

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Caroline Elizabeth Wright (Applicant)
AND Domaine Restaurant (Respondent)
REPRESENTATIVES Samuel Hood, Counsel for Applicant
Glenys Steele, Advocate for Respondent
MEMBER OF AUTHORITY Ken Anderson
INVESTIGATION MEETING 4 August 2005
31 August 2005
SUBMISSIONS RECEIVED For the Applicant, 2 September and 21 September 2005
For the Respondent, 16 September 2005
DATE OF DETERMINATION 30 November 2005

DETERMINATION OF THE AUTHORITY

The Employment Relationship Problem

- [1] In August 2004, Ms Wright was employed as a Chef at the Domaine Restaurant in Hamilton. She claims that she was unjustifiably dismissed on or about 31 August 2004 – the dismissal being constructive in its nature. Ms Wright seeks that the Authority finds that she has a personal grievance and award her various remedies.

Background

- [2] At the time that this matter arose, Ms Wright was a quite newly qualified Chef, having entered the workforce in the role of Assistant Chef. When Domaine Restaurant (“the Restaurant”) advertised for a Chef in late July 2004, Ms Wright applied for and was successful in obtaining the position.
- [3] Mr Brian Milicich is the owner/manager of the Restaurant. He is a very experienced restaurateur and employs about 30 staff. He interviewed and appointed Ms Wright. It was agreed that Ms Wright would start work at the Restaurant on Tuesday 24 August 2004, initially working 30 hours each week - training with the person that she would replace. Ms Wright was given a Restaurant Association of New Zealand individual employment agreement to take away for her consideration. As the Restaurant was short staffed on Friday 20 August and Saturday 21 August 2004, Ms Wright agreed to work in a “front of house” role in order to help the Restaurant out of a difficulty.

The absence for a bereavement

- [4] On Sunday 22 August 2004, Ms Wright received some most unfortunate news. A close friend had been killed in a car accident. On Monday 23 August, Ms Wright telephoned Mr Milicich. He took the call on his cell phone, as he was travelling in his car to Tauranga, and stopped on the side of the road to talk. There is conflict in the evidence as to the overall conversation that took place.

The evidence of Ms Wright

- [5] The evidence of Ms Wright is that she conveyed to Mr Milicich that a close friend had been killed and she asked if she could have some time off to go back to her home in Kawerau for the funeral. Ms Wright says that Mr Milicich told her that he was sorry to hear about the loss of her friend and that she should: “[take all the time you need and call me when you get back.” Ms Wright’s evidence is she thanked Mr Milicich for his sympathy and that was the totality of the conversation. Ms Wright also says that she repeated the conversation to her flatmate, Ms Warman.
- [6] Ms Warman was not present at the investigation meetings but a written and signed statement was attached to a brief of evidence. However, given her absence from the investigation meetings, and the consequent inability to clarify what appears to be in some regards, an inconsistent version of events, compared with that of Ms Wright and other witnesses, I have found her evidence to be largely unreliable.
- [7] There is also the evidence of Ms Elizabeth McCarten, another of Ms Wright’s flatmates. Ms McCarten says that upon becoming aware that Ms Wright was going to return to Kawerau for her friend’s funeral, she asked Ms Wright what would happen in regard to her new job. Ms McCarten’s evidence is that Ms Wright replied by stating that: [“Brian had told her to take as much time as she needed and to call him when she returned from Hamilton.”

The evidence of Mr Milicich

- [8] Mr Milicich says that when Ms Wright phoned him on the afternoon of 23 August 2004 she was upset about the death of her friend and she stated that she was going to take three days off work. The evidence of Mr Milicich is that while he sympathised with the situation, he declined to allow Ms Wright to have the time off as it was important for the training in her new employment that she be there to work with the person whom was soon departing. Mr Milicich says that Ms Wright was “defiant” and stated that it was a close friend and she was going to have three days off work. Mr Milicich’s evidence is that he informed Ms Wright that under the terms of her employment agreement, she was only entitled to three days’ off work for bereavement in the event of the death of a relative.
- [9] Mr Milicich says that Ms Wright then told him that the deceased person was a close friend and also a family member and that she was going to take the time off anyway. Mr Milicich says he then advised Ms Wright that she could take the time off that she was legally entitled to according to her employment agreement. Upon Ms Wright confirming that she was taking the three days off, Mr Milicich says he informed her that he would take her off the work roster while she was away and asked her to contact him when she was back in Hamilton, so that she could be put back on the roster.
- [10] The evidence of Mr Milicich is collaborated to some extent by that of his wife, Mrs Raewyn Milicich. Mrs Milicich says that she was in the car with Mr Milicich when he was talking to

Ms Wright and heard his side of the conversation. She confirms that the conversation “*went round in circles*” and it was only concluded when Mr Milicich consented to Ms Wright having the time off that she sought. Mrs Milicich says that when Mr Milicich concluded his phone call, he conveyed to her that Ms Wright had “changed her story” in regard to the bereaved person being initially a close friend, and then a relative.

