

- [3] In the preliminary investigation Mr Kumar said he was now seeking reinstatement as well as the compensation for humiliation, lost earnings and cost specified in his statement of problem filed on 12 November 2007.
- [4] Further mediation did not settle their substantive problem.

Relevant Events

- [5] On 19 November 2003 Mr Kumar was employed by Transfield as a senior chef at Waiouru military base. In February 2006 he was promoted to kitchen manager.
- [6] On 10 & 11 April 2007 Mr Kumar's manager, Mr Craig Woolliams and another Transfield employee met with two other staff who made serious allegations about the applicant.
- [7] In a letter dated 11 April 2007 Mr Kumar was advised of an investigation by the company into 3, broadly detailed, allegations. He was told that the matters were serious, could result in his termination and encouraged to bring a support person.
- [8] Four subsequent meetings then took place involving Mr Kumar and his employer: at all times Mr Kumar asserted his innocence in respect of the allegations.
- [9] As a result of the investigation, including a series of interviews with the applicant and others, Transfield dropped one of the allegations against Mr Kumar and elected not to pursue others.
- [10] Transfield summarily dismissed Mr Kumar in respect of two surviving allegations.
- [11] The decision to dismiss the applicant was that of Mr Woolliams. As was made clear in Mr Woolliams' witness statement and during my investigation, his decision to dismiss in respect of one of the allegations was based on, amongst conclusions, the following:
- 3 invoices showed Mr Kumar had ordered food items (four packets of nutrigrain cereal, 2 jars of gherkins and 2 jars of olives, potatoes and onions).
 - Staff junior to the applicant alleged they had seen Mr Kumar take those items from the workplace.

- The items were no longer in the workplace.
- Mr Woolliams did not find credible Mr Kumar's explanation he had used the nutrigrain to make dessert crumble. That was because: Mr Woolliams is a trained chef and believes nutrigrain would not be a suitable ingredient for a crumble; a large quantity was involved (2.6 kilograms); no staff in the small workplace had seen the applicant pouring the nutrigrain into a whizz to make the crumble; and Mr Kumar could not provide a menu showing he had served crumble.
- Mr Woolliams did not find credible Mr Kumar's explanation for the high usage of gherkins and olives, etc, when those items were ordered in February and again in April.

[12] The decision to dismiss the applicant in respect of the other allegation was based on, amongst others, the following findings:

- Mr Kumar and other staff were required to fill in weekly timesheets for the hours worked. The system requires staff to anticipate some of the hours claimed. If actual hours are different to those claimed they are required to advise an administrator. While nothing is in writing all staff were aware of the requirements.
- The complainants alleged Mr Kumar recorded hours in his timesheet he had not worked in respect of 25 and 30 March and 5 April 2007.
- In respect of 25 March, Mr Woolliams interviewed staff on duty that day and reached the conclusion – from their evidence, and because he did accept that of the applicant – that Mr Kumar had worked only 3 hours while claiming 8.
- In respect of 5 April, Mr Kumar said in an interview with Mr Woolliams that in fact he worked from 8.00 a.m. until 4.30 p.m. and not, as he originally recorded, from 5.30 a.m. to 2.30 p.m.

Discussion and Findings

[13] Section 103 A of the Employment Relations Act 2000 sets out the question of whether a dismissal is justifiable: it must be determined on an objective basis by

considering whether the employer's actions were what a fair and reasonable employer would have done in all the circumstances at the time.

[14] Mr Kumar and those who attended the company's investigation meetings as his supporters were bitterly critical of the respondent's investigation process. However, I am satisfied that – by the completion of the company's investigation – the applicant had enjoyed a proper, if robust, opportunity to comment on the allegations made against him. In particular, I find Mr Kumar was able to put to the company any information he wanted to present, and that he was not disadvantaged by a delay in the identity of the complainants and the full detail of their statements being put to him.

[15] However, notwithstanding the overall fairness of its investigation process, I am satisfied for the following reasons that the company's decision to dismiss Mr Kumar was unjustified:

- It was not for Mr Kumar to prove his innocence but for the company to establish the serious allegations against him.
- Serious allegations require corresponding levels of supporting evidence, if they are to be upheld. The standard of proof an employer must establish to justify a dismissal is the balance of probabilities. Where a serious charge is the basis of the justification for a dismissal then the evidence in support of it must be as convincing as the charge is grave: *NZ (with exceptions) Shipwrights etc Union v Honda NZ Ltd* [1989] 3 NZILR 82.
- In this instance Mr Woolliams' decision was relatively narrowly based: it relied on preferring the accounts of two employees junior to Mr Kumar to those of the applicant, and from the conclusions from Mr Woolliams' own investigation as well as the answers provided by the applicant to his questions.
- Mr Woolliams had no prior reasons to doubt Mr Kumar's credibility (or that of the complainants): the applicant had not been warned previously in respect of accounting for stock or time keeping or related offences. Mr Woolliams was therefore faced with equally competitive credibility claims. And it was not a contest that could simply be determined by numbers.
- Mr Woolliams' own assessments of use of nutrigrain and the consumption of gherkins and olives, etc does not amount, I find, to an objective criteria; while no

doubt professional, they remained subjective. That is because what Mr Kumar said he had done was not something Mr Woolliams in his experience would have done or expected: but that difference is not fairly and reasonably determinative of the matter. That is because no objective calculation was attempted by the respondent, such as, for example, developing a formula along the following lines: over a defined period, measuring A number of diners x B number of meals produced which did or did not incorporate the foodstuffs alleged to have been taken by him, equalling (or not) the number of items ordered that could have been fairly and reasonably consumed, in light of those figures.

