

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2014] NZERA Auckland 408
5443540

BETWEEN ANDRE LUIZ ROCHA
Applicant

A N D WYNYARD SEAFOOD
MARKET LIMITED
Respondent

Member of Authority: James Crichton

Representatives: Keshila Fayen, Advocate for the Applicant
Dean Organ, Advocate for the Respondent

Investigation Meeting: 25 September 2014 at Auckland

Date of Determination: 7 October 2014

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant (Mr Rocha) alleges that he was unjustifiably constructively dismissed from his employment by the respondent (Wynyard Seafood Market). That claim is resisted by Wynyard Seafood Market.

[2] Mr Rocha was, at the time of the termination of the employment a retail manager with Wynyard Seafood Market. Although he had only worked for Wynyard Seafood Market for a short period, he had worked in the predecessor business for a number of years. Mr Rocha says that when ownership of the business changed in April 2013, he was one of the continuing staff members.

[3] Mr Mohammed Kahn became a director of the company and subsequently (in August 2013) Chief Executive Officer. Mr Rocha says that his relationship with Mr Kahn was troubled. He refers to a number of instances where he says there were

exchanges between himself and Mr Kahn which left him with uncertainty about his position. In particular, he alleges that there were differences between himself and Mr Kahn about the direction of the business and that he thought Mr Kahn's style was *autocratic*.

[4] Mr Kahn denied his style was autocratic, but did confirm that the new owners of the business were greatly troubled by the financial direction of the business and were determined to address its shortcomings.

[5] Mr Rocha referred to an incident which he says happened on 21 July 2013 when he claims Mr Kahn shouted at him on the shop floor and that he (Mr Rocha) felt intimidated. Mr Kahn does not remember the incident and in any event denies shouting at Mr Rocha or anybody else. He pointed out in his evidence to the Authority that on the date in question he was only a director of the company and had not taken over the role of chief executive officer until the following month.

[6] Matters came to a head at a management meeting on 17 September 2013. Mr Rocha presents this meeting as being, in effect, a disciplinary meeting which he was summoned to attend on his first day back from annual leave, but I prefer the evidence of Wynyard Seafood Market to the effect that it was a normal management meeting to address the various business failings and try to arrest the financial decline of the business.

[7] I am satisfied that this characterisation of the meeting is the correct one (rather than Mr Rocha's characterisation of it) because Mr Kahn presented evidence of the agenda of the meeting which included his intention to give Mr Rocha responsibility for another business unit. That seems absolutely inconsistent with Mr Rocha's description of the purpose of the meeting.

[8] It is common ground that during the course of this meeting, Mr Rocha became angry and swore. Again, it is common cause that there were women staff present at the meeting and Mr Kahn remonstrated with Mr Rocha for swearing and asked him to desist.

[9] Mr Rocha says that Mr Kahn physically threatened him and amongst other things *pointed the finger to my nose* to the extent that Mr Rocha was fearful that ... *he would punch me*.

[10] Mr Rocha says that he was *so scared* that he stopped engaging in the meeting process and verbally resigned.

[11] Later the same day, Mr Rocha completed a voluntary resignation form and gave it to Mr Kahn. Mr Rocha was at pains to tell me that he had prepared the form himself as part of his management role in the company.

[12] The voluntary resignation form entitles the person completing the form to attach *any other communication* and gives a range of reasons for the resignation whereby the person completing the form can tick a box indicating their reasons.

[13] Amongst other things, the boxes that can be ticked include *not satisfied with the following (please check all which apply):* and then lists the following matters: *pay, type of work, hours/shifts, too few hours, unrealistic expectations, other.* None of those options are ticked by Mr Rocha.

[14] The box which is ticked by Mr Rocha is next and it is the box for *other reasons.* There is then a space left blank for the employee to *comment briefly on the reasons you checked above* and Mr Rocha has simply crossed that blank space out with three diagonal lines.

[15] Mr Rocha says that in handing this completed document to Mr Kahn after the management meeting on 17 September 2013, he explained verbally to Mr Kahn why he was resigning.

[16] Mr Kahn's evidence on the whole process of resignation is quite different. First, while he acknowledges that Mr Rocha verbally resigned his position during the management meeting, he maintains that he twice sought to have Mr Rocha reconsider his resignation during the management meeting. That evidence is supported by the evidence of Mr Teariki who attended the management meeting then gave evidence to the Authority.

[17] Moreover, Mr Kahn's evidence is that when Mr Rocha handed him the resignation form duly completed, he offered no comment at all about the reasons for it and that in the subsequent two week period while Mr Rocha worked out his notice period, there were no issues raised by him at any time. Mr Kahn expressed himself as much surprised by the receipt of the personal grievance claim after the employment ended.

Issues

[18] It will be convenient if I address the following questions:

- (a) What happened before the management meeting on 17 September 2013?
- (b) What happened at the management meeting of 17 September 2013?

