

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 21/09
5130845

BETWEEN KEVIN ROSS
 Applicant

AND

 Respondent
 DUA SERVICES LIMITED

Member of Authority: Dzintra King

Representatives: Mark Nutsford, Advocate for Applicant
 No appearance by Respondent

Investigation Meeting: 20 January 2009

Determination: 23 January 2009

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant, Mr Kevin Ross, says he has been unjustifiably dismissed by the respondent, Dua Services Ltd.

[2] No Statement in Reply was received from the respondent within the specified time nor was there any reply to a query from the Authority as to whether the respondent wanted to defend the matter.

[3] The respondent was notified of the hearing date and was given a schedule for the filing and exchanging of witness briefs. Nothing was provided by the respondent.

[4] The day before the hearing the Authority received a fax from Mr Dua. The fax not did provide the fax number of the sender nor were any contact details provided. Mr Dua said his father had had a stroke and two of his three witnesses were not available and he would not be attending the investigation. He attached a lengthy letter, which for the first time set out the respondent's views of the matter.

[5] A message was left on a cell phone and a letter was sent by urgent courier asking Mr Dua to notify the Authority of the date of his father's stroke and why that event would preclude him from attending the investigation. Mr Dua was also told that if the Authority did not hear from him within an hour the meeting would go ahead as scheduled.

[6] No reply was received and the couriered letter was returned, the courier having been advised that Mr Dua had moved.

[7] I proceeded to hear the matter and this determination is based on the evidence of the applicant.

Background

[8] Dua Services Limited provides a distribution service for the NZ Herald. Mr Ross worked as a supervisor and carried out paper runs.

[9] In September 2006 Mr Dua, a director of the respondent, introduced a friend of his, Mr Shiv Mattu, to the employees. He was introduced as a friend of Mr Dua's who wanted to learn what the job was about and how the business functioned.

[10] On 31 October 2008 Mr Ross had an accident at work which resulted in him being hospitalised. Mr Dua and Mr Mattu visited him in hospital. Mr Ross was discharged from hospital on 9 November and he was declared fit to resume work on 7 December.

[11] Prior to that, Mr Ross and Mr Dua had had a telephone conversation in the course of which Mr Ross told Mr Dua he would be back at work in a couple of weeks. Before that occurred, Mr Dua went to India.

[12] On 5 December Mr Ross contacted Mr Mattu about his return to work and said he would start on Thursday 7 December.

[13] When Mr Ross turned up at work Mr Mattu asked to see his medical certificate and said he could not resume work until he had sighted it. Mr Ross was frustrated but returned to his home to get the certificate.

[14] He offered the certificate to Mr Mattu upon his return to work. Mr Mattu said he needed a copy to send to Mr Dua, who would need to see it before work could

commence. Mr Ross said this posed a problem as it was 2am. Mr Ross wanted to know if he would be paid. Mr Mattu said that could be arranged. Mr Ross said it was unclear whether he was being allowed to return to work or not. He became angry and abused Mr Mattu. At that stage a colleague suggested he returned home and they would sort it out the next day.

[15] At 3.15am Mr Ross received a phone call from Mr Dua threatening him with a trespass notice.

[16] Later that day Mr Ross contacted ACC and asked about the requirements for returning to work. He was advised to get the employer to sign a form saying he had gone to work but had been sent home.

[17] The following day, Friday 8 December, Mr Ross went to work and asked Mr Mattu to sign the form. He refused. He asked Mr Mattu whether he represented Mr Dua and received a noncommittal answer. Mr Ross said he became very angry and abused Mr Mattu.

[18] At 2.40 and 2.43am Mr Ross received 2 messages from Mr Dua. The first referred to getting the police to issue a trespass order and the second offered him a run with no managerial responsibilities when the incumbent's notice was finished.

[19] On Saturday Mr Mattu rang and asked Mr Ross to meet him. Mr Ross refused.

[20] On the Sunday Mr Mattu arrived at Mr Ross's house and presented him with a trespass notice and an email from Mr Dua dismissing him. The email had been sent on the Friday.

[21] The email said Mr Ross had been shouting racist remarks, had threatened Mr Mattu and that Mr Dua did not want to employ a racist.

[22] Mr Ross said that apart from asking Mr Mattu whether he understood English he had said nothing that could be construed as racist but did admit he had sworn at Mr Mattu.

[23] Mr Ross said that at no stage had Mr Dua told him his job was in jeopardy or asked him for an explanation of the behaviour that had been reported to him by Mr Mattu.

Decision

[24] It is clear that a fair process was not followed in dismissing Mr Ross. Mr Ross was not given an opportunity to explain that he had not been permitted to return to work and that his medical certificate had not been accepted.

[25] Mr Dua knew Mr Ross was returning to work and should have made appropriate arrangements for that during his absence in India.

[26] The dismissal was unjustified.

[27] While Mr Ross's frustration is understandable it does not excuse abusing Mr Mattu. As Mr Ross's representative acknowledged, that constitutes contributory behaviour.

[28] Mr Ross is entitled to compensation for humiliation and distress pursuant to s 123 (1) (c) (i). I set that at \$4,000.

[29] Mr Ross looked for and found other employment, which he commenced on 8 February. His claim for lost remuneration totals \$6,300.

[30] Mr Ross contributed to the dismissal and the remedies awarded are to be reduced by 20%. The respondent is to pay the applicant the above sums less 20%.

Costs

[31] Mr Ross has incurred costs of \$2,080.94. Although the investigation took only a short time due to the failure by the respondent to appear, preparation for the proceedings was required. Mr Ross is entitled to a contribution to his costs. The respondent is to pay the sum of \$1,500 in costs and the \$70 filing fee.

Dzintra King
Member of the Employment Relations Authority