

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2013] NZERA Auckland 376
5407245

BETWEEN PRAMENDRA (“BOBBY”)
KUMAR
Applicant

A N D SPOTLESS FACILITY
SERVICES (NZ) LIMITED
Respondent

Member of Authority: Rachel Larmer

Representatives: Jerry Noble, Counsel for Applicant
Richard Harrison, Counsel for Respondent

Investigation Meeting: 19 August 2013 at Auckland

Date of Determination: 22 August 2013

DETERMINATION OF THE AUTHORITY

- A. Spotless Facility Services (NZ) Limited’s summary dismissal of Mr Pramendra Kumar for serious misconduct was justified so his personal grievance claim for unjustified dismissal does not succeed.**

Employment relationship problem

[1] On 07 March 2011 Spotless Facility Services (NZ) Limited (Spotless) summarily dismissed Mr Pramendra (Bobby) Kumar for serious misconduct arising from a barbecue fire which occurred at the Fairview Lifestyle Village (Fairview) on 22 February 2011. Mr Kumar claims his dismissal was unjustified.

[2] Mr Kumar was a chef employed by Spotless to work at Fairview. He was employed by Spotless in June/July 2010 when the company took over the contract for

providing catering services at Fairview. Mr Kumar was employed directly by Fairview for the couple of years before Spotless took over the catering.

[3] There were many conflicts in the evidence, the material ones I resolve later. However, there is no dispute that on 22 February Mr Kumar was required to prepare a barbecue dinner for residents. He lit the barbecue which was situated outside the Fairview dining room and then left it unattended for a period of time. The fat tray under the barbecue caught on fire. The barbecue was so damaged it could not be used again. The wall outside the dining area also suffered over a \$1000 of smoke damage. One of the resident's statements describes the fire as "*very scary*".

Issues

[4] The following issues are to be determined:

- (a) Conflicts in the evidence and credibility issues;
- (b) Was Mr Kumar's dismissal justified?
- (c) If not, what if any remedies should be awarded?
- (d) Should costs be awarded?

Conflicts in the evidence and credibility issues

[5] The conflicts in the evidence are to be resolved on the balance of probabilities, i.e. by determining which version of events is more likely than not to be correct. I was not impressed by Mr Kumar's evidence because he changed his story a number of times and gave evidence which was contradictory. This contrasted with Ms Lithgow who appeared to have an accurate recall of these matters despite them occurring two and a half years ago. I have resolved the material conflicts below in favour of Spotless' evidence.

[6] The evening catering services at Fairview involve the provision of two sets of meals; one to hospital patients which are provided according to a strict timetable and the other to residents who elect to dine in either the dining room or their rooms. A morning chef is responsible for preparing the evening hospital meals (among other tasks) whilst the afternoon chef is responsible for preparing the evening meal for non hospital residents.

[7] On 22 February 2011 two chefs worked the normal morning roster (8.30am to 3pm for one chef and 6.30am to 2.30pm for the other) and Mr Kumar worked the afternoon shift (10.30am to 7pm). A kitchen assistant was also rostered on between 4pm and 7.30pm to assist with the dinner service for residents dining in the dining room.

[8] Mr Kumar claims that on 22 February he had to prepare a barbecue for around 25 people as well as 45 hospital meals which he also had to deliver. Spotless says Mr Kumar only had to prepare a barbecue for 18 residents because in accordance with normal practice the hospital meals had already been prepared by the morning chef. Spotless says Mr Kumar just had to heat the prepared hospital meal and deliver it on trolleys to the hospital section for the caregivers to distribute to the hospital residents.

[9] I prefer Spotless' evidence because it was supported by the meal charge sheet which clearly shows 18 barbecue meals were required on 22 February. The timesheets (which staff are paid from and which are signed off by both the staff member and their manager as accurate) show two chefs on duty as usual. Mr Kumar's evidence about which chefs were working and what time they left work on 22 February was contradicted by the timesheets so I consider it unreliable.

[10] Mr Kumar claims that before the 22 February incident he told his manager Mr Rashid Davids¹ the barbecue had caught fire on previous occasions, it needed to be serviced and properly cleaned, it was unsafe for the chef to have to cook in the kitchen and barbecue at the same time. Mr Kumar also claims that on 22 February he told Mr Davids it was too windy to barbecue.

[11] Ms Janice Lithgow, currently the Location Manager at the University Hall of Residence for Spotless, at the relevant time held the role of Operations Manager of Aged Care for Spotless in Auckland in 2011. She was the main liaison between Spotless and Fairview and she was one of the decision-makers (with Mr Davids) at the disciplinary investigation which resulted in Mr Kumar's summary dismissal.

