IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON

WA 92/10
5274806

	BETWEEN	KYLIE ANNE WATERS Applicant
	AND	DARIUS LIMITED trading as THE COFFEE CLUB Respondent

Member of Authority:	P R Stapp
Representatives:	Ben Sheehan for the Applicant Manouchehr Kia and Lilith White for the Respondent
Investigation Meeting:	15 April 2010 at Wellington
Determination:	5 May 2010

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The employment relationship problem involves a change of ownership in a coffee house franchise business and allegations from Kylie Waters, the applicant, that she was bullied and verbally abused and when her roster was significantly changed she had no other option but to resign.

[2] The respondent, Darius Limited trading as the Coffee Club in Lower Hutt (Darius) claimed that it had to change the rosters because the business was in financial trouble and that the operation and cleanliness of the business had to be improved. Mr Manouchehr Kia, director, and Lilith White, Mr Kia's fiancée say that Ms Waters decided to resign instead of agreeing to attend a formal meeting to discuss options around her employment, and rosters and the possibility of her position being made redundant. Mr Kia and Ms White say that they could not force Ms Waters to attend the formal meeting to talk about options that they had requested. They all disagree over whether or not Ms Waters had the opportunity to get a support person to assist.

[3] A personal grievance was raised, but the respondent denied the claims. The parties attended mediation and now it falls on the Authority to make a determination.

The applicant's position

[4] Ms Waters claimed that she was not properly consulted and the respondent attempted to reduce her hours; she was put under stress and she had no alternative but to resign, and did so in writing, without being given any explanation of any complaint from the respondent.

[5] She further claimed that the respondent's action involved: bullying on 17 January 2009 and verbal abuse on 18 January 2009; being told of a significant change to her roster; being yelling at and intimidated at work by Mr Kia and Jamishid Borghash ("Jamie"), a manager. She says these were a course of conduct with the deliberate and dominant purpose of coercing her to resign. She claimed that she had been constructively dismissed, and any dismissal was not justified.

[6] She is seeking $5,198 for lost earnings, $10,000 compensation for humiliation, loss of dignity and injury to feelings, and a contribution to the legal costs in the sum of $4,300 plus GST.

The respondent's position

[7] The respondent's witnesses denied the claims and alleged that the applicant tendered her resignation of her own free will and there was no pressure put on her to resign. It was claimed that she agreed to 2 weeks pay in lieu of notice with a signed full and final settlement.

The issues

[8] The issues are:

(i) What were the terms of Ms Water's employment with Darius Limited?

(ii) Was the roster hours offered non negotiable?

(iii) Did Ms Waters leave voluntarily, resign, or was she dismissed?

(iv) If she resigned, what were the reasons for her resignation?

(v) Is there any evidence to support the claim that there was a course of conduct with the deliberate and dominant purpose of coercing Ms Waters to resign?

(vi) Did the parties enter into a mutually agreed settlement to end the employment?

The facts

[9] Ms Waters commenced work as a part time hourly worker on 8 April 2008 with Carson New Zealand Limited trading as The Coffee Club in Lower Hutt (Carsons). She was employed as a duty manager and performed various tasks and responsibilities that included: arranging staff recruitment and training, rostering, and other tasks as directed by Carsons, the former employer, from time to time. She worked between 41 to 46 hours per week and received $16 per hour gross during her employment with that employer under the terms of an employment agreement.

[10] On 17 January 2009 the business was sold to Darius Limited (Darius). Clause 16 (b) of the Agreement for Sale and Purchase of the business stated:

> *16.0 Employees …*
> *(b) All the staff at present employed by the vendor shall be offered employment by the purchaser on terms no less favourable than they currently enjoy.*

[11] Ms Waters' employment with Darius commenced from 17 January 2009. She was not provided with an employment agreement until after the employment had started. However, she did subsequently sign off an agreement document dated 27 February 2009, to work as a duty manager, get $16 per hour and where the same terms applied as those at Carsons.

[12] On 17 January 2009 Mr Borghash offered Ms Waters $13 per hour. Ms Waters says that she referred him to clause 16.0 (b) of the Sale and Purchase Agreement, which she had obtained from her previous employer, whereby she was entitled to employment on terms no less favourable than enjoyed prior to the transfer of the ownership of the business. She claimed that Ms Lorraine McGuinness a representative for the Coffee Club franchisor responded by informing her that Darius could do what it wanted. Ms McGuinness denied this, and denied that Mr Borghash bullied Ms Waters during the meeting.

