

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2014] NZERA Auckland 307
5444582

BETWEEN

IRENE SHULRUF
Applicant

AND

YOGHURT SENSATIONS
LIMITED
Respondent

Member of Authority: Robin Arthur

Representatives: Greg Bennett, Advocate for the Applicant
Max Whitehead, Advocate for the Respondent

Investigation Meeting: 14 July 2014

Determination: 15 July 2014

DETERMINATION OF THE AUTHORITY

- A. Irene Shulruf's employment relationship with Yoghurt Sensations Limited (YSL) ended by constructive dismissal.**
- B. Within 28 days of the date of this determination YSL must settle Ms Shulruf's personal grievance by paying her:**
- (i) \$2472.52 in reimbursement of lost wages; and**
 - (ii) \$3000 as compensation for humiliation, loss of dignity and injury to feelings.**
- C. By consent YSL must also pay Ms Shulruf \$600 (net) in wage arrears.**
- D. Costs are reserved.**

Employment relationship problem

[1] Irene Shulruf worked part-time from 26 July until 24 November 2013 in a 'Yogorino' store operated by Yoghurt Sensations Limited (YSL) in Auckland's Queen Street. Over that 17 week period she worked each Friday, Saturday and Monday with only four additional shifts – one Thursday and three Sundays (including Sunday, 24 November).

[2] On 23 November 2013 a co-worker, Debbie du Preez, passed on a message to Ms Shulruf from YSL operations manager Hemant Malik. His message was that the store would be closed for three days so work could be done on an air-conditioning system. The three days were the coming Monday, Tuesday and Wednesday. This meant Ms Shulruf missed one of her usual days of work – a Monday.

[3] On Tuesday 26 November Ms Shulruf rang YSL owner Satish Shetty to check when the air-conditioning work would be finished and whether she was needed to work her usual Friday shift on 29 November.

[4] Ms Shulruf said Mr Shetty told her that the store was losing money due to the high rent paid for the downtown premises. She asked if he was thinking of closing the store and making the staff redundant but Mr Shetty said he had not decided what he was going to do and he would try and find her some hours in the Yogorino store at the Westfield St Lukes shopping centre. Mr Shetty also said he would let her know if she should come to work at the Queen Street store on Friday, 29 November.

[5] On Wednesday, 27 November Ms Shulruf went to the Queen Street store and saw its frozen yoghurt machines, other store equipment and stock had been removed. She decided to walk by the store after getting a message from Ms du Preez earlier that day (which said that a friend of Ms du Preez who worked in the downtown area said it looked as though the Yogorino store was closed). Ms du Preez also went to the store to meet up with Ms Shulruf and they took photos of what appeared to them to be an emptied and closed store.

[6] Ms Shulruf heard nothing more from either Mr Shetty or Mr Malik until 5 December. On that day Mr Malik left her a message on her phone asking her to return a store key. He apologised for not contacting her earlier and told her he had some hours that she could work at Yogorino's St Lukes store.

[7] Ms Shulruf did not accept those hours or start work at the St Lukes store. Instead she raised a personal grievance on two grounds. Firstly, she said she was unjustifiably disadvantaged by not being consulted about closure of the Queen Street store and not being given the two weeks' notice provided in her employment agreement. Secondly, Ms Shulruf said she was unjustifiably dismissed because she was not told of the store closure when she spoke to Mr Shetty on 26 November and, as a result of that and her discovery of the apparently closed Queen Street store on 27 November, she subsequently lacked sufficient trust in YSL to accept work offered from 5 December onwards at its St Lukes store.

[8] YSL denied it had misled Ms Shulruf about what was happening at its Queen Street store, said Mr Shetty had assured her on 26 November that she would remain employed and potentially could be relocated to St Lukes, and she had failed to respond to Mr Malik's request that she start work at the St Lukes store. It said she was not dismissed but rather failed to attend work as required and that the company was entitled to use a clause in her employment agreement whereby Ms Shulruf had agreed "*to work at any other locations as directed by [YSL]*".

Issues and investigation

[9] The issues for investigation and determination by the Authority were:

- (i) Whether arrangements made with Ms Shulruf in relation to the closure of the company's Queen Street store and an offer of work at its St Lukes store in December 2013 amounted to an unjustified disadvantage and/or a constructive dismissal of her?
- (ii) If the company were found to have acted unjustifiably towards Ms Shulruf, what remedies should be awarded, considering:
 - (a) lost wages; and
 - (b) compensation for hurt and humiliation; and

(c) whether, under s124 of the Employment Relations Act 2000 (the Act), any remedies awarded should be reduced due to any blameworthy conduct by Ms Shulruf?

(iii) Whether either party should contribute to the costs of representation of the other party?

[10] At the investigation meeting an outstanding wage arrears claim was resolved, by consent, on the basis that the Authority would order a payment of \$600 (net) by YSL to Ms Shulruf.