[12] Ms Lithgow says she contacted Mr Davids after Mr Kumar's Statement of Problem had been filed with the Authority in May this year to clarify what (if any)

¹ Mr Davids is currently working in the mining industry in Australia. He was not in a location that enabled the Authority to contact him by conference call or video link nor had Spotless been able to contact him to brief his evidence. It was unclear when Mr Davids would be available to be contacted so Spotless elected to proceed with the investigation meeting in his absence.

discussions Mr Davids had with Mr Kumar about barbecue issues. Ms Lithgow says Mr Davids told her Mr Kumar had reported the incident the evening it occurred but had downplayed it. He also said that Mr Kumar had not raised any safety concerns with him about the barbecue, either on the day of the incident or prior to that.

[13] Ms Lithgow also made inquiries with the current Manager of Fairview who is an ex-Fire Department chief. He told Ms Lithgow he was certain there had not been any previous fires involving the barbecue because he would definitely have heard about it if they had happened.

[14] In terms of Mr Kumar's claim he told Mr Davids it was not safe for the chefs to be expected to cook in the kitchen and to use the barbecue at the same time, because the barbecue was 30 metres away from the kitchen area and could not be seen by those working in the kitchen, the chefs were never required to cook in the kitchen and on the barbecue at the same time.

[15] On 22 February Mr Kumar was just required to prepare a barbecue for 18 residents. He was not required to do any cooking in the kitchen. His kitchen activities were limited to plating up the hospital meals and loading them onto three trolleys which he then deposited with the caregivers in the hospital area who were responsible for distributing the meals.

[16] Mr Kumar gave new evidence to the Authority that he told Mr Davids that he did not want to prepare a barbecue because it was too windy. This evidence did not appear in his personal grievance letter, his statement of problem, or his witness statement. Nor was it something he raised at his disciplinary meeting. I found Mr Kumar's evidence about what he allegedly told Mr Davids about safety issues involving the barbecue unconvincing. I consider it more likely than not that Mr Kumar did not raise any concerns about the wind with Mr Davids when instructed to prepare a barbecue dinner on 22 February 2011.

[17] Although Mr Kumar engaged a lawyer to raise his dismissal grievance no reference to the concern about it being too windy or the other safety issues being previously raised with Mr Davids was made in the personal grievance letter. I also note that Mr Kumar did not complete an incident report or update the accident register to reflect any of the safety issues he claims to have raised with Mr Davids prior to 22 February.

[18] The information relayed by Ms Lithgow is hearsay so it must be treated with caution. However, I nevertheless prefer it over Mr Kumar's evidence for the reasons identified above. Human nature is such that if Mr Kumar had previously raised safety concerns about the barbecue with Mr Davids then I expect he would have emphasised that during the disciplinary meeting and when raising his grievance, but he did not do so.

[19] Mr Kumar's evidence about why he left a lit barbecue or how long it was left unattended has changed considerably over time. At least four completely different explanations have been given by Mr Kumar for leaving the lit barbecue unattended. These range from he left it for a moment to get meat from the kitchen through to he must have left it for approximately 20-25 minutes while he delivered hospital meals to a different floor.

[20] I consider Mr Kumar to be an unreliable witness because his explanations to the disciplinary meeting, in his personal grievance letter, his statement of problem, his witness statement, when questioned by the Authority, and when cross-examined all varied. Some of that may be attributed to the fact the events in issue occurred two and a half years ago.

[21] Mr Noble submits Mr Kumar "*clarified*" his evidence with increasing levels of detail. I do not accept that. Mr Kumar's story changed significantly depending on which stage in the process it was being told. Mr Kumar gave contradictory evidence about the reason for leaving the barbecue unattended, the period he left it unattended, and about how and when he found out about the fire, and what he did about it.

Was Mr Kumar's dismissal justified?

Justification test

[22] Section 103A of the Employment Relations Act 2000 (the Act) sets out the legal test of justification. This requires the Authority to objectively assess:

"[...] whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal [...] occurred."

Procedural fairness

[23] Mr Kumar had two main complaints about the procedural aspects of the disciplinary process and sanction. The first involves a claim that Mr Davids had assured him that there would be no adverse consequences as a result of the barbecue fire. The second relates to an allegation that Spotless breached s.103A(3)(d) of the Act because it did not genuinely consider Mr Kumar's explanation before dismissing him.

- (i) Did Mr Davids assure Mr Kumar there would not be any adverse consequences as a result of the barbecue fire?

[24] I find Mr Kumar's evidence in respect of this issue unsatisfactory. He initially says in his Statement of Problem and witness statement that when he reported the fire to Mr Davids on 22 February he was told "*Don't worry Bobby you were alone, I will sort it out.*" I find this does not amount to an assurance Mr Kumar would not face disciplinary action.

