

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKĀURAU ROHE**

[2020] NZERA 508
3107495

BETWEEN

ALEXEY MARSHALL
Applicant

AND

WORKING FATHERS LIMITED
TRADING AS THE CANDY
SHOP
Respondent

Member of Authority: Anna Fitzgibbon

Representatives: Simon Greening, counsel for the Applicant
Michael Smyth, counsel for the Respondent

Investigation Meeting: 17 November 2020 at Auckland

Submissions Received: 12 November 2020 from the Applicant
23 September 2020 from the Respondent

Date of Determination: 8 December 2020

DETERMINATION OF THE AUTHORITY

- A. The applicant, Mr Alexey Marshall was not unjustifiably disadvantaged by the Respondent, Working Fathers Limited trading as the Candy Shop (the Candy Shop). Accordingly, Mr Marshall does not have an employment relationship problem.**
- B. Costs are reserved.**

Employment Relationship Problem

[1] The respondent, Working Fathers Limited trading as the Candy Shop (the Candy Shop) owns a restaurant/café specialising in Asian influenced cuisine. It has three directors, Mr Sungyong Hong, who refers to himself by the English name of Tom, Mr Pillok Lee, who refers to himself by the English name of David and Mrs Hyungjin Park. Mr Hong works in the

restaurant and Mr Lee is responsible for menu design and marketing. Mrs Park's husband is Mr Woonghung Park who also works in the restaurant.

[2] The applicant, Mr Alexey Marshall was employed by the Candy Shop as a senior chef de partie. On 3 July 2020, Mr Marshall resigned from his employment with the Candy Shop. Mr Marshall is not claiming that he was constructively dismissed.

Mr Marshall's claims

[3] Mr Marshall claims that he was bullied during the course of his employment by the head chef and the sous chef which was not investigated. Accordingly, Mr Marshall says he has an unjustifiable disadvantage claim. Mr Marshall seeks compensation for distress he says he suffered as a result of the alleged unjustifiable disadvantage together with lost wages.

The Candy Shop's response

[4] The Candy Shop denies Mr Marshall was bullied. It says on two occasions issues arose between co-employees, namely Mr Marshall and the head chef and Mr Marshall and the sous chef. The issues concerned Mr Marshall's food preparation.

[5] The first occasion on which Mr Marshall claims he was bullied, was when he received a text from the head chef, which he found offensive. The second occasion, a few days later, was when a statement was made by the sous chef to Mr Marshall which he says was offensive and amounted to workplace bullying which impacted his safety at work.

[6] The directors of the Candy Shop say the issues were between co-employees and they were not immediately aware of them. They say as soon as they did become aware, apologies were given to Mr Marshall for the employees' behaviour. They say the statement and text related to Mr Marshall's failure to prepare food in accordance with the restaurant's new takeaway menu. In that regard it was a one-off event and attempts were made to resolve the matter amicably and as quickly as possible. However, they say Mr Marshall was not prepared to accept apologies or to return to work. Rather than work through the issues, Mr Marshall sought compensation from the Candy Shop for what he described as bullying conduct.

Issue

[7] The issue for determination by the Authority is whether Mr Marshall's employment, or one or more conditions of his employment was affected to his disadvantage by some unjustifiable action by his employer, the Candy Shop.

[8] If the answer to this question is yes, should remedies be awarded to Mr Marshall including:

- (a) Compensation for hurt and humiliation under s 123(1)(c)(i) of the Employment Relations Act 2000 (the Act); and
- (b) Reimbursement of lost remuneration under s128 of the Act.

[9] If remedies are awarded, should they be reduced for any blameworthy conduct by Mr Marshall.

The Authority's investigation

[10] Mr Marshall and his father, Mr David Marshall each provided written witness statements for the Authority's investigation. Mr Tom Hong, director and Mr Kevin Chou, the head chef each provided written witness statements on behalf of the Candy Shop. Mr David Lee, director of the Candy Shop attended the Authority's investigation meeting at the Authority's request and answered questions.

[11] Each of the witnesses either affirmed or swore on oath that their evidence was true and correct.

[12] An interpreter fluent in the Korean language attended the Authority's investigation meeting to assist the Authority.

Oral indication of preliminary findings – 174B(1)(b) of the Act

[13] The parties participated in mediation prior to the investigation meeting. Mediation was not successful in resolving the employment relationship problem. Prior to the commencement of the Authority's investigation meeting, a further opportunity was provided to the parties to resolve their employment relationship problem. Unfortunately, the parties were not able to resolve their differences.