[11] For the purposes of the Authority investigation Ms Shulruf, Ms du Preez and Mr Malik had lodged written witness statements. Under oath or affirmation, they each confirmed their own statement and answered questions from me and the parties' representatives. The representatives also had the opportunity to provide closing submissions on the facts and legal issues.

[12] As permitted by s174 of the Act this determination has not recorded all the evidence and submissions received but findings of fact and law are stated and conclusions on the issues for determination are expressed.

Unjustified actions

[13] Mr Malik's evidence was that Ms Shulruf misunderstood what she saw in the store on 27 November. The machines for making frozen yoghurt were removed to enable contractors installing a new heat extraction system to have enough room to work. Other equipment and foodstuff was also removed as a matter of proper food safety. He said it was not until Thursday, 28 November or Friday, 29 November that Mr Shetty made a decision to close the Queen Street store permanently. Mr Shetty made that decision after being advised that the intended system could not be installed in the way planned because the store was in a heritage building where necessary removal of brickwork was not permitted. Faced with the costs of an expensive alternative and on-going high rents Mr Shetty then decided to close the store.

[14] I concluded Ms Shulruf's claims of unjustified disadvantage and constructive dismissal must succeed even if she was wrong about the store closure decision having

been made earlier than 27 November (when she saw the empty store) and if Mr Malik was entirely correct about the practical necessity of removing equipment and about Mr Shetty not having made the actual closure decision under later in that week.

[15] I reached that view because – even accepting YSL’s own evidence about what had happened and when – its treatment of Ms Shulruf breached its duties of fair treatment and good faith to her in the following ways:

- (i) She was stood down from a day’s rostered work on Monday, 25 November without pay and without adequate warning.
- (ii) Mr Shetty did not get back to her to answer her query on Tuesday, 26 November about whether she was needed for work on Friday, 29 November.
- (iii) Despite the fact that on her normal roster pattern – unchanged for 17 prior weeks – Ms Shulruf could have expected to work that weekend and Monday and the following Friday and Saturday, neither Mr Shetty nor Mr Malik contacted her when the original advice that the store would be closed for only three days (for air conditioning work) was superseded by other considerations and an actual decision was made on the Thursday or Friday to close the Queen Street store.
- (iv) When she contacted Mr Malik on 5 December (responding to a phone message to return a store key) the offer made of some hours’ work – of uncertain length on uncertain days – at the St Lukes store was, effectively, a take-it-or-leave-it change to her existing work arrangements rather than proper consultation with her.

[16] YSL was obliged to be active, constructive, responsive and communicative in maintaining a productive employment relationship.¹ The obligation included providing information and the opportunity to comment on proposed decisions likely to have an adverse effect on the continuation of her employment.² Both Mr Shetty and Mr Malik could easily have contacted Ms Shulruf to advise her that a business decision had required closure of the Queen Street store. They both had her mobile phone number.

¹ Section 4(1A)(b) of the Employment Relations Act 2000 (the Act).

² Section 4(1A)(c) of the Act.

[17] Instead Ms Shulruf was left in an uncertain state from 26 November until 5 December. Even if she had misunderstood what she saw in the apparently closed store on 27 November, Mr Shetty's failure to get back to her about working on 29 November could reasonably have been taken by her to mean YSL had dispensed with her services.

[18] It was not what a fair and reasonable employer could have done in the circumstances.³ Instead such an employer would have notified Ms Shulruf earlier about not being needed for work on 25 November (or paid her for it), have got back to her about whether she was needed on 29 November, and have contacted her before 5 December about its decision to close the Queen Street store. YSL's failure in those regards was to her disadvantage and was unjustified.

[19] In the circumstances of those breaches of fair treatment and good faith, Ms Shulruf could reasonably conclude that YSL did not intend to be bound by its duties to her as its employee and could not be relied on to fully or consistently do so in the future.⁴

[20] The simple agreement that she could work all her weekly rostered hours, or at least be paid for them if available to do so, had been broken over the period of two weekly rosters. A significant business decision affecting her livelihood was made without letting her know about it within a reasonable period. In that light, her decision not to accept or pursue uncertain hours at the St Lukes store was not a refusal to accept a direction to work at a different location but a resignation induced by her employer acting in a manner likely to destroy or seriously damage the relationship of trust and confidence – that was, at law, a constructive dismissal.⁵

[21] In reaching that conclusion I did not accept YSL's submission that Ms Shulruf learned on 1 December about the Queen Street store closure, not the later date of 5 December. It made that submission on the basis of a reference to the 1 December date in a personal grievance letter prepared by Ms Shulruf's previous representative and sent to the company on 9 December. I considered all the contextual evidence

³ Section 103A of the Act.