- [11] In regard to the evidence pertaining to Ms Wright asking for the time off work, I find that of Mr and Mrs Milicich to be more acceptable. I conclude that the conversation more probably than not went on for a number of minutes. While I have found the overall evidence of Ms Warman to be largely unreliable, I note that she says that the conversation between Ms Wright and Mr Milicich lasted “10 to 15 minutes”. I doubt if it was that long, but Mrs Milicich’s evidence is that the conversation went on for at least some minutes. If the content of the conversation was as Ms Wright says, it would have been very brief indeed. Furthermore, I find it is most unlikely, and indeed without good reason, that Mr Milicich would manufacture the version that he has advanced.

Meeting on 27 August 2004

- [12] Following the funeral of her friend, Ms Wright returned from Kawerau to Hamilton on Thursday 26 August 2004. She contacted Mr Milicich by telephone as he had requested. Mr Milicich says that during this conversation he offered his condolences regarding her relative’s funeral, and that Ms Wright replied that it was a close friend that had died. Mr Milicich says that given the “conflicting advice” he had received from Ms Wright, he asked to meet with her the next day.
- [13] The evidence of Ms Wright is that: “It became a shock” to her that Mr Milicich did not believe where she had been. While I accept that Ms Wright probably had the perception that Mr Milicich was questioning whether she had been at a funeral, I find that this was not a valid perception and that the only concern that Mr Milicich had was that Ms Wright was not consistent in regard to what she had told him pertaining to her relationship to the deceased person.
- [14] Mr Milicich and Ms Wright met at 3:00pm on Friday 27 August 2004. Mr Milicich says that Ms Wright had with her the funeral programme but that was not required, as he had no doubt that she had been absent due to attending a funeral. Mr Milicich says that he simply wanted to check the relationship to ascertain if Ms Wright was entitled to three days’ bereavement leave. Ms Wright confirmed that the funeral was not for a relative. Mr Milicich confirms that Ms Wright was upset about him questioning her about who the funeral was for.
- [15] Mr Milicich then told Ms Wright that in future, taking time off without entitlement would be seen as “letting the side down” and this was not acceptable. Mr Milicich also gave examples of other employees whom had been dishonest in regard to claiming bereavement leave and that it was his intention to “prepare the groundwork” for Ms Wright, as a new employee, in regard to the importance of honesty in the relationship. The evidence of Mr Milicich is that the meeting was not disciplinary in nature – he wanted to ensure that Ms Wright was aware of what was required in the business.
- [16] The evidence of Ms Wright about the meeting is reasonably consistent with that of Mr Milicich, except, she says that Mr Milicich gave an example of a person that had falsely claimed bereavement leave and had been taking methamphetamines. Ms Wright says that she found it “extremely distressing” to be compared with this person.