[14] After hearing all the evidence at the investigation meeting, I gave the parties an oral indication of my preliminary findings, subject to further submissions.

Written record of determination

[15] The parties provided a synopsis of their legal submissions prior to the investigation meeting. Following the investigation meeting, no further written submissions were provided by either party. Accordingly, this is a written record of my determination which confirms the oral indications of my preliminary findings.

[16] As permitted by s 174E of the Act this determination has stated findings of fact and law and expressed conclusions on issues necessary to dispose of the matter. It has not recorded all evidence and submissions received.

Was Mr Alexey Marshall's employment or any conditions of his employment affected to his disadvantage by some unjustifiable action by the Candy Shop?

Lockdown

[17] The Candy Shop is a restaurant/café located in Newmarket, Auckland. The Candy Shop reopened under Alert level 3 in late April 2020, following New Zealand's national lockdown in March 2020 as a result of the global Covid-19 pandemic.

Tuesday, 28 April 2020 - training day

[18] Due to Alert level 3 restrictions it was decided by the directors that a new takeaway menu would be prepared which would enable the business to operate. A training day was held to enable the chefs to train in preparing the new dishes. Mr Marshall attended the training day on 28 April 2020. Mr Marshall's rostered day off was on 29 April 2020.

Thursday, 30 April 2020 - 30 April 2020 at 5.18pm

[19] On 30 April 2020, Mr Marshall was working at the café. Mr Marshall says he attempted to prepare the new dishes on the menu which were unfamiliar to him. He says he struggled because there were no written instructions for the preparation of the dishes and he had to work off the paper menu.

[20] Mr Lee, one of the directors and the person who was in charge of menu design along with other similar duties, was at the café. Mr Lee said he became concerned that Mr Marshall

did not seem to be able to prepare the new dishes on the menu. Mr Lee said that one of the customers in the restaurant was a food blogger and he was concerned that the restaurant would receive negative publicity about the food being prepared by Mr Marshall.

[21] Mr Lee says he was upset, not with Mr Marshall but rather with the head chef, Mr Kevin Chou, who had undertaken the training in respect of the new menu, on 28 April 2020. Mr Lee said he wanted to find out how the training had gone so he spoke to Mr Hong about it. They both rang Mr Kevin Chou to talk to him about the training he had provided in respect of the takeaway menu. Mr Chou told him he had undertaken full training and that many of the chefs present took notes and photos but that Mr Marshall did not.

[22] Mr Marshall says that following the phone call made by Mr Lee and Mr Hong to Mr Chou, he received a text at 5:18 pm from Mr Chou which he described as offensive. The text was as follows:

Hey. U busy now? why u keep making trouble and David and Tom keep calling me? is menu too hard for you? or u don't wanna work? Stop fucking piss me off.

[23] Mr Marshall was upset when he received the text. However, he did not talk to either Mr Hong or Mr Lee about the text, nor did he raise any issue about it with Mr Chou. Mr Marshall's next day of work was 2 May 2020 and there were no issues.

Sunday, 3 May 2020 – statement to Mr Marshall by the sous chef

[24] On 3 May 2020, when Mr Marshall arrived at work, he says there was an incident with the sous chef, which upset him. Mr Marshall says that as soon as he got to the restaurant, the sous chef spoke to him aggressively and said "You can just clean today. Everything you touch you fuck up". Mr Marshall says he was shocked and humiliated by the statement. He felt that following the phone call by Mr Hong and Mr Lee to the head chef on 30 April 2020 there had been gossip about him behind his back.

[25] Mr Hong says that he was not aware of this incident with the sous chef until the sous chef came to speak to him and told him Mr Marshall was not happy about undertaking cleaning tasks, rather than food preparation. Mr Hong said given Alert level 3 restrictions all staff were required to do more cleaning than usual.

[26] Mr Marshall also spoke with Mr Hong and told him what the sous chef had said to him. The sous chef admitted to making the offensive statement to Mr Marshall. Mr Hong apologised to Mr Marshall for the way in which he had been spoken to by the sous chef. Mr Marshall then showed Mr Hong the text message that he had received from Mr Chou on 30 April 2020. Mr Marshall told Mr Hong that he was offended by Mr Chou's text. Mr Hong says he could see that Mr Marshall was upset by the statement made by the sous chef and by the text he had received from Mr Chou. He gave Mr Marshall the option of going home for the rest of the day. Mr Marshall agrees that he was given this option and that he did go home because he was upset by what had occurred at the restaurant on 30 April and 3 May 2020.

