

duties that he (Mr Brake) felt were improper or illegal having regard to the relevant tax legislation.

[5] On 24 October 2007, Mr Brake was handed a letter signed by one of the firm's partners, Mr Hartnell, which raised *serious concerns* as to the applicant's *conduct*, talked of the trust and confidence in Mr Brake being *reduced* and referred broadly to three heads of concern: (a) Mr Brake's *general attitude*; (b) Mr Brake's *approach to clients*; and (c) Mr Brake's *dealings with other staff members and partners*.

[6] A meeting to discuss these concerns of the firm was scheduled for 29 October 2007. In the meantime, and in response to the firm's letter of complaint, Mr Brake issued his own letter dated 25 October 2007 in which he raised a personal grievance alleging that a number of his dealings with partners of the firm were, for various reasons, unsatisfactory.

[7] The disciplinary meeting proceeded on 29 October 2007 as scheduled, and Mr Brake was invited to respond to the matters raised in the firm's letter of 24 October 2007. At the conclusion of the meeting, Mr Brake was advised he was dismissed with immediate effect.

Issues

[8] It will be helpful for the Authority to consider what happened at the disciplinary meeting on 29 October 2007. That must be the primary focus of the inquiry.

[9] However, it will be useful if the Authority also reviews the conduct of the parties prior to the disciplinary meeting on 29 October 2007.

Pre-meeting conduct

[10] Mr Brake's initial employment seems to have been unremarkable. He worked as a salaried accountant in a large room with 16 other staff and was responsible directly to one of the partners of the firm, Mr Hartnell.

[11] Difficulties started arise, from Mr Brake's own evidence, in June 2007 when he says that the firm asked him to complete tasks that he was *uncomfortable* with. Specifically, these were tasks wherein Mr Brake was asked by a partner of the firm to, for instance, make a claim for a tax deduction in relation to a client's affairs which, in

Mr Brake's opinion, was improper or illegal. A particular incident which Mr Brake described in his evidence was left on the basis that Mr Brake refused to undertake the work in question and the firm gave it to another staff member to attend to.

[12] When I explored this issue at the investigation meeting, the firm's view appeared to be that it was not Mr Brake's decision to make and if in fact the particular tax treatment of a matter was improper or illegal then it was not a matter that Mr Brake should concern himself with because *the onus is on the client if there is anything wrong*.

[13] In essence, it was suggested to me by Mr Hartnell that the partners made decisions about any controversial aspects of a client's professional affairs and it was not for Mr Brake to interfere as he was effectively only a processor of the work and had no direct relationship with the client.

[14] Of course, Mr Brake took the view that he had obligations of his own because he was himself a member of the profession and he did not wish to be involved in behaviour which he thought was improper.

[15] At about the same time (June 2007), Mr Brake says that he received a letter from the firm about his reluctance to complete certain tasks of the sort I have just described. In fact, Mr Brake's evidence is that there were three particular matters that were raised with him in this letter, the first being the issue I have just highlighted, the second being his direct contact with a client, and the third being a professional argument about the completion of a taxation questionnaire.

[16] The firm says that there was never a letter sent to Mr Brake remonstrating with him about these issues, although it acknowledges that the issues were indeed live ones and it says that Mr Hartnell spoke with Mr Brake about these matters.

[17] Nothing turns on whether there was a letter or not; both parties accept that the issues which Mr Brake highlights were indeed of concern to the employer, but the issues were actually dealt with at the time.

[18] In July 2007, there were further issues around Mr Brake's refusal to undertake work which he considered professionally inappropriate and again work which would have been done by him was directed to another staff member by the firm after

Mr Brake had refused to undertake it because of his concern about the propriety of the work.

[19] About this time, there were two other incidents which may be briefly described as examples of the deteriorating relationship between the parties. The first was the so-called looming incident when Mr Brake is accused of standing over another staff member to the extent that it was said he was intimidating. This particular allegation was advanced in the investigation meeting by Mr Hartnell who, amongst other things, said that he felt Mr Brake *invaded* (his) *personal space*. Mr Hartnell then went on to say *I don't think I would be able to tell him to back off*.

[20] The second incident, which is illustrative of the deteriorating relationship, involved a contention that Mr Brake had been teased about having body odour. The incident involved one of the firm's partners allegedly making an observation in the lunch room about body odour when that partner and the other staff then in the lunch room departed as soon as Mr Brake arrived.

[21] Mr Brake was hurt by this remark, especially as the property that he was living in and was developing had, at the relevant time, no working shower. Mr Brake's response to the remark was to take a week off from work to get a working shower organised in his home.

[22] The firm says there was no issue about Mr Brake's personal hygiene; it was simply one of those remarks that people make when everybody leaves a room together after someone else comes in. It was not meant to offend.

