

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2013] NZERA Auckland 401
5411426

BETWEEN HEMANT KUMAR
Applicant

AND THE SURREY HOTEL
LIMITED
Respondent

Member of Authority: R A Monaghan

Representatives: V Raman, counsel for applicant
B Smith, counsel for respondent

Investigation Meeting: 26 July 2013

Date: 5 September 2013

DETERMINATION OF THE AUTHORITY

A. The Surrey Hotel Limited's dismissal of Mr Kumar was justified.

Employment relationship problem

[1] Hemant Kumar's former employer, The Surrey Hotel Limited (TSHL) dismissed him because of his threatening behaviour towards a manager. Mr Kumar denies the behaviour and says TSHL was motivated by a wish to get rid of him. He says the dismissal was unjustified.

[2] Mr Kumar was employed as a part time chef de partie, or line cook, in the kitchen of the hotel operated by TSHL. He worked on the morning shift from Monday – Thursday.

[3] At about 10 pm on Sunday 18 November 2012 he contacted the night shift manager to say he would not be attending work on Monday 19 November. When he returned to work on Tuesday 20 November the general manager, Denise King, sought to speak to him about what she considered a high number of recent absences. He explained that he was absent the previous day because his house had been burgled on

18 November. Ms King enquired why this meant he could not work at all on 19 November and why he had not contacted either herself or the executive chef about the absence as he should have. She says that he responded by accusing her of being racist and saying he would 'go behind bars' because of her.

[4] Ms King understood the reference to mean Mr Kumar would act against her in a way that could put him in jail, and was disturbed by what she considered a threat. She felt intimidated and left the kitchen.

[5] The executive chef, Craig Hughes, says Mr Kumar went to speak to him. Mr Kumar was extremely angry and told Mr Hughes he would 'slap' Ms King. Mr Hughes told Mr Kumar he would have to report that statement to Ms King, and left to do so. His view of Mr Kumar's state of mind was such that he suggested to Ms King that she stay out of the kitchen. He says that when he returned and told Mr Kumar of the report, Mr Kumar said 'something bad' was going to happen in the kitchen. Mr Hughes interpreted that as a threat.

[6] These alleged threats were brought to the attention of the company's chairman, Richard Langridge. On Mr Langridge's instruction, by letter also dated 20 November Ms King informed Mr Kumar he was suspended. The letter advised that a meeting to discuss the threats, and which were set out in the letter, was sought on 22 November. Mr Kumar was advised that disciplinary action could follow and invited to bring a support person.

[7] A meeting duly went ahead on 22 November.

[8] Mr Langridge conducted the meeting. He raised with Mr Kumar the threats said to have been made to Ms King and Mr Hughes. Mr Kumar denied making the threats. He said Ms King was lying and was trying to get rid of him.

[9] Mr Langridge took a break to consider his response. He noted that Mr Kumar had received a first written warning on 16 July 2012 for shouting at and abusing the front office manager, and a second written warning on 1 August 2012 for ignoring the executive chef's instructions. He did not accept Mr Kumar's denials, and believed Mr Kumar was refusing to accept responsibility for actions which were inappropriate. He concluded that Mr Kumar's background of angry behaviour posed a risk to the safety

of employees in the workplace, particularly as Mr Kumar worked in a kitchen and knives were readily accessible. For these reasons, dismissal was appropriate.

[10] Mr Langridge returned to the meeting and advised Mr Kumar accordingly.

[11] The dismissal took effect immediately.

Issues

[12] The test of justification for the dismissal is set out in s 103A of the Employment Relations Act 2000. It concerns 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. In applying the test the Authority must consider whether the employer: sufficiently investigated the allegations before dismissing the employee; raised its concerns with the employee before dismissing the employee; gave the employee a reasonable opportunity to respond; and genuinely considered the explanation before dismissing the employee.¹

[13] The issues are:

- (a) did TSHL follow a fair and reasonable procedure in reaching its conclusions;
- (b) was the finding that Mr Kumar acted as alleged reasonably open to TSHL;
- (c) was dismissal the action a fair and reasonable employer could take; and
- (d) if not, what is the appropriate remedy.

Did TSHL follow a fair and reasonable procedure

[14] Mr Kumar says a fair and reasonable procedure was not followed because:

- he was not given a fair opportunity to respond to the allegations against him;
- his explanation was not genuinely considered; and
- no full investigation was carried out.