⁴ *NZ Woollen Workers IUOW v Distinctive Knitwear NZ Ltd* (1990) ERNZ Sel Cas 791 (LC) at 803.

⁵ *Auckland Electric Power Board v Auckland Provincial District Local Authorities IUOW* [1994] 1 ERNZ 168 (CA) at 172.

confirmed that the 1 December date was referred to in error in that letter and neither Mr Shetty nor Mr Malik had spoken with Ms Shulruf about the closure decision before 5 December.

Remedies

Lost wages

[22] In remedy of her personal grievance Ms Shulruf sought “*lost income*”. I took the relevant period for assessing lost wages as running from 25 November 2013 to the end of January 2014 – that is a maximum of ten weeks. From February 2014 Ms Shulruf was employed on a three-month fixed-term employment agreement paying around what she earned at YSL.

[23] Her evidence of her endeavours to mitigate her losses in that December-January period was sparse. She provided copies of applications for two jobs in late December and another in late January. She was not able to increase her income from other work she did as a licensed real estate salesperson from September onwards because the housing market was typically quiet in the summer holiday period.

[24] Another contingency to be factored into the assessment of her loss was that, properly handled, YSL could have consulted Ms Shulruf about redundancy as a result of closing the Queen Street store and, if a transfer to the St Lukes store on the same or reduced hours was not available or agreed, terminated her employment with two weeks’ notice as provided for in her employment agreement. Alternatively, she might also have been offered and agreed to work at St Lukes and continued to earn some or all of what she had previously earned at the Queen Street store.

[25] Ms Shulruf was entitled to two weeks’ notice at the end of her employment, which was not provided and not paid. I preferred her evidence that a supposed payment of 40 hours’ pay for that purpose was not made. Although YSL provided a pay slip suggesting such a payment was made in early January 2014, it was not substantiated by any evidence of an accompanying bank transaction and Ms Shulruf’s bank records did not show such a sum was received (unlike earlier payments from

YSL into the same account). Accordingly I have included the two weeks' notice as part of the award of lost wages.

[26] Balancing the factors and contingencies discussed I concluded six weeks' wages should be awarded under s123(1)(b) of the Act for a total amount of \$2472.52. Using a table of hours worked provided by Ms Shulruf, the calculation was based on a rounded-down average of 27 hours per week at the hourly rate of \$13.75 with eight per cent added to that gross amount for holiday pay (\$178.20) and three per cent for Kiwisaver contributions (\$66.82).

Compensation for hurt and humiliation

[27] Ms Shulruf was shocked by seeing what appeared to be an empty and closed store on 27 November. She must have known closing the store was a possibility as a result of her conversation with Mr Shetty on 26 November when he said that he had not yet decided what to do about the store. However YSL must still bear some responsibility for the effect on her of her impression that day and feelings over subsequent days. Even if she was mistaken to think on 27 November that the store had been closed, that belief occurred and continued because Mr Shetty did not get back to her about working on Friday, 29 November (when he could have corrected a mistaken impression) and then because he did not contact her about when – according to Mr Malik's evidence – the actual closure decision was made on 28 November or 29 November. If she had not been misled on 27 November, she was in the days of the following week, when she was told nothing of what had been decided until 5 December.

[28] Ms Shulruf felt tearful, humiliated and anxious through the following week about the loss of her regular income so near the holiday season. Although initially knocking her confidence to contact the company about what had happened and to seek other work and income, there was no evidence of any longer-term effect on her health or capability.

[29] Considering her particular circumstances and the general range of awards in similar cases, I concluded \$3000 was the appropriate level of compensation under s123(c)(i) of the Act.

Contribution

[30] No reduction of the remedies awarded was required under s124 of the Act. Ms Shulruf had not contributed to the situation giving rise to her grievance because she had sought information from Mr Shetty. It was him and Mr Malik, not her, who failed to provide the relevant, timely information that could otherwise have avoided her constructive dismissal and the preceding unjustified disadvantage.

[31] Ms Shulruf could have reduced her loss of earnings by taking up at least some hours at the St Lukes store but I have already balanced that factor in the award of lost wages and no further reduction, if it were appropriate, was required.

Costs

[32] Costs are reserved. The parties are encouraged to resolve costs themselves. If they are not able to do so and an Authority determination of costs is required, Ms Shulruf should lodge and serve a memorandum on costs no later than 28 days after the date of this determination. In that case YSL would then have 14 days to lodge a memorandum in reply. The representatives know costs in the Authority are usually set on the basis of a daily tariff of \$3500. In this case, it would apply proportionately to what I would treat as a half-day investigation meeting. Subject to what might be disclosed by the parties' memoranda, the tariff could be adjusted up or down if required by various factors in the particular case (under the principles set out in *PBO v Da Cruz*).⁶

Robin Arthur
Member of the Employment Relations Authority

⁶ [2005] 1 ERNZ 808.