

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2011] NZERA Wellington 156
5318131

BETWEEN DAVID DAHYA
 Applicant

AND ACCOUNTANTS FIRST
 LIMITED
 Respondent

Member of Authority: G J Wood

Representatives: Graeme Ogilvie for the Applicant
 Frances Lear for the Respondent

Investigation Meeting: 20 July 2011 at Wellington

Submissions Received: 20 July 2011

Determination: 13 October 2011

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Mr Dahya claims that he was unjustifiably dismissed by the Respondent (Accountants First) when its Managing Director (Mr Imran Kamal) told him to leave the building after a heated discussion about Mr Dahya's hours of work. Accountants First considers that Mr Dahya either abandoned or resigned his job following this dispute. The claim for outstanding holiday pay was withdrawn at the investigation meeting.

[2] The issues for determination are whether or not Mr Dahya was dismissed and if so, what remedies (if any) should be awarded to him. Such a dismissal, if there was one, would clearly be unjustifiable.

Factual discussion

[3] Accountants First, as its name implies, provides accounting and tax advice to mainly small and medium size businesses in the Wellington area. Mr Dahya was employed as a credit controller from July 2008 onwards. He was paid \$15 per hour (later increased to \$18 per hour) and his expected normal hours per week were four, usually worked on a Monday. Such hours could *be varied by mutual agreement*. Mr Dahya's employment did not go without any problems, as in 2009 he was warned for shouting in the office in front of staff and clients. However there were no other serious performance concerns specifically made clear to him.

[4] In approximately April 2010 Mr Dahya started working extra hours, normally on a Thursday, as a result of work being there and Mr Dahya's initiative. This went on for about the next month before being questioned by Accountants First. It caused concern to Mr Kamal and the office manager, Ms Michelle Turney-Mitchell, as it increased Accountants First's weekly wage bill. Ms Turney-Mitchell accordingly emailed Mr Dahya on Sunday 23 May to say that she would be monitoring all staff's work output over the next month, and that it had been decided to discontinue Mr Dahya's Thursday work, as it was not needed. He was told that if he needed to work overtime it would have to be discussed with Mr Kamal first. He was also taken to task over an alleged lack of calls being made, the accuracy and/or clarity of his reports, and that he was to fill in timesheets, starting that Monday morning.

[5] Mr Dahya responded stating that he needed to discuss these issues with Mr Kamal, as he reported to him and that *if you need to trim the fat round here, don't start with me*. He further stated:

Regarding my work on Thursdays, before any decision is made it needs to be discussed with me as I am the person doing the work.

I would rather not have this decision relating to my responsibilities made behind my back.

Your method will take additional time also.

I will discuss the above with Imran.

[6] The opportunity for such a discussion did not occur until the afternoon of the 24th of May. This was a key meeting in terms of this claim. However the evidence given about it by four witnesses gives rise to two quite separate versions. Mr Dahya's

version was supported by Ms Turney-Mitchell, now a former employee of Accountants First, whereas Mr Kamal's version was supported by its client services manager, Mr Mohammed Mazhar.

[7] Mr Dahya's evidence was that Mr Kamal was dismissive of his concerns about the reduction in hours, which led to an argument, with Mr Kamal finally telling Mr Dahya to get out. On being asked whether or not Mr Dahya should get out of Mr Kamal's office or out of the building, Mr Kamal made it clear that it was out of the building. Mr Dahya claims that he was then informed that he had to return the keys to the building he had been regularly cleaning next door, for which Mr Kamal was responsible. Thus it was clear to him that he had been dismissed, and he therefore followed up the next day with an email requesting reasons for his dismissal, which went unanswered.

[8] By contrast, Mr Kamal claims Mr Dahya did not like being told that he had to talk to Ms Turney-Mitchell about the issues in her email. He claims that Mr Dahya started shouting and swearing at him and then walked out. Mr Dahya then sent a text requesting his final pay.

[9] I have preferred the evidence of Mr Dahya and Ms Turney-Mitchell, despite the fact that Ms Turney-Mitchell had previously signed (in September 2010) a version that accords with those of Messrs Kamal and Mazhar. Someone who signs a statement with one version of events and later gives evidence (in writing and in person) quite inconsistent with that can not normally be expected to have their evidence accepted.