[25] When Mr Davids allegedly made the above comment he knew nothing about the incident other than what Mr Kumar reported. It is unlikely he would have formed a view on what if any action was required until after he had the opportunity to properly review the incident. I doubt a manager would have immediately minimised a fire in an aged care facility without making first making any inquiries into the incident.

[26] In any event, after that conversation Mr David wrote to Mr Kumar on 02 March inviting him to a disciplinary meeting to investigate three serious allegations that could potentially result in the termination of his employment. The letter encouraged Mr Kumar to bring a representative to the meeting given the seriousness of the allegations and the possible consequences.

[27] During the Authority's investigation meeting Mr Kumar raised for the first time an allegation that he spoke to Mr Davids about the disciplinary letter and was told not to worry about it as nothing would come of it. I do not accept that evidence for the following reasons:

- a. It was given by Mr Kumar immediately after his counsel told the Authority exactly the same thing;

- b. It was not raised by Mr Kumar in the disciplinary meeting, in his personal grievance letter, in the Statement of Problem or in his written evidence;
- c. At the beginning of the disciplinary meeting Ms Lithgow and Mr Davids expressed concern to Mr Kumar that he did not have a representative give the seriousness of the allegations. He was told his on-going employment may be in jeopardy and he was offered the chance to adjourn to arrange representation, which he declined;
- d. If Mr Davids had given the assurances Mr Kumar alleges he did then I expect Mr Kumar to have raised that when the seriousness of the matter was emphasised to him at the outset of the disciplinary meeting. He did not do so which strongly suggests Mr Davids had not given assurances to Mr Kumar which contradicted the content of the disciplinary letter and/or the advice given to him at the outset of the disciplinary meeting;
- e. I consider Mr Kumar was not a reliable witness.

[28] I consider it very unlikely Mr Davids assured Mr Kumar that there would be no consequences as a result of the barbecue fire. I consider Mr Davids actions in connection with the disciplinary letter, meeting and outcome all contradict Mr Kumar's evidence.

(ii) Did Spotless genuinely consider Mr Kumar's explanation?

[29] Mr Kumar initially claimed Mr Davids and Ms Lithgow did not listen to him and would not let him give his explanation during the disciplinary meeting. However, questioning of him established he had been taken separately through each of the three disciplinary concerns and had been given an opportunity to provide his explanation to each allegation. Mr Kumar subsequently acknowledged his complaint was really that his explanation was not accepted, because he had in fact been given a fair and reasonable opportunity to respond to each of the disciplinary allegations.

[30] Mr Kumar's explanation to the disciplinary concerns was that he was short staffed and overworked so he had to leave the barbecue unattended while he did other work.

[31] I accept Ms Lithgow's evidence that Mr Kumar's explanation was genuinely considered but was not accepted because there was nothing out of the ordinary on the day in terms of workload or staffing. In fact Mr Kumar had a lower than usual number of meals to prepare on 22 February. He only had to do a barbecue dinner for 18 residents when it was not uncommon for him to have to do dinner for double that number.

[32] Ms Lithgow and Mr Davids discussed the staffing issues and reviewed the rosters which satisfied them that Mr Kumar's explanation did not adequately explain why he would take the significant health and safety risk of leaving a lit barbecue unattended, especially in an environment involving an aged care facility.

[33] I find that Ms Lithgow and Mr Davids did genuinely consider Mr Kumar's explanation and they had good reasons for not accepting it as a satisfactory explanation. I consider the process used by Spotless when investigating the disciplinary concerns arising from the barbecue fire on 22 February was what a fair and reasonable employer could have done in all of the circumstances.

Substantive justification

[34] Mr Noble submits that Mr Kumar's actions cannot be fairly or reasonably be viewed as serious misconduct. I disagree.

[35] The context within which the incident arose is in my view critical. Mr Kumar left a lit barbecue unattended in a residential aged care facility. As Ms Lithgow explained, some of the residents have mild dementia and it is reasonably foreseeable one such resident could have approached the barbecue and possibly burnt themselves if there was no one around to protect them.

[36] I consider leaving an unattended fire in such circumstances is a serious issue and I can understand why Spotless concluded that Mr Kumar's actions in lighting a barbecue and then leaving it completely unattended amounted to serious misconduct. I do not consider there is anything unfair or unreasonable about that conclusion.

[37] I also consider that it was fair and reasonable for Spotless to conclude that Mr Kumar had other appropriate and realistic options available to him rather than leaving the barbecue unattended. He could have asked the kitchen assistant to keep an eye on the barbecue or he could have held off lighting the barbecue until he was in a

position to be there to mind it. He could also have stayed by the barbecue and asked the kitchen assistant to bring him anything he needed from the kitchen so he did not have to leave a lit barbecue unattended.