[27] Mr Hong says after Mr Marshall went home he immediately rang Mr Chou to talk to him about his text message to Mr Marshall. Mr Hong says he told Mr Chou that the content of the text message and in particular the language used was not appropriate, had caused offence and asked that he ring Mr Marshall to apologise.

[28] Mr Hong says that he felt he was dealing with two incidents. The first incident being the text message from Mr Chou to Mr Marshall on 30 April 2020 which he saw for the first time on 3 May 2020. The second incident was the statement made by the sous chef to Mr Marshall on 3 May 2020. Mr Hong says he felt the best way to deal with the situation was to apologise to Mr Marshall for what had happened and which he agreed was not appropriate, and to ask the head chef, Mr Chou to apologise for his part.

[29] Mr Hong says he then wanted to focus on repairing the relationships between the head chef and Mr Marshall, and the sous chef and Mr Marshall.

Phone calls from Mr Chou to Mr Marshall

[30] Mr Chou rang Mr Marshall a number of times to apologise to him for his text on 30 April 2020. However, Mr Chou says Mr Marshall did not answer or return his phone calls. Mr Marshall accepted that Mr Chou had been ringing him a number of times to apologise. However, he felt that any apology from Mr Chou was not authentic and that Mr Chou was not genuinely wishing to apologise to him.

[31] Mr Marshall requested a meeting with Mr Hong to resolve issues.

Meeting on Monday, 4 May 2020

[32] On Monday, 4 May 2020, Mr Hong and Mr Chou met with Mr Marshall and his father, Mr David Marshall in an attempt to resolve the issues. The parties have differing views of what occurred at the meeting. Mr Marshall and Mr David Marshall were of the view that the meeting was a shambles, that Mr Hong did not know what he was doing and there was no resolution.

[33] Mr Chou and Mr Hong say they were attempting to discuss the issues with Mr Marshall openly but were continually interrupted and badgered by his father, Mr David Marshall. When it came to options for resolution, Mr Chou and Mr Hong both say that Mr David Marshall suggested that they pay compensation to Mr Marshall in return for which he would resign. Mr Marshall and Mr David Marshall deny this but do accept that Mr David Marshall informed Mr Hong and Mr Chou that this was a serious matter which they needed to take seriously.

5 May 2020

[34] On 5 May 2020 at 10.19 am, Mr Marshall sent an email to Mr Hong, reiterating his concerns, claiming a personal grievance and his desire to “settle this amicably between us “...on a ‘without prejudice’ basis”.

[35] Mr Hong emailed Mr Marshall back at 3.06 pm. Mr Hong states:

We are hearing that you have taken issue with [being] spoken to in an inappropriate manner by your fellow staff members Kevin Chou & SP [sous chef]. We value you as an employee and have been happy to work with you in the past. And in saying such, we would like to work with you and the related staff members to try and mediate between the involved employees and resolve the pressing issues you have together and try to work towards a resolution where you can work together in a harmonious way moving forward. You showed me the txt message that Kevin sent to you the other night and we feel the language he used was unfortunate, and is not in a manner we would usually like to see in our business. We will be following this up with Kevin & SP in a disciplinary procedure to ensure they are aware of the expectations of their behaviour in our work place to avoid such conflict in the future...We would actually like to work with you, in good faith, to try and adhere to the process of mediation...Alex, we would really like to resolve this with you. We like you as a person and value the work you have done for us.

[36] Mr Marshall responded at 3.55pm on 5 May 2020 that he felt he had been treated unfairly, had presented a reasonable offer and if it was not acceptable would be seeking mediation.

[37] Mr Hong replied on 6 May 2020 that he felt rather than:

going straight to monetary(sic) compensation... we would prefer to try and work with the staff members involved to find a fair & reasonable resolution to your workplace friction and would welcome the opportunity to resolve this within the setting of the Employment Mediation service.

[38] The parties engaged in further correspondence but were not able to reach a resolution. Mr Marshall resigned on 3 July 2020.

Credibility

[39] I prefer the evidence of the witnesses for the Candy Shop. At the Authority's investigation meeting, Mr David Marshall spoke in a manner which was domineering and in my view consistent with the way in which Mr Hong and Mr Chou say he spoke to them at the meeting on 4 May 2020. Such an approach was not constructive.