[13] Ms Waters alleged that on 18 January 2009 Mr Borghash verbally abused her in front of Ms McGuinness. She claimed that he accused her of being "*pathetic*" and "*a weak person*". She claimed that he further advised her that Darius did not need "*somebody like that'*. There was no explanation about the context of that comment from Ms Waters. She claimed that Mr Borghash told her that she should be ashamed of her alleged actions that resulted in the business being unsuccessful. Ms McGuinness denied that Mr Borghash made such comments. But she did say Mr Borghash was very direct with Ms Waters about improvements that needed to be made and she had to intervene because the problems he was referring to were not Ms Waters' responsibility.

[14] Ms Waters claimed that she was not informed that she could have a support person present at a meeting held on 10 March 2009 where she was presented with a new roster with a maximum of 8 hours a week. She did not agree to this reduction and referred Mr Kia and Ms White to clause 16.0 (b) of the sale and purchase agreement, which she had obtained from the owner of Carsons. Mr Kia and Ms White obtained advice and decided to reinstate the hours because an opinion was needed on the application of the terms.

[15] On 12 March 2009 Waters was advised that she could have a maximum of 11 hours of work per week and that should one of the other employees cease their employment then she would receive up to a maximum of 21 hours per week. Mr Kia claimed the after revising his rosters he offered Ms Waters up to 26 hours. Ms Waters told me that she decided to resign, as had another employee, when these terms were put to her, and allegedly, that Mr Kia's response was that her hours were non negotiable. He denied saying that and relied upon his changed roster offers as proof that he was trying to make arrangements for her. Telephone calls were then made to Ms McGuinness. She responded by drafting what she thought the outcome had been.

[16] Later that same day Ms Waters was given a letter from Darius which included the following:

(i) That Ms Waters refused to meet with the respondent to discuss the possibility of her employment position with the respondent being made redundant.

(ii) Ms Waters had tendered her resignation.

(iii) The final day of work would be Saturday, 14 March 2009.

(iv) Ms Waters would not be required to work-out two weeks notice and would be paid for her notice.

(v) Ms Waters' two weeks pay would be calculated on an average hour's work before 8 March 2009.

(vi) Full and final settlement.

[17] The letter was drafted by Ms McGuinness on the basis of a telephone conversation with Ms Waters recording what she understood Ms Waters' position was. Ms Waters signed the letter. She submitted her resignation in writing without any reference to complaints about bullying, verbal abuse and the unconditional nature of the proposed hours.

[18] On Friday 13 March 2009 Ms Waters arrived at work, but she says that she was sent home because Mr Kia and Ms White were not happy with her working for Darius. They say that she and another friend were disruptive and brought the business into disrepute by sitting at the coffee club and making demands for a uniform bond from Mr Kia, which he paid he says to get them to go away. Ms McGuinness provided a favourable and genuine reference for Ms Waters.

Determination

[19] Mr Kia handed the responsibility to Mr Borghash to manage the transition of offering employment to the employees. This was because Mr Borghash spoke better English than Mr Kia, and because Mr Kia says he did not have the confidence to speak to the employees. Darius was required to offer her employment on no less favourable terms under the Sale and Purchase agreement. This included a package that would be no less than $16 per hour and between 41-46 hours on a roster. She had been regularly working such hours and could reasonably expect these terms to continue. The offer of $13 per hour and 8 hours on a roster certainly failed to meet the terms of the sale and purchase agreement, but it was open to the employer to negotiate a change, I hold. I will come back to the latter point shortly.

[20] The employer was entitled to meet with Ms Waters as it did on 17 and 18 January 2009. Ms Waters was not informed that she could get a representative/and or did not have a representative present, but I hold that any omission on this was not fatal. There is no absolute requirement under the law for a representative to attend

any meeting including dealing with an offer of employment. It certainly would not have been enough to decide to resign over, I hold. The employer's offer, while it was open to be made, however, occurred without the employer properly providing an intended employment agreement upon taking over the business and continuing Ms Water's employment under the terms of the sale and purchase agreement. Later, Ms Waters' position was safeguarded anyway, when she was presented with an individual employment agreement document and on which she could obtain independent legal advice. She signed off the agreement and confirmed that she had read the terms and accepted the agreement on the same terms, which applied at Carsons.