[10] My reasons for preferring Mr Dahya's version, however, are:

- Mr Mazhar was further away from the conversation from Ms Turney-Mitchell and was not necessarily in a direct line of sight of it;
- No other staff members present on the day gave evidence, yet should have been available to Accountants First to call as witnesses;
- Mr Dahya's evidence was that the instruction to leave the building was not given in a raised voice, which would explain why others did not hear it;

- It would seem more than coincidental that Mr Dahya was required to return keys to the property next door at the same time as he says he was dismissed, yet Mr Kamal said he had just left to cool down;
- Accountants First never responded to an email from Mr Dahya the same day requesting reasons for dismissal;
 - a. It was not argued until the investigation meeting that Mr Kamal had never received the email requesting the reasons for dismissal. There is no evidence of Mr Kamal not being given such emails by Ms Turney-Mitchell, yet it was her practice to do so;
 - b. In his first statement Mr Kamal states that Mr Dahya left the building after shouting loudly in the meeting in his office, and without finishing his day's work. Yet in his statement of evidence in reply he relies on an email exchange with Mr Dahya that he said occurred an hour or so *after he had been abusive to me and stormed out of the office*;
 - c. Mr Kamal's written evidence that he had prepared his file note dated 24 May on that day was maintained by him on many occasions in oral evidence, until he finally accepted that could not be correct (and then only after having it repeatedly pointed out to him that this was not possible, because it referred to events that took place well after 24 May);
 - d. I accept that Mr Dahya's email was sent at the time it states on the company's records. I do not accept that the time sent would be the time an email arrived. Even when there are delays in emails arriving that should not change the date and time upon which they are sent. That therefore contradicts Accountants First's evidence that Mr Dahya's and Mr Kamal's argument occurred before 3 o'clock;
 - e. The very similar wording between the written statements of Ms Turney-Mitchell and Mr Mazhar in September 2010, some five months later, which shows that it is likely that Mr Kamal had a degree of involvement in their creation; and

- f. Mr Mazhar's evidence was basically about the fact that there had been shouting by Mr Dahya, which was accepted by him and Ms Turney-Mitchell.

[11] Therefore I accept that in the afternoon of 24 May Mr Dahya sent an email at 3.07pm about his Thursday work. It stated that Mr Kamal had agreed to him doing that work and yet it was later removed, and that this should have been addressed with him directly, and if not so addressed, then fairly resolved by a third party.

[12] At 3.29pm Mr Kamal replied stating

*Thursday is never a working day for you and is an on call basis only.
Michelle will do follow-up calls for Thursday.
I will review it in two weeks time.*

[13] The argument occurred around the same time, when Mr Dayha went to see Mr Kamal in his office. Although Mr Kamal did not raise his voice in the face of provocation from Mr Dahya, he did tell him to get out and clarified that that was out of the building. Mr Dahya was then sent a text message stating that he would have to return the keys to the building next door. In the light of all this Mr Dahya reasonably concluded that he had been dismissed and he asked for his final pay, which he did not receive until he had returned all Accountants First's property. There were no further attempts to get him to attend work, or to respond to his email requesting the reasons for his dismissal. Under s 120(2) of the Act an employer is required to respond to such a request within 14 days of it.

[14] It therefore follows that Mr Dahya was dismissed, in the form of a sending away with permanent effect and without any follow up by Accountants First. This can not be justifiable because it did not arise following any proper investigation of any misconduct by Mr Dahya. Instead, Mr Kamal appears to have simply had enough of him and told him so, without going through the normal sorts of procedures that are expected in law. This is clearly not how a fair and reasonable employer would have acted, or what it would have done in all the circumstances. Rather a fair and reasonable employer should have required Mr Dahya to explain himself in a formal disciplinary context, where he would have had a chance to explain himself, with representation if he so desired, before Accountants First would be fairly able to consider any sanctions for his behaviour in the office.

[15] Mr Dahya has been unable to find work ever since. I accept that he is entitled to claim lost remuneration for 13 weeks, for 6 hours per week at \$18 per hour, namely \$1404 gross. Because I am not satisfied that he has looked for work across a broad enough range of jobs (he has worked in several other areas than debt collection, such as cleaning) I do not extend lost remuneration beyond that period.

[16] I also accept Mr Dahya's evidence that he was greatly upset at being effectively dismissed when he came to challenge a reduction in what he saw, albeit wrongly, as his proper hours of work. An appropriate level of compensation is \$2000.

[17] However Mr Dahya has clearly contributed to the situation that gave rise to his unjustified dismissal. First, he was wrong about being able to insist on 10 hours of work per week. His only entitlement was to 4 hours per week, which was what he was being offered. Second, he raised his concerns in a most inappropriate manner, particularly by shouting at Mr Kamal, who did not respond in kind, even though he also acted inappropriately by sending Mr Dahya away for good. On the other hand, only Accountants First is responsible for how it acted, and a fair and reasonable employer would have found other ways to deal with Mr Dahya's behaviour that would not have left him with the damages that he has suffered.

[18] In these circumstances contribution must be set at one third and compensation limited to \$1,333, and lost remuneration to \$936.

[19] I therefore order the respondent, Accountants First Limited, to pay to the applicant, Mr David Dahya, the sum of \$1,333 compensation under s 123(1)(c)(i) and \$936 gross in lost remuneration.

Costs

[20] Costs are reserved.

G J Wood
Member of the Employment Relations Authority