[23] What seems to have been the tipping point for the firm was an incident involving the firm's senior partner, Ms Dow. Ms Dow summoned Mr Brake to her office on 19 October 2007 and told Mr Brake that she was taking him off a particular job in the most direct and straightforward terms. The firm's position is that the client contended it was being *harassed* by Mr Brake.

[24] The partners of the firm met that same afternoon to consider *the issues surrounding Peter's* [Mr Brake's] *employment*. That meeting led inexorably to the letter written by the firm dated 24 October 2007 and the disciplinary meeting of 29 October 2007 as a consequence of which Mr Brake was dismissed from his employment.

The 29 October 2007 meeting

[25] The meeting on 29 October was, to use Mr Hartnell's word, *convened* by the firm's counsel. Clearly that was a surprise to Mr Brake when he turned up alone to offer explanations to the matters referred to by the firm in its letter of 24 October 2007. To be fair to the firm, Mr Brake was given the opportunity to adjourn the meeting so he could obtain legal representation but he chose not to do so, believing that he could resolve the issues himself.

[26] The nature of the meeting must have been rather unnerving for Mr Brake. He says, and the firm accepts, that he was simply left to respond to each of the issues in the 24 October letter *without questioning or prompting of any sort*. Mr Hartnell had this to say about the nature of the meeting:

The partners felt that it was appropriate to let Peter [Mr Brake] address the issues without debate.

[27] It seems to be accepted that there was no exchange of views, no questioning, no comment of any sort from the firm's representatives.

[28] Mr Hartnell's evidence is that, at the end of Mr Brake's presentation, he was asked to leave the room and the partners discussed what to do. Mr Hartnell says that Mr Brake:

... did not accept responsibility for any of the concerns raised and did not show any indication whatsoever that he would consider changing his attitude and approach with the aim of resolving those concerns.

[29] Mr Hartnell described Mr Brake's responses as *challenging, antagonistic and abrasive*.

[30] Because of these conclusions, the partners of the firm felt that there was no alternative but to dismiss, Mr Hartnell told me. A preliminary decision to dismiss was made and Mr Brake was invited back to the meeting and told that that was the preliminary decision.

[31] There is some dispute about the end of the disciplinary interview process. Mr Brake does not recall the preliminary intimation that dismissal was the likely outcome and thinks he was told immediately by Ms Dow that the firm no longer wanted to employ him and that all of his responses were unsatisfactory to the firm.

Determination

[32] The test to apply is whether a fair and reasonable employer, having conducted a proper investigation, would dismiss in the circumstances of the particular case. I have reached the conclusion that a fair and reasonable employer would not dismiss in the particular circumstances of this case. I am satisfied that the final interview process was so fatally flawed as to be completely inappropriate, and I am equally satisfied that the process leading up to the final meeting was also unfair and unjust.

[33] It is clear from the evidence that Mr Brake was never warned about performance deficits. It is true that he was spoken to about his unwillingness to accept direction from the firm when he thought he was professionally compromised (whether by discussion or by receipt of a letter dated June 2007), but both parties agree that there was no warning administered at that time.

[34] On balance, I am inclined to prefer the firm's view that there was no letter at all and that frankly weakens its position rather than strengthens it. If the firm had taken the trouble to write to Mr Brake and point out to him what was causing it concern, that might have put it in a slightly stronger position than to have simply raised matters with him orally.

[35] However, the issues around Mr Brake's professional ethical standards would not, in my opinion, be matters which could properly form a basis for dismissal in any circumstances. Mr Brake told me (and I accept) that he himself has professional obligations by virtue of his membership of the profession and in that context, it seems to me thoroughly inappropriate that any employer should seek to require compliance with ethical standards which the staff member is uncomfortable about.

[36] In reaching this conclusion, I place reliance on the old common law principle that an employee can be directed to comply with a lawful and reasonable instruction and that a failure to do so can ground disciplinary action. The question in the present case would have been whether it is lawful and reasonable to require a professional person to perform work or duties which they feel are ethically challenging or, worse still, legally wrong. I am satisfied the answer to that question is in the negative and accordingly I would have concluded that the firm could not rely on any of its *professional* complaints about Mr Brake as a ground for a lawful dismissal, had it sought to do so.

[37] In fact, of course, the letter of 24 October does not rely on those matters at all and proceeds essentially on the basis of complaints about Mr Brake's interpersonal skills as between himself and other staff, himself and partners, and himself and clients of the firm.

