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Rew v Fare Café Limited [2011] NZERA 17; [2011] NZERA Auckland 15 (13 January 2011)

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Rew v Fare Caf❖ Limited [2011] NZERA 17 (13 January 2011); [2011] NZERA Auckland 15

Last Updated: 4 February 2011

IN THE EMPLOYMENT RELATIONS AUTHORITY AUCKLAND

[2011] NZERA Auckland 15 5163767

BETWEEN AND

MARIA REW

FARE CAFE LIMITED

Member of Authority: Yvonne Oldfield

Representatives: David Flaws for applicant Bill Guest for respondent

Investigation Meeting: 9 July 2010

Submissions received: 22 July 2010 from Applicant

25 July 2010 from Respondent

Determination: 13 January 2011

DETERMINATION OF THE AUTHORITY Employment Relationship Problem

[1] This matter concerns allegations of workplace bullying allegedly giving rise to a disadvantage grievance. When the matter was first lodged it was also claimed that the alleged conduct had caused a resignation that amounted to a constructive dismissal. At the investigation meeting Mr Flaws advised that the latter claim was withdrawn, primarily because it had been established that minimal wages were lost as a result of the termination and therefore the only claim (either way) was for compensation for hurt and humiliation.

[2] Ms Rew worked at the respondent's Dargaville cafe from the end of January 2009. She worked with and reported to husband and wife proprietors John Tan and Lina Long. The month of February (during which she was washing dishes) passed without problems. After that cooking was included in her duties. She says that from March onwards Mr Tan and Ms Long subjected her to unjustified criticisms of her work, directing sharp words, abuse, shouting and blame at her.

[3] Following an incident at the end of May 2009 Ms Rew went on sick leave. She remained on leave until 6 July when she resigned. She now says that this resignation amounted to a constructive dismissal.

[4] Both proprietors deny bullying Ms Rew or doing anything to give rise to a personal grievance. Mr Tan says that he had a number of problems with the standard of Ms Rew's work. He said these needed to be addressed. He says that Ms Rew was moody and difficult to deal with and used bad language. He said that her behaviour caused him and his wife a great deal of stress.

Issues

[5] The issue for determination in this case is one of fact: whether Mr Tan or Ms Long subjected Ms Rew to behaviour of a nature that gave rise to a grievance of unjustified disadvantage.

[6] Each of the parties provided statements from past and present employees of the respondent attesting to how the proprietors conducted themselves towards staff. Four (for the respondent) found them to be good employers while two (for the applicant) did not. One person from each group worked in the cafe at the same time as Ms Rew. Because only these two individuals were in a position to give evidence of the way in which Ms Rew, Mr Tan and Ms Long behaved to each other I required only those two individuals to attend the investigation meeting to give evidence.

The allegations

[7] Ms Rew gave the following examples of the bullying and harassment she says she was subjected to during March:

- i. she was blamed for turning off the oven timer (leading to food spoiling) when she had not done so;
- ii. Ms Long took offence because Ms Rew frequently had to ask her to repeat herself (English not being her first language and Ms Rew finding her difficult to understand);
- iii. Mr Tan would sometimes push or elbow Ms Rew out of his way when working in the kitchen;
- iv. there was a day when Mr Tan and Ms Long did not speak to her at all, and
- v. when the cafe received a poor report following a visit from a health inspector Ms Rew was blamed for this.

[8] The staff member who gave evidence in support of Ms Rew was Caitlyn Bennett, the girlfriend of Ms Rew's son. She worked for Mr Tan and Ms Long from May 2008 until approximately the end of March 2009 and was responsible for introducing Ms Rew to Mr Tan and Ms Long. Ms Bennett said that although she herself had never had any serious problems at the cafe, she did find her employers (particularly Mr Tan) rude and discourteous. She also felt Mr Tan and Ms Long unfairly singled out Ms Rew for criticism.

[9] Ms Rew did not give evidence of any specific incidents of concern during the month of April although she said she experienced some confusion about whether she was expected to be cooking or cleaning and blames Mr Tan for this.

[10] There is no dispute that by May the parties' working relationship was seriously deteriorating. On one occasion Ms Rew put on a large pot of cheese sauce and left the cafe for an hour and a half, asking the kitchen hand (who was washing dishes) to watch it. When it spoilt, Mr Tan held Ms Rew responsible, unfairly in her view. On another occasion a customer complained about a bagel that Ms Rew had prepared. Again, when Ms Long spoke to Ms Rew about this Ms Rew felt the criticism was unreasonable and excessive.

[11] Things came to a head on 27 May over the preparation of some potatoes for baking. Ms Long told Ms Rew that she had not properly washed the potatoes. Ms

Rew heatedly disagreed and left the premises to go home early. The next day she presented a doctor's certificate and as we have seen, after five weeks on sick leave, Ms Rew resigned.

[12] Early in May 2009 a new kitchen hand, Frankie Mrkusich, had started work. She left the respondent's employ some time before the Authority investigation meeting (for personal reasons of her own) but attended to give evidence at the request of the proprietors.

[13] Ms Mrkusich told the Authority that as a co-worker she found Ms Rew to be very rude, abusive and intimidating. She said she never heard the proprietors use bad language to anyone but Ms Rew "*had a foul mouth.*" She also said she had heard Ms Rew describe Ms Long as a "*short skinny Asian who didn't know how to speak English*" Ms Mrkusich told me she felt it was clear that Ms Rew did not like Ms Long and Mr Tan and did not like taking instructions from them: "*it was either her way or no way.*"

[14] It was Ms Mrkusich who had been washing dishes when the cheese sauce spoiled. She agreed that Ms Rew told her to watch the sauce before she left but she said that she was busy washing dishes and forgot to check it. She was also present when the exchange over the baked potatoes took place. Ms Mrkusich's evidence was that the potatoes were not clean, and that Ms Rew started "*yelling and swearing*" in earshot of customers, before walking out, leaving Ms Long in tears.

Determination

[15] I am not satisfied that the conduct complained of during March amounted to bullying and harassment. It was not unreasonable for the proprietors to speak with staff, including Ms Rew, about the poor hygiene report, nor was it unreasonable for them to raise the issue of the oven timer with Ms Rew. It is not in dispute that at the time it was turned off, she was alone in the kitchen, with Ms Bennett on her break and the proprietors serving in the shop.

[16] I also consider that Ms Rew must share responsibility for the breakdown in her relationship with the proprietors. It was over-sensitive to object to being bumped into in a cramped and busy kitchen (the Authority was shown pictures of the workspace, which was very small.) It was also discourteous to pass remarks about Ms Long's English (when giving evidence Ms Long's English was not perfect, but readily comprehensible.)

[17] With regard to the events of May, Ms Mrkusich's evidence is accepted. She was an entirely disinterested witness (unlike Ms Bennett) and in my view, a very credible one. Her description of the behaviour she encountered in the cafe in the final weeks that Ms Rew worked there was not consistent with Ms Rew's allegations of bullying and harassment.

[18] On balance, the evidence does not support a finding that Ms Long and Mr Tan conducted themselves in a way that amounted to an unjustified action. Ms Rew has failed to make out her personal grievance claim.

Costs

[19] In closing submissions the respondent included an application for costs. At this stage the issue of costs is reserved. The applicant has a period of 28 days to respond to the respondent's costs application. Thereafter the application for costs will be determined.

Yvonne Oldfield

Member of the Employment Relations Authority

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