[21] When Mr Kia found out that the sale and purchase agreement had certain terms that needed to be complied with he restored the status quo arrangements about pay and the roster, despite an attempt to renegotiate the roster. The respondent was entitled to correct a mistake, and I am satisfied that that was done by restoring the roster and pay, although in hindsight such a mistake should never have happened. I am satisfied and accept that what happened caused Ms Waters some upset, but would not be enough to resign over, I hold.

[22] Clearly Mr Kia and Mr Borghash did not fully understand the terms of the sale and purchase agreement because of their attempt to unilaterally change the rosters and change the pay and hours when there was a protection for Ms Waters under the terms of the sale and purchase arrangements and Ms Waters had an employment agreement, which had been signed off on 27 February 2009. Firstly, they should have known what the terms of the sale and purchase meant when they engaged with the employees. Secondly they should have properly communicated with Ms Waters that she understood her rights under the sale and purchase agreement. They were fortunate that Ms Waters' previous employer disclosed to her the terms of the sale and purchase agreement because it would have an impact on her employment with the change of employer and contained a term affecting her employment.

[23] A fair and reasonable employer was entitled to form a view that the roster was open to re-negotiation on the basis that the contract signed off by Ms Waters with her previous employer, and subsequently with Darius, was for a part time position; there were no hours specified in the agreement; and the agreement had a term that the hours of work per week may vary and would be in accordance with the team roster. Their

honestly held belief about applying the part time nature of the position and proposed changes to the roster do not amount to a breach of good faith, I hold.

[24] There is not enough evidence from Ms Waters that Mr Borghash bullied and abused her at the meetings on 17 and 18 January when her evidence has been challenged and contradicted by Ms McGuinness[1]. Ms McGuinness told me that Ms Waters is an honest person, and accepting that, given their conflict on what happened, I can only form a conclusion that Ms Waters genuinely believed that she has been bullied and abused, but is not able to establish that was the actual situation given Messrs Kia's and Borghash's different approach and wish to improve standards and the coffee club's performance, which they were entitled to do. They talked to each other in their own language (not denied). This also upset Ms Waters, and while it was discourteous of them, it was not fatal, I hold. They may have been more direct and demanding and their tone of conversation different from the previous employer, but those features in a relationship are not enough to resign over and claim constructive dismissal, I hold.

[25] I am further supported in this decision by the employer continuing to pay Ms Waters $16 per hour and restoring the roster until the problem was sorted out. Thus, I also accept Mr Kia's contention that his intention was to negotiate and offer different hours on the roster, and try to improve the business.

[26] Also it has not assisted Ms Waters that she did not raise her allegations of bullying and verbal abuse while she continued to work and without formally complaining to anybody at the time, or raise them in her employment relationship before she filed in the Authority. Even if she complained at home nobody took the matter up on her behalf with the employer. Likewise, her claims about Mr Kia ignoring her complaints was never taken up with anybody else and reasonably confided in at the time: such as Ms White, who tried to be the peace maker; and Ms McGuinness who defended her when Mr Borghash made comments about improvements that needed to be made and what he was referring to were not of Ms Waters' making.

[1] Ms McGuinness appeared at the Authority's investigation meeting without any written statement of evidence. At first her appearance was opposed by Mr Sheehan and he submitted the matter be delayed. However, in my opinion it was entirely foreseeable she could turn up given the documents and information provided in advance about her involvement in the events. Following the opportunity to question her Mr Sheehan withdrew his opposition. Her presence was no reason to delay the investigation meeting.

