to the evidence and the submissions of the parties.

#### The Anonymous Letters

Sometime during the months of September/October 2001 three anonymous letters were forwarded to the HR Dept of the Hotel<sup>1</sup>. Taken together, those letters made a number of allegations about Mr Suzuki i.e.

- Mr Suzuki acted in a threatening way towards staff. (Allegations not specified).
- Mr Suzuki told chefs that if they didn't work hard he would not support renewal of permits.
- Rosters were not posted in accordance with the Collective.
- Staff could not get rostered days off together.
- Mr Suzuki was a poor chef – his skill level was below that of other Katsura chefs.
- Mr Suzuki stole from the hotel.
- Mr Suzuki should be fired.

I am satisfied on the evidence that Hotel management took the letters and the allegations seriously. I find that every Katsura chef was interviewed by the Executive Chef Mr Haberkorn with a view to clarifying and confirming the allegations made. No Katsura chef took ownership of the allegations made. This being the case a meeting was called with all Katsura chefs. An interpreter was engaged to assist hotel management who went through all of the following with the Katsura chefs:

- The Carlton's internal processes for raising and resolving grievances.
- The measures taken to resolve the specific issues raised including speaking to the chefs and Mr Suzuki.
- The parcel pass required for goods going in and out of the Carlton. (Mr Suzuki's explanation that he bought personal food at the same time as he bought food for the Restaurant was accepted by the Hotel and he had been reminded of the need to utilise a parcel pass when removing goods from the Hotel).
- The process for the renewal of work permits and in particular that it was the responsibility of HR to provide supporting documentation and that neither Mr Suzuki nor any other manager has influence over the provision of such documentation.
- Where to obtain/find the Collective Agreement.
- Issues relating to breaks and rosters.

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<sup>1</sup> It is not possible to be more specific as to the date of the letters because they were lost following mediation. However, the fact the letters were received and their content is not disputed.

It was the evidence of the respondent's witnesses that they had done all they could on the basis of the anonymous allegations raised. I accept that evidence.

I find that on the balance of probabilities that Mr Nagai was indeed present at this meeting and that the above information was explained with the assistance of an interpreter.

A few weeks later three Katsura chefs went to see Ms Barlow of HR. I accept her evidence that Mr Nagai and Mr Igami were among the chefs that visited Ms Barlow. They raised the matter of the letters sent to HR and asked why Mr Suzuki had not been fired. Ms Barlow explained that the Hotel was required to follow a fair procedure where allegations are made against an employee. They were told it was difficult to take the allegations raised in these letters further without more specific detail and that non-specific allegations raised in anonymous letters do not automatically provide justification for dismissal. When the three chefs heard that Mr Suzuki was not going to be fired they left, very disappointed.

#### Rostered Hours, Posting of Rosters and Payment for Overtime Worked

Mr Nagai submitted that Mr Suzuki took his copy of the Collective Agreement after he returned from his orientation programme, thereby leaving him in a position where he was ignorant of his rights. I accept the evidence of Mr Suzuki that he did no such thing. Further, there was absolutely nothing for Mr Suzuki to gain from such an action as the Collective Agreement is readily available to any employee who asks for one and it is posted in the employee's canteen and available in the office of the Executive Chef, Lothar Haberkorn.

I am satisfied that rostered hours were allocated to meet the requirement to cover restaurant opening hours and client bookings. Around that staff preferences with regard to rostering were considered if possible. It was as Mr Suzuki said a "*juggling act*"

Mr Nagai submitted some time sheets attached to his statement of problem which showed he worked on occasion more than the 40 ordinary hours described in his collective agreement. This issue is the same one raised by him with the hotel following his resignation. It was immediately resolved by the Hotel and appropriate payment made to Mr Nagai for working on the sixth day of his rostered week. If Mr Nagai's problem was that he worked more than the 40 ordinary hours described in the Collective Agreement then I note that Agreement specifically provides that employees may be required to work a reasonable amount of overtime. There was nothing unreasonable about these hours worked.

Mr Nagai complained that he had been rostered to work 14 days in a row between 2-15 July 2001. Relying on rosters submitted to me in evidence I cannot find that Mr Nagai was in fact rostered to work for 14 days in a row from 2-15 July 2001 in contravention of the CEA provisions relating to days off. Further in respect of Mr Nagai's other complaint i.e. that his days off were not rostered consecutively I note that the CEA provides only that days off will be rostered consecutively "where practicable". Business levels are cited as the factor which determines "practicability".

Mr Nagai claimed that Mr Suzuki changed the roster haphazardly. He produced no evidence to support this claim.

However, the evidence does disclose there had been a problem with the posting of rosters in respect of the Katsura Restaurant. This was one issue raised in the anonymous letters of complaints about Mr Suzuki's management of the Katsura Restaurant received by HR staff in September/October 2001. The CEA requires rosters to be posted at least one week in advance of them coming into effect. Mr Suzuki's practice had been to hold off finalising rosters and posting them to enable him

to fine tune them in accordance with restaurant bookings. I find that when this issue was raised it was addressed by management with Mr Suzuki and thereafter the rosters were posted in accordance with the provisions of the CEA. This problem was, I find, addressed by the Hotel when it was raised by Katsura staff. The breach of the CEA was corrected.

