

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Chandra Kumar (Applicant)
AND Icehouse (New Zealand) Limited (Respondent)
REPRESENTATIVES David Fleming, Counsel for Applicant
Paul Tremewen, Counsel for Respondent
MEMBER OF AUTHORITY Leon Robinson
INVESTIGATION MEETING 4 March 2005
SUBMISSIONS RECEIVED 14 March 2005
DATE OF DETERMINATION 26 April 2005

DETERMINATION OF THE AUTHORITY

- 1. The Authority is unable to assist Mr Kumar in the resolution of his employment relationship problem.**
 - 2. The parties are to attempt to resolve any costs issues between them but failing agreement, Mr Tremewen is to lodge and serve a memorandum as to costs within 14 days of the date of this Determination. Mr Fleming is to lodge a memorandum in reply thereafter but within 28 days of the date of this Determination.**
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Employment Relationship Problem

[1] The respondent Icehouse (New Zealand) Limited (“Icehouse”) employed the applicant Mr Chandra Kumar (“Mr Kumar”) as a guillotine operator.

[2] Icehouse summarily dismissed Mr Kumar on 10 June 2004 for sexual harassment. Mr Kumar claims that he has an employment relationship problem because his dismissal is unjustifiable. He seeks the Authority’s assistance to resolve his employment relationship problem because the parties were unable to resolve the differences between them by the use of mediation.

[3] The Authority investigates to see whether Icehouse carried out a full and fair enquiry which disclosed information capable of being regarded as serious misconduct.

A full and fair enquiry?

[4] On the morning of Friday 4 June 2004 an employee Ms Rajeshwari Chand (“Ms Chand”) made a complaint to Ms Robyn Warin a manager at Icehouse (“Ms Warin”). The complaint was about Mr Kumar and that he had inappropriately touched Ms Chand.

[5] Ms Warin held a meeting with Mr Kumar, a supervisor Ms Dawn Pinfold and another employee Mr Joe Tuaru who attended as support person for Mr Kumar. Ms Warin advised Mr Kumar that there had been a complaint of sexual harassment about him and that he was suspended until 2.30 pm on 8 June 2004 when there would be a further meeting where he would have the opportunity to respond. Mr Kumar was not told who had made the complaint about him. He denied being in the cutting area at all that morning. Ms Warin had seen Mr Kumar in the cutting area. Mr Kumar then left the workplace. Ms Warin says she advised Mr Kumar to seek representation.

[6] On 8 June 2004 Mr Kumar attended the meeting with his union organiser Mr Mike Coleman, a minister from his church. Mr Terry Parkinson Icehouse’s managing director was also present. Mr Kumar responded to the allegation against him. He denied the incident occurred at all and continued to maintain he was not in the cutting area that morning.

[7] On 10 June 2004 Mr Kumar was advised that his employment was terminated. He was paid one week’s wages in lieu of notice.

Serious misconduct

[8] A letter dated 10 June 2004 stated the allegation against Mr Kumar as follows:-

- a. *On Friday 4th June we received a formal complaint of sexual harassment from one of our female employees. You were named as the person committing this offence. The full details of this incident were explained to you at a meeting on Tuesday 8th June. You were supported at that meeting by your church minister and your union organiser. At this meeting you were given the opportunity to respond to the complaint, you denied the incident occurred.*
- b. *We have accepted the formal complaint and do not accept your explanation of what took place. We believe that what took place, following a reasonable investigation and following a fair procedure, amounted to gross misconduct and as a result your employment has been terminated with one weeks pay in lieu of notice.*

[9] Ms Chand says she had told Ms Warin that while she had been bending down looking for a swatch under the cutting table, Mr Kumar had come up behind her and banged into her back. She said that it was quite forceful and not just a brush past. She also said Mr Kumar had said “*sorry Raj*”. She said that when she asked to speak with Ms Warin she was crying and upset. Ms Warin told the Authority Ms Chand had not been crying and that Ms Chand had told her that Mr Kumar had said “*sorry touch*”. Ms Warin also said Ms Chand had used the words “sexual harassment” although Ms Chand tells me she had not. Ms Chand says that she told Ms Warin she did not want Mr Kumar working at her cutting table. Ms Warin told Ms Chand they would wait for Mr Parkinson to return and sort the matter out.

[10] Ms Chand also told Ms Warin that she had complained to Dawn Pinfold about Mr Kumar’s behaviour the previous week.

[11] At the meeting on 8 June 2004, Mr Kumar was told that Ms Chand had complained that he had blocked her way and was standing over her. Ms Warin also told him that she had three previous complaints against him of a similar nature but the workers concerned did not wish to pursue the matter.

[12] Mr Kumar denied the allegation and denied being in the cutting table area at all. He said that he treated all the female staff as he would his daughters and that he was a man of the church. He said he never touched Ms Chand and had not blocked her way or stood over her.

[13] At the conclusion of the meeting on 8 June 2004 Mr Kumar was advised that he would be contacted after his explanations were considered.

[14] Icehouse had information before it that Mr Kumar had gone up behind Ms Chand and banged into her back forcefully and that he had said “*sorry touch*”. It also had Mr Kumar’s denial of the incident and his denial that he was in the area at all. Icehouse knew that Mr Kumar’s denial of his presence in the area was untrue.

[15] I am satisfied that it was open to Icehouse to conclude that serious misconduct had occurred based on the information received from Ms Chand and Mr Kumar’s denial and untrue statement. Icehouse was entitled to reject Mr Kumar’s denial. In doing so, I am satisfied that Icehouse had formed “an honest belief held on reasonable grounds” that the incident complained of had occurred. Having concluded that the incident complained of had occurred, I am satisfied that it was open to Icehouse to regard that conduct as serious misconduct.

Determination

[16] **I find that Icehouse conducted a full and fair enquiry which disclosed information capable of being regarded as serious misconduct. I conclude that Mr Kumar was not unjustifiably dismissed. The Authority is unable to assist Mr Kumar in the resolution of his employment relationship problem.**

Costs

[17] In the event that Icehouse seeks costs, the parties are encouraged to resolve any costs issues between them but failing agreement, Mr Tremewen is to lodge and serve a memorandum as to costs within 14 days of the date of this Determination. Mr Fleming is to lodge a memorandum in reply thereafter but within 28 days of the date of this Determination.

Leon Robinson
Member of Employment Relations Authority