[27] The next meeting requested occurred on 10 March 2009. Again it was not fatal that the employer did not suggest that Ms Waters get a support person because the employer's approach involved a request to have a formal meeting I hold. I am satisfied that Mr Kia and Ms White attempted to get Ms Waters to agree to attend a formal meeting but when they further tried to deal with what was developing on 11 and 12 March, Ms Waters' response was to resign and meant that there was no possibility of a formal meeting. Instead Ms White gave Ms Waters the opportunity to talk to Ms McGuinness on the telephone, as the person Ms White genuinely thought could help. Ms Waters confirmed her decision to resign and subsequently provided a written resignation. Both documents had no indication that there was any other problem, except that clearly the terms of the roster were a problem. That is not a matter for constructive dismissal, but for negotiation, I hold. Also, Ms White's decision to involve Ms McGuinness and arrange for Ms Waters and Ms McGuinness to talk on the telephone mitigate the omission of the employer putting in writing that a formal meeting had been requested.

[28] A matter that has confused the situation is that the employer decided to get advice, as it was entitled to do, and embarked on the possibility of doing away with the duty manager positions because of the financial state of the business. It was legitimately entitled to take that course, and I am satisfied that was put to Ms Waters to consider and to meet to have a discussion. Her resignation meant that any further consideration was not a possibility. The employer's only failure here is that its course of action was not documented, except that Ms McGuinness was able to clearly articulate what happened, and I accept her evidence. Thus, there was an attempt albeit clumsily to consult with Ms Waters. The financial situation of the business has not been challenged, and I did not need any other evidence.

[29] It is my conclusion that Ms Waters resigned voluntarily. In light of the following she has not been able to establish that there was a course of conduct with the deliberate and dominant purpose of coercing her to resign:

- Inadequate evidence of what actually happened in the meetings of 17 and 18 January, 10, 11 and 12 March;

- The employer's genuine lack of understanding about the terms of the sale and purchase agreement and the employment agreements upon taking over the business;

- The employer restoring the status quo arrangements until advice could be obtained;

- The employer following a genuine course to consult Ms Waters on the opportunity to discuss options in the face of the possibility of redundancy where the business was facing financial difficulties;

- Ms Waters' written resignation; and the subsequent agreement on the entitlements to be paid upon leaving;

- There were differences in the information given by Mr Kia to his advisors having regard to the documents, but the differences were not enough to make findings about credibility given the language difficulties and the parties' views on the events;

- Ms McGuinness provided a favourable and genuine reference for Ms Waters. In any event the reference establishes that there was absolutely no issue about Ms Waters' performance of her duties. This was a genuine reference and cannot be construed in any other way;

- Changed offers from Mr Kia on the roster.

- Ms Waters' decision to leave was reinforced by her return to the coffee bar and demands for the uniform bond to be paid back.

[30] Ms Waters signed off a full and final settlement without any input from an independent advisor, but Ms Waters chose to sign it off where Ms McGuinness genuinely recorded what she believed her understanding of the situation was and produced as background in respect of Ms Waters' employment relationship problem. Given Ms Waters' resignation and decision to leave not much could come of signing the record off anyway. The enforcement of it is an entirely different matter since it was not signed off by a mediator under s 149 of the Act, but its existence does serve as proof of an agreement.

[31] Ms Waters' reasons for resigning related to her decision at the time that I believe related more to do with the proposals to change the roster and her getting upset about that. Indeed there was no indication from Ms Waters that made it foreseeable to the employer that she would resign on the grounds that the employer's

conduct had the dominate purpose of coercing her to resign. The employer's position on the various matters means that it is not enough to imply that her resignation was foreseeable, I hold. I can understand how Ms Waters construed what she believes happened, but it is not enough to establish a constructive dismissal.

Conclusion

[32] This is a very unfortunate case. Ms Waters incurred costs on what she genuinely believed happened, which upset her. The costs have been spent by her on an unsuccessful outcome that was always going to be very risky on the law and considering the evidence available. With such risks at stake in hindsight this case should have been brought to an end much sooner. If there is one aspect that Ms Waters highlighted in bringing her employment relationship problem it is the unsatisfactory way in which a small business has been taken over, the way in which information has been used and the way in which Ms Waters believes she has been treated and got upset. That could all have been avoided if the employer approached its proposals and financial circumstances along with the changes it wanted in the workplace with much better practice, openness and communication. Another option was for both parties to have used mediation services from the Department of Labour to fix the employment relationship problem that emerged during the employment relationship.

[33] Ms Waters' application is dismissed.

[34] Costs are reserved.

P R Stapp
Member of the Employment Relations Authority