Mr Nagai did not treat this matter as a serious breach of his contract such as to entitle him leave at the time and succeed in a personal grievance claim and the Hotel's action in remedying when it was brought to their attention is evidence of the Hotel's commitment to meeting its obligations to its employees.

Threats by Mr Suzuki to withhold approval for the extension of Mr Nagai's work permit.

Mr Nagai's evidence on this matter lacked credibility.

Mr Nagai submitted that Mr Suzuki made this threat in front of other Katsura chefs. He produced no evidence to corroborate this very serious allegation despite admitting the chefs in question no longer worked for the Carlton and therefore had no reason to fear for their positions if they gave evidence on this point.

I also note it is not disputed that Mr Nagai made no approaches whatsoever to the Carlton to have his work permit extended. It expired according to its tenor and he and his family returned to Japan.

On this issue I find that the Carlton's practice regarding work permits is divorced from the influence of any manager and from any performance related issues that arise. If overseas national needs documentation from the Carlton to support an application for a work permit the policy to obtain that documentation is clear. Staff are to obtain the necessary documentation from immigration and fill it out themselves. They must approach HR for the necessary supporting documentation i.e. a job offer and job description, a letter supporting the application for a work permit which explains why New Zealand is unable to produce a worker with the required skills and evidence of advertising for a local worker. I accept Mr Suzuki's evidence that he did not involve himself in this process and that he did not threaten Mr Nagai. I also accept the evidence of Hotel management witnesses that no manager is permitted to influence the decision regarding the provision of this documentation and that any worker who approaches HR for the necessary supporting documentation is provided that documentation within 48 business hours regardless of subjective influences, including whether the worker is liked or disliked.

I also find that performance management issues are the subject of a separate and unrelated procedure and that one procedure is not impacted by the other.

Lastly on this issue I find that on the balance of probabilities Mr Nagai underwent the normal orientation procedure at the commencement of his employment and that the procedure to obtain work permits was explained to him at that time. I also find he utilised that procedure when he obtained his 2001/2002 work permit. I have also found on the balance of probabilities that Mr Nagai was at the meeting which was held with all Katsura staff in September/October 2001 following the investigation of the anonymous letters. The procedure to be followed in obtaining work permits was clearly spelt out once more at that meeting.

I find the only reason that Mr Nagai did not obtain the necessary documentation to support an extension of his work permit in January 2002 was that he did not ask for it.

### Allegations of bullying, harassment and humiliation by Mr Suzuki.

The allegations under this head related to incidents where Mr Nagai said he was singled out for criticism by Mr Suzuki in front of other staff or that he was blamed for deficiencies that were not his responsibility. He also submitted that Mr Suzuki yelled at him.

In support of these allegations Mr Nagai cited one or two exchanges between himself and Mr Suzuki which were in the nature of directions/exchanges of an operational nature. Mr Suzuki too recalled one or two exchanges between himself and Mr Nagai.

The evidence of Mr Haberkorn, Executive Chef, of the Carlton was that Mr Suzuki runs a strict kitchen. He may speak harshly on occasions but this is necessary sometimes as reputations are at stake if substandard food is served.

Having heard the evidence of Mr Nagai, Mr Suzuki and Mr Haberkorn on this matter I find the complaints made by Mr Nagai about Mr Suzuki amount to nothing more than firm directions or rebukes by Mr Suzuki in respect of minor misdemeanours on Mr Nagai's part. The exchanges complained of came well within the scope of expected and acceptable conduct between a supervising chef and an employee in a busy kitchen. That some of these exchanges (including directions) were a cause of unhappiness for Mr Nagai is clear but there is nothing in the evidence that shows that Mr Suzuki's conduct crossed the boundary between conduct which caused unhappiness and resentment and that type of behaviour which is oppressive or repudiatory in nature.

### Conclusion

Mr Nagai has used the statutory provisions relating to the settlement of an alleged grievance as a forum to test the allegations brought by him and two other chefs against Mr Suzuki. He has taken the opportunity the law allows to have grievances aired. The burden was on him to substantiate the allegations to a level that would satisfy me that the respondent either followed a course of conduct with dominant purpose of forcing him to resign or breached its duty towards him in a way that is sufficiently serious to warrant Mr Nagai leaving at once or shortly after the breach occurred. This Mr Nagai has not done. The allegations made by him are either not proven to the standard required to support a finding he was constructively dismissed or were breaches of duty which the employer rectified immediately they were brought to its notice or were examples of exchanges which go on in busy kitchens all over the world where professionals are expected to turn out a quality product under pressure.

I note too that Mr Nagai decided in November 2001 to leave the Carlton. He did not resign until 28 December when he gave and worked out the two weeks notice he was required to give. Even allowing for cultural differences relating to taking leave from ones colleagues the time frame adopted by Mr Nagai in relation to his departure does not support a finding that the employer breached its duty to him in such a way that he was forced to leave or leave shortly thereafter. This supports my determination that Mr Nagai was not constructively dismissed.

### **Determination**

Mr Nagai was not constructively dismissed from his employment. He is not, therefore, entitled to the remedies he seeks.

**Costs**

Costs are reserved. The parties are directed to attempt to resolve the question of costs between them. If they cannot do so they are to file and serve submissions on the subject within one calendar month of the date of this determination.

Janet Scott  
Member of Employment Relations Authority