What happened before the management meeting on 17 September 2013?

[19] Mr Rocha's evidence before the Authority is that there were a number of incidents which preceded the management meeting of 17 September 2013 which are relevant to his personal grievance. The difficulty for him is that the only evidence that exists of these matters is his bare testimony. There is no evidence that he ever raised any issue with the employer about the way that he was allegedly treated, no evidence that he ever complained of being under stress as a consequence of the way he was allegedly treated, and there is no consistency in the claims made by Mr Rocha across time.

[20] In the statement of problem filed in the Authority on 10 December 2013, the only documentary evidence of the nature and extent of the grievance is a supporting letter from Mr Rocha's advocate dated 17 October 2013 which refers to an unhappy relationship between Mr Rocha and Mr Kahn, *flippant* comments made by Mr Kahn about Mr Rocha being dismissed and finally the suggestion that Mr Kahn became *enraged* at the management meeting on 17 September 2013 and *began to point his finger at Mr Rocha's nose* which resulted in Mr Rocha's resignation.

[21] Then, in the brief of evidence filed by Mr Rocha for my investigation meeting, which is dated 2 September 2014, Mr Rocha makes a number of other allegations about Mr Kahn all broadly consistent with the theme of a relationship difficulty but adding further particulars to the claim.

[22] The additional material falls into two separate categories. The first is a collection of unspecific allegations of relationship difficulty referring not to particular incidents but simply talking more broadly about difficulties in communication and using pejorative terms for Mr Kahn in the process.

[23] The only support for this material is the evidence of Ms Marina Baranova, a former colleague of Mr Rocha at Wynyard Seafood Market who, like Mr Rocha, has now left the employment. Her evidence contains claims of a difficult relationship between Mr Kahn and Mr Rocha, allegations that she heard Mr Kahn criticising Mr Rocha and suggesting publicly that Mr Rocha might be incompetent. She maintained that she left the employment because of Mr Kahn's *autocratic and intimidating style*.

[24] Like Mr Rocha's evidence, this material in Ms Baranova's evidence does not refer to the dates and times of particular incidents. Moreover, Mr Kahn denies the behaviour referred to. He does agree that when his group took over the ownership of Wynyard Seafood Market, the business was failing and that he and his colleagues had to take urgent steps in order to ensure that that decline was arrested. He concedes that that made him unpopular with some of the staff (including Mr Rocha) who he saw as *resistant to change*.

[25] But Mr Kahn vehemently denied making comments about Mr Rocha's competence when Mr Rocha was not present, and denied the broad allegation that he was difficult. Mr Kahn pointed out that most of the people who worked for him in the business had remained in the business after the change of ownership and that in relation to Mr Rocha particularly, he sought to give him increased responsibility at the fateful meeting on 17 September 2013 which as he pointed out, was absolutely inconsistent with Mr Rocha's claim that Mr Kahn thought poorly of him.

[26] For the avoidance of doubt, I prefer the evidence of Mr Kahn to the evidence offered by Mr Rocha. I accept there may have been tensions between the two men but Mr Kahn was the owner's representative throughout Mr Rocha's employment and in the end, was entitled to make decisions about the future direction of the business. Those decisions may not always have been popular with either Mr Rocha or indeed with other staff but they were Mr Kahn's to make and a personal grievance for unjustified constructive dismissal must be based on something more concrete than simply the failure of an employer to win a popularity contest with staff. There is no requirement in law that an employer be nice; the requirement is that the employer behaves in accordance with the legal requirements of honest and fair dealing with staff.

[27] I also note at this point that none of this material complaining about the relationship between Mr Rocha and Mr Kahn was included in the original personal grievance letter and indeed the first occasion that Mr Kahn had to confront it was in the investigation meeting before the Authority.

[28] The second group of claims contained in Mr Rocha's brief of evidence, again for the first time, was material relating to events in July and August 2013 which Mr Rocha says *contributed to the stress I was feeling*. Before dealing individually with these events, I mention again that there is no evidence before the Authority that Mr Rocha ever complained of stress, no evidence that he ever took leave because of stress, despite his claim that the annual leave that he took immediately prior to the management meeting on 17 September 2013 was because of stress. If it was because of stress, he certainly did not tell Wynyard Seafood Market that; they thought he was simply having a holiday from work. Not only is there no evidence at Wynyard Seafood Market that Mr Rocha was stressed; there is also no other evidence before the Authority independent of Mr Rocha which suggests that he told a third party that he was stressed or under pressure.

[29] The first of these events that Mr Rocha relies upon happened on 21 July 2013 when it is his evidence that Mr Kahn shouted at him on the shop floor and that as a consequence he *felt intimidated*. The context in which this event allegedly happened was advocacy by Mr Rocha of a particular range of products, a range which Mr Kahn told the Authority was simply unprofitable and which he sought to discontinue.