[38] The difficulty with these matters is that the first occasion on which Mr Brake was confronted with these issues was on receipt of the firm's letter of 24 October 2007. Indeed, in defence of its claim, I am satisfied that the firm went further in its evidence before the Authority than it had even in its disciplinary letter of 24 October 2007. As an example of that, I refer to the statement made by Mr Hartnell in his brief of evidence wherein he told me that a number of clients of the firm had asked that Mr Brake not work on their accounts in the future. However, he also told me that at no time had the firm bothered to tell Mr Brake that that was the position. Indeed, Mr Brake found out about the issue when the briefs of evidence were filed in preparation for the investigation meeting.

[39] Furthermore, Mr Hartnell accepted that there was no feedback provided to Mr Brake about his behaviour, and Mr Hartnell accepted that he himself would not have been able to tell Mr Brake to *back off*.

[40] Further, Mr Brake's evidence, which I accept, was that he was never told about his work having to be redone, never told him about any problems in respect of a particular issue relating to the Ministry of Education, never told him about complaints from clients, never told about problems with his telephone manner, and never told him about the allegation that he was *harassing* a client.

[41] Many of these allegations are serious and arguably go to the root of the employment relationship, but it is simply not good enough to refer to them after the event. Any employee who is subjected to disciplinary action is entitled to know the extent of the claims against him or her and I am satisfied that in this particular case, Mr Brake had no idea of the extent of the employer's unease about his behaviour.

[42] Indeed, all of the evidence suggests that the employer was either unwilling or unable to confront Mr Brake and deal properly with issues that were of concern. Whether or not Mr Brake had the appropriate interpersonal skills to deal properly with the firm's clients, staff and partners is not the issue. The issue is whether Mr Brake

was ever properly and fairly advised of the concerns that the firm had about his behaviour.

[43] I am satisfied, for the reasons I have just enunciated, that Mr Brake did not find out the extent of the firm's concerns about his behaviour until well after the dismissal (in fact, until preparations were under way for the investigation meeting), by which time, of course, it was far too late.

[44] I think the firm exacerbated its inadequacies in that regard by failing to engage properly with Mr Brake at the final disciplinary meeting where a reasonable exchange of views with the partners saying what they actually thought and felt about Mr Brake's behaviour might well have put both parties into a better environment for resolving the employment relationship problem.

[45] As it was, I am absolutely satisfied that the process used by the firm was completely unjust, denying as it did any opportunity for Mr Brake to be advised of the nature and extent of the allegations against him so that he could have some reasonable opportunity to respond to them and, insofar as that was possible, put them right.

[46] No such opportunity was given and therefore the dismissal must be held to be unsafe.

[47] I am satisfied that Mr Brake has proved the existence of a personal grievance by reason of having been unjustifiably dismissed and that he is, in consequence, entitled to remedies.

[48] However, before considering the question of remedies, I must reflect on whether Mr Brake's own behaviour has contributed in any way to the dismissal. In the unusual circumstances of this case, I am not satisfied that Mr Brake's behaviour has contributed to the dismissal. Certainly, Mr Brake's behaviour in the workplace, had he been told about it and chosen to do nothing about it, might have been seen to impact on contribution. However, that was not the position in the present case so I hold that there was no contribution from Mr Brake.

[49] Mr Brake seeks compensation of \$15,000 and a significant contribution for lost wages. He estimates his wages loss at \$92,000. The evidence of Mr Brake's emotional trauma as a consequence of the dismissal is palpable; the circumstances in

which his employment ended caused him great distress and the impact of it was magnified by the small, close knit community in which it happened.

[50] Furthermore, the very size of the community (and Mr Brake's commitment to it) made finding a new position problematical. In the result, Mr Brake chose (in the absence of any viable alternative), to establish his own accounting firm and it is the struggle to make that firm sustainable which grounds his very significant wages loss claim.

[51] However, it is not appropriate for the unsuccessful respondent to have to fund Mr Brake's failure to make his own firm profitable. The dismissal happened in October 2007 and I have reached the conclusion it was unjustified. In the 17 months or so since that date, Mr Brake has struggled to make his own practice financially sustainable. The law requires me to consider what remuneration Mr Brake has lost and it would, I hold, be dangerous to try to relate that loss to the currently unprofitable nature of Mr Brake's new firm.

[52] I am disposed to think the only proper course of action is to exercise my discretion conservatively and make an order of wages contribution which, while it exceeds the three months provided for in s.128(2) of the Employment Relations Act 2000, does so by a relatively modest amount.

[53] I make the following orders to remedy Mr Brake's personal grievance:

- (a) Compensation under s.123(1)(c)(i) of the Employment Relations Act 2000 in the sum of \$9,000;
- (b) A contribution to lost wages in the sum of \$20,000 gross;
- (c) Reimbursement of the filing fee for the Employment Relations Authority in the sum of \$70.

Costs

[54] Costs are reserved.

James Crichton
Member of the Employment Relations Authority