¹ s 103A(3)

Opportunity to respond

[15] Mr Kumar says that, rather than being asked at the disciplinary meeting whether he had made the threats in question, he was subjected to attempts to force admissions from him. He became frustrated and angry.

[16] Mr Langridge prepared a note of the disciplinary meeting shortly after the meeting. The accuracy of the contents was discussed during the investigation meeting in the Authority, and the following account draws in part on the aspects of it which I have accepted.

[17] The three statements of concern were put to Mr Kumar, Mr Kumar was told such statements were unacceptable, and the concerns about his previous conduct were referred to. Mr Langridge said in evidence that, after he put these matters to Mr Kumar, he asked Mr Kumar what he had to say.

[18] Mr Kumar gave a response. It amounted to a bare denial, together with the accusation that Ms King and Mr Langridge wanted to get rid of him. The meeting note summarises the remainder of the discussion by recording: '*Hemant would not discuss the incident he just kept making statements that were irrelevant to the meeting*'. Mr Langridge explained that passage by saying Mr Kumar kept repeating that he was a good employee and worked hard. Mr Kumar also sought to debate the merits of the concerns about his previous conduct. Mr Langridge said he was obliged to redirect Mr Kumar's attention to the threats, and felt the meeting was going nowhere.

[19] Mr Langridge's view that Mr Kumar was making 'irrelevant' statements, and his attempts to return Mr Kumar to the threats, is probably the reason for Mr Kumar's perception that Mr Langridge was merely attempting to force admissions from him. However Mr Langridge was faced with a bare denial of the 20 November statements, and was attempting to obtain more information about the events of that day. I do not accept that approach amounted to an attempt to force admissions from Mr Kumar.

[20] As for the 'irrelevant' statements arising in the attempt to debate the merits of the company's earlier concerns, these flowed from a letter dated 13 July 2012 which Mr Kumar had written to Mr Langridge. The letter pre-dated the warnings but commented on the incidents addressed in the warnings. It said Ms King was bullying

and abusing Mr Kumar, and took the view, wrongly, that there had been no response. Mr Langridge had responded promptly, so was unaware of any reason why these matters would be raised again four months later.

[21] I accept those matters were being raised in support of Mr Kumar's view that Ms King wanted to get rid of him. However, if Mr Langridge's attempts to bring Mr Kumar's attention back to the events of 20 November limited Mr Kumar's ability to explain why the related allegations were not true, in all of the circumstances I consider the flaw to be minor. Otherwise I find Mr Kumar had an opportunity to respond.

Genuine consideration of explanation

[22] The explanation provided to the employer at the time amounted to a denial and a counter accusation.

[23] Genuine consideration was given to that explanation.

No full investigation

[24] Most of the submissions on behalf of Mr Kumar addressed alleged failures to investigate the merits of the concerns about his previous conduct, and in particular the warnings. However no personal grievance was raised in respect of the warnings. Further, TSHL was not obliged to investigate the merits of the warnings as part of its investigation into the alleged conduct of 20 November. In investigating that conduct it was obliged to consider whether Ms King and Mr Hughes had fabricated their allegations. Mr Langridge found their accounts to be credible, as he was entitled to.

[25] Accordingly I do not accept the submissions.

[26] Mr Kumar also says Mr Hughes should have been called to the meeting. Nothing would have been gained by doing that. It is better to say Mr Langridge should have interviewed Mr Hughes again rather than apparently relying on his written account, particularly in the light of Mr Kumar's denials. In all of the circumstances I consider that flaw to be minor.

Was the finding that Mr Kumar acted as alleged reasonably open to TSHL

[27] Mr Langridge's finding was based on his preference for the accounts of Ms King and Mr Hughes. That finding was reasonably open to him.

Was dismissal the action a fair and reasonable employer could take

[28] I have noted some flaws in the disciplinary process. Section 103A(5) sets out the approach when flaws are identified. It reads:

The Authority ... must not determine a dismissal or an action to be unjustifiable under this section solely because of defects in the process followed by the employer if the defects were –

(a) minor; and

(b) did not result in the employee being treated unfairly.

[29] I have characterised the flaws here as minor. If, in addition, the flaws did not result in any unfair treatment to Mr Kumar, they cannot on their own lead to a finding of unjustified dismissal.