[30] Mr Kahn remembers various discussions about this particular range and Mr Rocha's advocacy of it and Mr Kahn's repeatedly advanced view that the product line simply was not profitable. But Mr Kahn does not remember the particular event that Mr Rocha refers to, denies shouting at him then or at any other time and in any event points out that at the date Mr Rocha says this discussion took place, it was unlikely that he would have been intimately involved in the day to day affairs of the business because he was not yet chief executive officer, that role not coming to him until the following month.

[31] Next, Mr Rocha complains about the deletion of his password for the firm's accounting system which he says happened in late July 2013. Mr Kahn remembers this event but certainly does not remember it as particularised to Mr Rocha. He says

the firm simply made a decision that all floor staff (including Mr Rocha) would cease to have access to the accounting software from the floor for reasons of security.

[32] Next there is reference to a meeting held on 6 August 2013 to discuss a new company logo. Mr Rocha complains that he was shut down in his advocacy of a different point of view from that advanced by Mr Kahn who was explaining to managers the new company logo. Mr Kahn's evidence is that what Mr Rocha states is substantially true; the company had decided at board level on the new logo, he was outlining the new logo to management staff and Mr Rocha took a negative view on it and sought to occupy the time of the meeting by going through what was wrong with the new logo. Mr Kahn did shut down Mr Rocha's negative comments about the new logo but Mr Kahn's evidence is that this was done professionally and politely.

[33] A further dispute relates to a meeting of heads of department held on 26 August 2013 when Mr Rocha says that he found out for the first time that he was in charge of the café. Mr Kahn denies that that was the first occasion Mr Rocha was told of that increase in his responsibilities.

[34] I conclude from an assessment of this material that there is a sense in which the material has been added to Mr Rocha's claim to bolster his case; none of this material was referred to the employer before the investigation meeting and so that was the first occasion on which Wynyard Seafood Market could confront it.

[35] Moreover, all of the material is, in my judgment, satisfactorily answered by Wynyard Seafood Market. This was a business undergoing significant change as a consequence of continued unprofitability. New owners were endeavouring to inject some life into the enterprise and the evidence for Wynyard Seafood Market is that they were encountering some push-back from Mr Rocha, who, as I indicated earlier, seemed resistant to change.

[36] In those circumstances it is inevitable that there will be some inter-personal difficulty. But even if all of the matters relied upon by Mr Rocha were decided in his favour (and that is certainly not my judgment at all, indeed quite the reverse is the case) there is still insufficient evidence to ground a constructive dismissal on the basis of a breach of duty by the employer.

[37] What the employer was doing was running its business and trying to do that to ensure that the business survived rather than failed. To do that, the employer had to

confront impediments to the changes that it needed to make and while I am satisfied that Wynyard Seafood Market thought well enough of Mr Rocha to seek to promote him within the organisation by giving him additional duties, they were also having to confront his resistance to changing things within the business which simply were not working. I am satisfied that that was the basis of any inter-personal difficulties between Mr Kahn and Mr Rocha and that none of that goes so far as to constitute evidence of a breach of duty by Wynyard Seafood Market.

What happened at the management meeting on 17 September 2013?

[38] I am satisfied on the evidence before me that Mr Rocha resigned his employment in a heated exchange with Mr Kahn at a management meeting on 17 September 2013, that the reason the exchange was heated was because Mr Rocha continued to swear when Mr Kahn remonstrated with him and asked him to desist, that when Mr Rocha tendered his verbal resignation in the midst of the meeting Mr Kahn asked him twice to reconsider and that when Mr Rocha subsequently completed the voluntary resignation form (a form which he himself had designed) he failed to include either on the form or in any contemporaneous or subsequent verbal exchange with Mr Kahn, the fact that the resignation was activated by the behaviour of the employer or was in any other way anything beyond a simple voluntary termination of the employment at the behest of the employee.

[39] Mr Rocha says that the reason that he felt constrained to resign was because Mr Kahn got angrier and angrier, allegedly made negative comments about the matters that Mr Rocha was raising and ultimately that Mr Kahn got so cross that Mr Rocha thought Mr Kahn was going to punch him.

[40] None of that is consistent either with Mr Kahn's evidence or with Mr Teariki's evidence. Both Mr Kahn and Mr Teariki were present at the management meeting and neither of them remembers the exchange in the way that Mr Rocha describes it.

[41] Mr Teariki for example gave evidence to me that he was present at the meeting, he remembered Mr Rocha becoming angry with Mr Kahn, raising his voice, and swearing at Mr Kahn several times. Mr Kahn told Mr Rocha to stop swearing and in response Mr Rocha verbally resigned. Mr Teariki says that Mr Kahn tried to *talk him out of it* (the resignation).