[38] Mr Kumar's sole explanation for leaving a lit barbecue unattended for a period of time is that he did not want to be late with dinner for the residents. It came out under cross-examination that his concern involved dinner being approximately 10 minutes late for four of the residents who had ordered room service. Spotless was entitled to view that as a manifestly inadequate explanation for a situation which raised serious health and safety concerns.

[39] Serious misconduct is conduct which fundamentally undermines the trust and confidence inherent in the employment relationship. Ms Lithgow gave evidence that she and Mr Davids concluded serious misconduct had occurred because they no longer trusted Mr Kumar to act in a safe and responsible manner which was of the utmost concern given he worked in an aged care facility. They consider that as an experienced chef who had worked for many years in an aged care facility Mr Kumar should have known not to leave naked flames unattended, particularly given the specific vulnerabilities of many of Fairview's residents.

[40] Spotless assessed Mr Kumar's actions in leaving the lit barbecue unattended as a serious health and safety risk. It rejected his explanation that he was overworked and understaffed. It did not accept Mr Kumar needed to light the barbecue and then leave it unattended rather than waiting until he was ready to barbecue the meat for the residents' dinner or arranging for someone else to oversee the barbecue. These are all conclusions a fair and reasonable employer could have reached in all the circumstances.

[41] I find that Spotless' conclusion that Mr Kumar had engaged in serious misconduct was justified.

Was summary dismissal justified?

[42] Mr Noble submits that summary dismissal was not within the range of responses open to a fair and reasonable employer in all of the circumstances. He says that if a disciplinary sanction was to have been imposed then Mr Kumar should have been given a warning before being dismissed because he had worked at Fairview for a number of years without incident. I disagree.

[43] I accept Mr Harrison's submissions that summary dismissal is within the range of potential responses open to a fair and reasonable employer in all of the circumstances because:

- (a) A lit barbecue that is left unattended is by its very nature a potentially serious safety risk because it is an open fire that is likely to be surrounded by accelerants such as oil and fat. One of the residents reports there was a bottle of oil on the tray of the barbecue when it caught fire. Mr Kumar says he knew the fat tray of this particular barbecue was dirty and had caused fires twice before. Mr Kumar also says he was concerned about barbecuing in windy conditions yet he still lit it and left it unattended;
- (b) In the context of a retirement home where there are elderly and less mobile persons in the vicinity the safety risk associated with a barbecue fire is magnified. The particular features of the environment in which the serious misconduct occurred are relevant to Spotless' assessment of Mr Kumar's safety to continue working in that environment. If the wall that had suffered smoke damage had actually caught on fire or if the fire had spread in some other way (perhaps by wind), the outcome could have been potentially disastrous;
- (c) Mr Kumar's actions even without the spread of fire put at risk patient wellbeing which is a very serious issue given the nature of his particular work environment;
- (d) Mr Kumar's actions posed such a serious health and safety risk that it was fair and reasonable for Spotless to conclude he had fundamentally breached the implied obligation of trust and confidence required of him. I consider this was exacerbated by Mr Kumar's lack of acknowledgment of any wrongdoing and complete lack of any appreciation that his actions had posed a significant health and safety risk.
- (e) Mr Kumar's position was that this was a very minor matter which had been blown out of all proportion. He could not accept there were any

safety issues involved in leaving a lit barbecue unattended in an aged care facility which included residents who had dementia.

- (f) Ms Lithgow explained that apart from the risk of fire there was also the real and possible more likely risk a resident (for example someone with dementia) could have hurt themselves by approaching the lit barbecue without supervision. I am satisfied Mr Kumar's lack of insight meant it was fair and reasonable for Spotless to conclude that it could not trust or be confident that Mr Kumar would not commit a similar act in future.
- (g) Ms Lithgow says summary dismissal was appropriate because she was concerned that Mr Kumar demonstrated no understanding of the health and safety concerns, demonstrated no remorse, and gave no undertakings or assurances that such actions would not recur in future. Ms Lithgow says she could not live with herself if a resident was burned in future and she was also very concerned about what would happen if a fire took hold at Fairview given the frailties and vulnerabilities of its residents.

Outcome

[44] Spotless has discharged its onus of justifying its finding of serious misconduct and its decision to impose the ultimate sanction of summary dismissal. I find that Spotless' actions, and how it acted, were what a fair and reasonable employer could have done in all the circumstances at the time Mr Kumar was dismissed². Accordingly, Mr Kumar's unjustified dismissal claim does not succeed.

Costs

[45] Spotless does not seek costs because Mr Kumar is legally aided.

Rachel Larmer
Member of the Employment Relations Authority

² S.103A of the Act.