- Mr Kumar was able to account for some of the allegations against him at least to the point that Transfield elected to put those matters to one side and make a finding in respect of only two, that the applicant removed company property without authority and claimed hours he had not worked.
- It was unfair of Mr Woolliams to expect Mr Kumar to produce menus in support of his claim of using nutrigrain as a crumble because, as his own investigation disclosed, records of menus were not kept on computer but were instead overwritten with each successive change.
- In respect of the timekeeping allegation, Mr Woolliams' investigation clearly established Mr Kumar was at work for some of the day, because of eye-witnesses. I do not accept the respondent's claim that no eye witnesses for the remainder of the period objectively established – on a balance of probabilities basis – that Mr Kumar did not work all of the hours he claimed. That is a step too far. As it happened, one of the complainant's gave evidence to the Authority he had seen Mr Kumar at home during the afternoon of that day cutting grass, and that he had coffee with him. It is not clear why that claim did not appear in the original allegations put by that complainant to Transfield, or emerge in Mr Woolliams' interview of him: it was not elucidated in the latter's investigation. It is a significant omission, because it is a highly graphic claim, albeit one the respondent was not aware of at the time it dismissed Mr Kumar but one it can fairly have expected to obtain.
- The admission by Mr Kumar of claiming different hours from those worked is not the same as saying Mr Kumar claimed hours he did not work. That is because Mr Kumar's admission was to working a different period than that claimed but one of the same duration. It would not be fair and reasonable to rely on that admission to support a finding Mr Kumar claimed hours he did not work, on another occasion.

- In summary, Mr Woolliams may have had strong personal reasons for doubting Mr Kumar's accounts but they do not amount, on an objective basis, to what a fair and reasonable employer would have done in all the circumstances at the time.

Remedies

Reinstatement

- [16] Mr Kumar seeks reinstatement to what he understands is a similar position currently being advertised in a different mess. Mr Kumar disputes the genuineness of the restructuring that has seen – the company says – his original position disappear. He also relies on Mr Woolliams no longer being an employee of Transfield to support his claim that (past) disharmony between the parties is no barrier to his successful reinstatement.
- [17] In the alternative Mr Kumar seeks redundancy compensation per his employment agreement with the company.
- [18] Transfield says the restructuring is genuine and that it chose to carry out the changes through natural attrition rather than forced redundancies. A recent advertisement for a kitchen manager was an error, resulting from ignorance by one staff member in the absence of another of the decision to restructure through natural attrition. The advertised position is, in reality, that of head chef and is significantly different therefore from the one previously occupied by Mr Kumar; an appointment has been made (15 September 2008).
- [19] Reinstatement is the primary remedy: s. 125 of the Act. However, as I have no reason to doubt the genuineness of Transfield's restructuring I accept Mr Kumar's original position – and almost all of those like it – no longer exist. It is therefore not practicable to reinstate Mr Kumar: ss. 125 (2) of the Act applied.
- [20] As Mr Kumar cannot be reinstated because his position was made redundant following his dismissal, it follows that – having been unjustifiably dismissed and no longer able to return to his position because it was restructured out of existence – Mr Kumar is entitled to redundancy compensation under clause 19 of his employment agreement (document 4 in the company's bundle): leave is reserved to the parties if agreement cannot be reached on the quantum to be paid to the applicant.

Humiliation

- [21] Mr Kumar claims \$35,000 compensation for humiliation. He argues an award higher than that usually sought is justified because of several factors including the effect of the unjustified dismissal on him, his wife (who continues to work for Transfield) and his family, his (and their) standing in a small community and the aggressive nature of his dismissal.
- [22] Having regard to the extensive evidence of Mr Kumar's humiliation I am satisfied that there are no grounds for an exceptional award but that Mr Kumar's unjustified dismissal seriously impacted on him: \$14,000 compensation is therefore fairly and reasonably payable.

Lost Wages

- [23] Mr Kumar accepts he failed to promptly obtain employment (when he could have) following his dismissal (par 6.7 of counsel's closing submissions dated 10 September 2008). Mr Kumar says the shock of his dismissal meant he was not immediately fit to work for the month following and that he felt too shamed to pursue work in the region. He therefore relies on s. 128 of the Act to recover one month's lost wages.
- [24] Despite the absence of medical records, I am satisfied that Mr Kumar's claim for one-month's lost salary is fairly made out. I accept that Mr Kumar would have been shocked by his dismissal and that he would have taken some time to come to grips with his situation. Lost remuneration is therefore fairly calculated as the one month claimed by the applicant, less any earnings he received during that period following his unjustified dismissal.

Contribution

- [25] The evidence discloses no reason for finding Mr Kumar contributed in any way to his unjustified dismissal: s. 124 of the Act applied.

Determination

- [26] I find that Mr Kumar was unjustifiably dismissed and direct Transfield to pay to him the following monies:

- Redundancy pay as provided for in the applicant's employment agreement;
- One month's wages; and
- Compensation for humiliation of \$14,000 (fourteen thousand dollars).

[27] Leave is reserved to the parties if agreement on the quantum of the awards set out above is not promptly forthcoming;

[28] The parties ask that costs be reserved.

Denis Asher

Member of the Employment Relations Authority