[42] Mr Teariki also told me that he had spoken to Mr Rocha the day after that meeting and told him to take his resignation back.

[43] Mr Kahn's evidence is similar. He says that Mr Rocha raised his voice and swore at him, was cautioned by Mr Kahn about swearing and *because I believe he did not get his way, he up and left and said he would resign. I asked him twice if he wanted to ... but he refused to withdraw his resignation.*

[44] The reference to Mr Rocha not getting his own way rings true; Mr Teariki told me in his evidence:

I recall (Mr Rocha) not liking the changes being made by Mohammed (Mr Kahn) this is why he became angry on 17 September.

[45] I am satisfied on the evidence I heard that there is nothing in the behaviour of Mr Kahn which would constitute a breach of duty of the sort necessary to ground a constructive dismissal allegation. The Authority's task is to assess the relevant conduct of the parties leading up to the termination of the employment, focusing on the employee's motive for the ending of the employment: *Commissioner of Police v Hawkins* [2009] NZCA 209.

[46] On the evidence of both the principal protagonists, the discussion began to get heated when Mr Rocha advanced his arguments about a particular area of the business and according to him, Mr Kahn raised his voice to criticise Mr Rocha's views. Mr Rocha says that the discussion degenerated from there and he admitted that as he got more heated he began to swear.

[47] On the swearing, there is common ground because both parties agree that Mr Rocha swore.

[48] Mr Kahn's evidence (which I accept) was that he objected to swearing in the presence of women, that there were always women present at the management meetings, and that he had raised the issue of swearing time and again.

[49] In that context, I think it more likely than not that Mr Kahn's recollection is to be preferred and that he asked Mr Rocha to stop swearing at him (twice) which ultimately precipitated Mr Rocha's resignation.

[50] It is difficult to see why Mr Rocha would have resigned if all he was resigning for was an inability to stop swearing when he was cross. The suggestion that both Mr Kahn and Mr Teariki make that Mr Rocha was in fact resigning because he had failed to get his own way, has the ring of truth about it.

[51] Of course, Mr Rocha says that Mr Kahn appeared to be about to hit him and that that was the precipitating event for the resignation, but Mr Kahn vehemently denies that and I believe him. Nothing Mr Teariki said in evidence supported Mr Rocha's claim that he was about to be assaulted. Without a finding supportive of Mr Rocha on this point, it is difficult to see what Mr Rocha has to complain about, except not getting his own way. Clearly there was a lively discussion. Mr Rocha was swearing. Mr Kahn had made clear on previous occasions that he objected to swearing and, if his recollection is correct that Mr Rocha was swearing at him then he has an even greater reason to object to the behaviour.

[52] Having rejected the key suggestion that Mr Kahn was offering Mr Rocha violence, even on Mr Rocha's evidence there is nothing in it which would justify a finding that the employer had breached its duty to Mr Rocha. The employer is entitled to have a different view from one of its senior managers and to express that view forcibly and in the end to make a decision consistent with the needs of the business, looked at in the round.

[53] Although not pleaded clearly, this is a constructive dismissal claim based, as I have already noted, on breach of duty by the employer. In that class of case, the three questions that the Authority must answer are, first whether there has been a breach of duty, second whether the resignation was caused by the breach and third whether the resignation was reasonably foreseeable: *Auckland Electric Power Board v Auckland Provincial District Local Authorities Officers IUOW Inc.* 1 [1994] 169.

[54] Having found on the facts that there was no breach of duty by the employer, the other two questions do not fall for determination.

Determination

[55] I have not been persuaded that Mr Rocha has any personal grievance. I am satisfied that he resigned his employment in circumstances where the changes being made in the business by the employer for legitimate commercial reasons were not to Mr Rocha's liking.

[56] I accept that there may have been differences of opinion, perhaps even significant differences of opinion between Mr Kahn as the Chief Executive Officer of Wynyard Seafood Market and Mr Rocha as a senior manager but I do not accept that Wynyard Seafood Market committed any breach of duty that it owed to Mr Rocha and therefore that Mr Rocha was not been constructively dismissed from his employment.

[57] The behaviour which the evidence discloses by Wynyard Seafood Market and by Mr Kahn in particular is behaviour that is consistent with the necessary prosecution of a business enterprise undergoing rapid transformation from an unprofitable entity into a profitable one. Some of the changes Wynyard Seafood Market Limited were undergoing were not changes which Mr Rocha agreed with and I am satisfied that is the explanation for his resignation rather than any breach of the obligations of Wynyard Seafood Market to be a good and fair employer.

Costs

[58] Costs are reserved but the parties are urged to try to resolve matters between them. If that should prove unsuccessful, the Authority will fix costs on the application of the successful party. The unsuccessful party has 14 days from the date the successful party's submission on costs is filed and served and the Authority will then determine the matter on the papers.

James Crichton
Member of the Employment Relations Authority