[30] Importantly in that respect Mr Kumar had an opportunity to put his response, and his denial and counter accusation was noted. There was sufficient in the evidence to indicate the warnings and concerns he sought to debate were not imposed arbitrarily and without reason. They were not the subject of a personal grievance. Even if there was some ground for saying the warnings were unjustified (and I do not say there was) this does not amount to evidence that the allegations of 20 November were lies. In turn, any limit on Mr Kumar's ability to expand more fully on why the allegations were lies - or fabricated in order to get rid of him - did not result in his being treated unfairly.

[31] Finally, on the evidence in the Authority I consider it likely there was an exchange between Ms King and Mr Kumar after Ms King questioned Mr Kumar's absence the previous day. Mr Kumar believed he had a good reason for the absence, and that his approach to the night shift manager was sufficient to convey his intentions. Ms King was probably disinclined to believe Mr Kumar, and probably indicated as much. In any event she believed Mr Kumar knew he should have reported his absence to her or to Mr Hughes, and was concerned because the unexpected shortage of staff that morning meant the housekeeper had been obliged to

prepare breakfast. Mr Kumar took exception to Ms King's response, an argument developed and Mr Kumar said the words attributed to him.

[32] Mr Kumar said further that he went to speak to Mr Hughes, to ask if he knew why Ms King had behaved in that way. Mr Hughes said he knew nothing about it. In his written statement of evidence Mr Kumar said he asked Mr Hughes '*where should I go, she just came here and slapped my face and left.*' In his oral evidence Mr Kumar said he told Mr Hughes that Ms King's words were '*like a slap in the face*'. His oral account of the statement '*something bad will happen in the kitchen*' was that he wondered what was happening in the kitchen and was concerned because Mr Hughes was not protecting him. He denied being angry.

[33] Mr Hughes said in evidence that Mr Kumar was extremely angry when he spoke to him. Mr Kumar told Mr Hughes that if Ms King spoke to him like that again he would '*slap*' her. Mr Hughes also confirmed that Mr Kumar said '*something bad*' was going to happen in the kitchen. He did not interpret that statement as a generalised expression of a fear of Mr Kumar's, as Mr Kumar said it was.

[34] I did not find credible Mr Kumar's statement that he informed Mr Hughes that Ms King's words were '*like a slap in the face*'. I find it more likely that Mr Kumar became angry when Ms King questioned him. Further, Mr Hughes' evidence, which I had no reason to disbelieve, was clear to the effect that Mr Kumar was angry. Similarly I prefer Mr Hughes' evidence that Mr Kumar said he would '*slap*' Ms King, as well as his interpretation of Mr Kumar's statement that '*something bad*' would happen.

[35] I add that no attempt was made to explain this to Mr Langridge, when it could have been. I do not accept that anything in Mr Langridge's conduct of the 22 November meeting prevented such an attempt.

[36] Mr Kumar's credibility also suffered from his unconvincing attempts to show the Authority that TSHL sought to get rid of him. He asserted, for example, that his job was advertised earlier in November 2012, when the advertisement in question sought someone for weekend work. That position clearly was not his, and there was a genuine vacancy for a weekend worker. Mr Kumar also asserted that an attempt had been made to shorten his hours of work, when in fact some months earlier there had

been a discussion about the possibility of additional hours which did not proceed. When that was pointed out in evidence he then asserted that he was dismissed because of a request for extra hours.

[37] Again, no attempt was made to raise these matters with Mr Langridge when they could have been. I do not accept that anything in Mr Langridge's conduct of the 22 November meeting prevented their being raised.

[38] For completeness I find that the allegations of racism, harassment and bullying against Ms King were unfounded. The actions complained of amounted to Ms King's attempts as manager to address aspects of Mr Kumar's performance and behaviour. She was not motivated by racism, and her actions did not amount to harassment or bullying.

[39] Overall I find it more likely than not that the conduct complained of occurred. Conduct of that kind was inconsistent with Mr Kumar's obligations towards his employer. I do not accept the allegations against him were fabricated in an attempt to get rid of him. I do not accept that any shortcomings in the way in which Mr Langridge reached the same conclusion amounted to unfair treatment of Mr Kumar.

[40] For these reasons I find dismissal was the action a fair and reasonable employer could take in all of the circumstances at the time.

Costs

[41] Costs are reserved.

[42] The parties are invited to resolve the matter. If they are unable to do so any party seeking an order for costs shall have 28 days from the date of this determination in which to file and serve a memorandum on the matter. The other party shall have 14 days from the date of receipt of the memorandum in which to file and serve a memorandum in reply.

R A Monaghan

Member of the Employment Relations Authority