[40] I consider that on the balance of probabilities, it is more likely than not that Mr David Marshall told Mr Hong and Mr Chou at the meeting that there was a serious situation and that Mr Marshall would resign upon payment to him of compensation. This is confirmed by the correspondence that followed from Mr Marshall not wishing to resolve the employment relationship problem other than by way of payment to him of compensation.

Did the conduct complained about amount to workplace bullying?

[41] Mr Marshall accepted that during the course of his employment by the Candy Shop which was approximately one year, he had never received an offensive text from Mr Chou, like the one he received on 30 April 2020. Nor had he ever had a run in with the sous chef in the manner which occurred on 3 May 2020.

[42] The two events, being the text on 30 April 2020 and the argument on 3 May 2020 related to a "one-off" situation involving Mr Marshall's preparation of the recipes for the new menu in the café, following its reopening in late April 2020. As soon as Mr Hong became aware of the situation, he took considerable steps to have the matter resolved, including an immediate apology. Mr Hong's correspondence to Mr Marshall is clear that he values Mr Marshall and wishes for him to continue working for the Candy Shop. He also made clear his intention to address the behaviour of the head chef and the sous chef by way of a disciplinary process.

[43] Mr Marshall's response was to reiterate his feeling that he had been treated unfairly, that it was unacceptable and that if they were not able to resolve it on the basis of the offer he

had made to Mr Hong, he would apply to have the matter mediated. Mediation occurred and was not successful.

[44] Mr Hong accepted that the text and the statement made by the head chef and the sous chef respectively to Mr Marshall, were not acceptable. However, they did not amount to workplace bullying as alleged and did not amount to an unjustifiable disadvantage.

[45] The definition of bullying provided in “Preventing and Responding to Workplace Bullying: The Guidelines” contains a helpful definition:

Bullying

Workplace bullying is a form of harassment, most often used for one person to have power or unwarranted control over another.

Bullying is unwanted and unwarranted behaviour that a person finds offensive, intimidating or humiliating, and which is repeated, so as to have a significant detrimental effect upon a person's dignity, safety and wellbeing. Behaviours that amount to bullying may be both overt and covert.

Note: An isolated incident of the behaviour described as bullying may be inappropriate conduct (and may require a managerial discussion with the perpetrator or disciplinary action under the Code of Conduct), but a one-off incident is not generally considered to be bullying.¹

[46] The conduct complained about by Mr Marshall does not fit in to the above definition but amounts to “inappropriate conduct” requiring “managerial discussion with the perpetrator”.

Safe and healthy work environment

[47] Counsel for Mr Marshall cites the Employment Court decision in *FGH v RST* in support of his submission that the conduct in this case amounted to workplace bullying and that the Candy Shop failed in its legal duty to provide Mr Marshall with a healthy and safe workplace.² Counsel also relies on the Court of Appeal decision in *Gilbert v Attorney General*.³ In his submission, Counsel for Mr Marshall argues that there is “The requirement to take all practicable steps to ensure an employee’s safety arises where an employer knows, or ought to reasonably know, about the circumstances giving rise to the risk of harm”.

[48] This of course is a correct summation of the law. However, both *FGH v RST* and *Gilbert v Attorney General* are distinguishable. *FGH v RST* involved a situation in which the employee

¹ <https://worksafe.govt.nz/dmsdocument/782-Preventing-and-responding-to-bullying-at-work>.

² [2018] NZEmpC60

³ [2002]1 ERNZ 31

was undergoing “intense” performance management over many months. In *Gilbert v Attorney General*, the employee was a Probation officer who suffered burnout following years working in an environment with inadequate staffing levels. These situations were ones in which the employer ought reasonably to have known about the circumstances giving rise to the risk of harm.

[49] As soon as Mr Hong became aware of the conduct by Mr Marshall’s co-workers which caused him offence, he attempted in good faith to resolve the matter and retain Mr Marshall in employment. Mr Hong did what a fair and reasonable employer could have done in the circumstances.⁴ Mr Marshall refused to participate in this process.

[50] Mr Marshall does not have an employment relationship problem.

Costs

[51] Costs are reserved. The Candy Shop has fourteen days within which to file a memorandum as to costs in the Authority. Mr Marshall has fourteen days following receipt of the Candy Shop’s memorandum as to costs, within which to respond.

Anna Fitzgibbon
Member of the Employment Relations Authority

⁴ S103A Employment Relations Act 2000