The outcome of the meeting and subsequent events

- [17] There is conflict in the evidence as to what occurred at the conclusion of the meeting between Ms Wright and Mr Milicich on 27 August 2004, and subsequently.
- [18] Ms Wright says that Mr Milicich gave her a wages cheque for the work that she had done the week before and then asked her what she would do in his situation. She says that she was too upset to answer. The evidence of Ms Wright is that Mr Milicich; [“told me to call him the following Tuesday after he had spoken to his Head Chef and son¹ about my position.”
- [19] Ms Wright says that she phoned Mr Milicich on Tuesday 31 August and: “He told me that there was no work for me anymore, that I had put him in an awkward position and that he would call me if any more work came up.” The further evidence of Ms Wright is that there was no doubt in her mind that she had been dismissed and that this was confirmed when she heard nothing further from Mr Milicich. Ms Wright says that she knew from the tone of Mr Milicich’s voice that he no longer wanted her there.
- [20] The evidence of Mr Milicich is that at the conclusion of the meeting, he informed Ms Wright that he had not rostered her for work for the coming week (Tuesday 31 August to Sunday 5 September 2004), as he did not know when she was coming back. Mr Milicich says that given the uncertainty of when Ms Wright would return and the difficulty of rostering replacements at short notice, he informed Ms Wright that she was on the roster for the week beginning Tuesday 7 September 2004, but he would check to see if she could be brought back onto the roster sooner. Mr Milicich says that he requested that Ms Wright should phone him on Tuesday 31 August to confirm if he had been able to start her earlier than 7 September. Mr Milicich says that he also told Ms Wright that he would call her if work became available before 7 September.
- [21] Mr Milicich confirms that Ms Wright did phone him on Tuesday 31 August. He says that he told her that the existing roster could not be altered but she was on the roster for the week beginning 7 September and he asked her to phone the Restaurant to ascertain the exact starting time. Mr Milicich says that Ms Wright was aware that he was going overseas on 7 September for six weeks. Mr Milicich was unaware that Ms Wright was pursuing a personal grievance until October when he returned from his trip.
- [22] There are two additional evidential elements that support the respective versions given to the Authority by Ms Wright and Mr Milicich. For Ms Wright, there is the further evidence of Ms McCarten. She says that she was present at the flat shared with Ms Wright when the phone call of 31 August took place. She says that when Ms Wright came off the phone she conveyed to Ms McCarten that Mr Milicich had said that he had no work for her at the moment and that he would call her if anything came up, and that Ms Wright was under the impression that she had been dismissed from her employment.
- [23] Mr Milicich has produced the Restaurant rosters and they confirm that Ms Wright was rostered to work for the week beginning 7 September and ending Sunday 12 September 2004.

¹ The Authority understands that Mr Milicich’s son is the Restaurant Manager.

Analysis and Conclusions

- [24] Given that Ms Wright is claiming that a constructive dismissal was visited upon her, the onus is on her to show firstly that a dismissal did in fact occur.² In most matters that appear before the Authority, where it is alleged that a constructive dismissal exists, the employee has resigned from their employment because the working relationship has become intolerable for a variety of reasons. But, that is not the situation here. Ms Wright did not resign. Rather, she alleges that she was informed by Mr Milicich that there was currently no work available for her and that she would be contacted if and when work became available. If that was indeed found to be so, that is not a constructive dismissal, that would be a summary dismissal.
- [25] However, the evidence, as shown by the duty roster for the Restaurant, for the week beginning 7 September 2004, clearly shows that work was available. The evidence of Mr Milicich is that all that remained was for Ms Wright to contact the Restaurant and ascertain her starting time. I accept that evidence. I do not accept that Ms Wright was dismissed.
- [26] I am bound to say that I have found this matter to be difficult to determine as I found all concerned to be largely genuine in relating their perception of events. However, on the balance of probabilities, I have found the evidence of Mr Milicich to be the most likely version of events. I find that it is more probable than not that upon reflection upon all the circumstances, particularly given that she had the perception, albeit mistaken, that Mr Milicich had questioned the genuineness of her attendance at her friend's funeral, and he had, unwisely, in my view, compared Ms Wright with other absentees, one being a methamphetamine user, Ms Wright decided that she did not wish to return to work at Domaine Restaurant and simply failed to make contact about her starting time. I also suspect that Ms Wright was probably not in best frame of mind emotionally and that her judgement was not as sound as it would normally be, given the most unfortunate series of events that came about.
- [27] While I gave some consideration to the failure on the part of someone from the Restaurant to make contact with Ms Wright as to her intentions, it seems to me that with Mr Milicich leaving the country on the day that Ms Wright was to start work, the fact that she was probably largely unknown to others at the Restaurant, and there was not a telephone number available for her, a set of circumstances existed whereby it would not be reasonable for any fault to assigned, given also that I have accepted that the onus was left with Ms Wright to contact her employer. Furthermore, by the time that Mr Milicich returned to work, personal grievance proceedings had been commenced.

Determination

- [28] I find that Ms Wright was not dismissed from her employment at Domaine Restaurant, on a constructive basis or otherwise. It follows that Ms Wright does not have a personal grievance and the hence the remedies that she seeks are not available to her.
- [29] In conclusion, it has been submitted for the Respondent that Ms Wright was in breach of clause 11b of her employment agreement in that she did not give one weeks' notice of the termination of her employment. Given the overall circumstances, I find that submission unacceptable and hence a remedy is not available.

² *NZ Amalgamated Engineering etc IUOW v Ritchies Transport Holdings Limited* [1991] 2 ERNZ 267.

Costs

[30] Costs are reserved. The parties are invited to reach a resolution of this matter. In the event that a resolution is not achieved, submissions may be made to the Authority for an order, within 28 days of the date of this determination.

Ken Anderson
Member
Employment Relations Authority