IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

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AA 177/09

	BETWEEN	JIE CHEN Applicant
	AND	NEW ZEALAND SUGAR COMPANY LIMITED Respondent

Member of Authority:	Alastair Dumbleton
Representatives:	Applicant in person Liz Caughley, counsel for Respondent
Investigation Meeting:	27 April 2009
Determination:	3 June 2009

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Mr Jie Chen has required his former employer, the New Zealand Sugar Company Limited, to show the Authority justification for a warning.

[2] It was given orally at the end of a disciplinary meeting on 11 March 2008 by Mr Chen's manager, Ms Cathy Gilroy, and was confirmed immediately afterwards in writing. Mr Chen was advised that the warning would remain on his personal file for six months, after which it would be destroyed.

[3] Mr Chen resigned and ceased working for NZ Sugar in March 2008, several months before the September expiry date of the warning.

[4] There is no dispute that Mr Chen raised a grievance about the warning. When the grievance remained unresolved after mediation, Mr Chen lodged a statement of problem in the Authority in January 2009. In the application, as well as challenging the warning, he raised the question:

> *…whether I am entitled to reserve ... the right to seek compensation from NZ Sugar because I have been forced to … resign … from NZ Sugar in April 2008…*

[5] Before the Authority held the investigation meeting Mr Chen confirmed that he had not raised a separate grievance about the termination of his employment. He confirmed that the grievance he had raised was about the warning only and that the remedies he was seeking through the Authority were an apology and compensation. He claimed those on the basis that he might not have resigned if the warning had not been given.

[6] Under s 114 of the Employment Relations Act 2000 any claim of personal grievance with regard to the termination of his employment had to be raised by Mr Chen within 90 days of 12 April 2008, the date he finished working for NZ Sugar. Under the Act there is no ability to reserve the right to raise a grievance, except insofar as a grievance may be raised at any time during the statutory 90 day period.

[7] The Authority therefore in this case cannot consider a claim for compensation flowing from the resignation of Mr Chen, on the suggested basis that his employment ended by unjustified dismissal.

[8] By the end of 2007, the first year Mr Chen worked for NZ Sugar as a Procurement Controller, his manager Ms Gilroy began noticing some unsatisfactory aspects about the way he related to her and others. To address those concerns she arranged a counselling session in December 2007 to try and reach agreement with Mr Chen on ground rules and guidelines for building relationships, particularly those between Mr Chen and Ms Gilroy.

[9] A written record of the discussions held during that session was made and a copy sent to Mr Chen and Ms Gilroy. It set out the ground rules and guidelines they had agreed to. Mr Chen was also advised that a failure to improve his behaviour *"could …..… lead into disciplinary action."*

[10] After Mr Chen questioned the reference to disciplinary action and asked to know what ground rules he had broken that could lead to that being taken in future, Ms Gilroy regarded him as having rejected the recorded outcomes from the December counselling session. She observed over the next few weeks aspects of Mr Chen's inter-relationship with others which she found unsatisfactory, but no further action was taken by her until after a meeting held on 7 March 2008.

[11] Ms Gilroy considered that Mr Chen's behaviour during that meeting to have been disrespectful, argumentative and lacking in team spirit. In evidence she said that at the end of the meeting Mr Chen had addressed her by asking "*are you finished yet?*" in a tone and manner which she found showed that he had rejected the behaviour standards agreed to in late 2007.

[12] At the end of the meeting Mr Chen gave an apology to Ms Gilroy but she viewed the matter seriously enough to call Mr Chen to a disciplinary meeting on 11 March 2008.

[13] At the meeting Mr Chen said he had been unaware of the impact of his conduct on Ms Gilroy and he apologised again for his behaviour on 7 March. He agreed to have weekly coaching sessions to help him observe the previously agreed ground rules.

[14] Also at the end of the meeting Mr Chen was issued with a 'warning' for failing to act in accordance with those ground rules. It was confirmed in writing which recorded the reason for giving the verbal warning as Mr Chen's failure to observe the agreed ground rules and guidelines for behaviour. Mr Chen was advised of the standards of behaviour expected of him and notified of counselling or coaching sessions that were to be held in the following month. He was advised they would be followed by a review in mid April.

[15] In the event there was no review as Mr Chen finished his employment on 12 April 2008, having given notice one month earlier.

[16] In the circumstances the grievance is to be viewed as a claim by Mr Chen that his employment, or one or more conditions of that employment, was affected to his disadvantage by unjustifiable action. That type of personal grievance is defined by s 103(1)(b) of the Employment Relations Act.

[17] For the grievance to be established, two limbs must be present: (1) disadvantage to the employee in his employment or conditions of employment, and (2) action that is not justifiable.

Disadvantage

[18] The passage from an Employment Court judgment quoted by Ms Caughley for the employer aptly draws attention to the degrees of disadvantage that may arise from a warning:

> *Another factor I bear in mind is that a warning given to Mr Griffith was a warning simpliciter. It was not a final warning. While it can properly be said that it affected his employment to his disadvantage in the sense that it could have been relied on by Sunbeam as an aggravating factor in any subsequent disciplinary issues, the extent to which that would have been open to a fair and reasonable employer was distinctly limited.*
>
> *Griffith v. Sunbeam Corporation Ltd* (unreported, 28 July 2006, at para.[173])

[19] In this case I find there was not a final warning, nor any warning given at all within the ordinary meaning of that word. In the circumstances the 'warning' did not create a disadvantage to Mr Chen in his employment or his conditions of employment, as it was ineffective as a disciplinary warning. While it was called a warning, in substance it was not that. Neither the oral or written warning stated the consequences to Mr Chen if he did not do what was required of him. The consequences might have been nothing at all, or a further warning, or a formal written warning including a final warning, or even dismissal.

[20] The law is clear that for an employer to rely upon an earlier issued warning, it must be explicit, or clear and unequivocal, as to the consequences of failing to comply. In this case the employer has not sought to rely on the 'warning' for any disciplinary purpose.

[21] I find that the mere utterance or use of the word warning, even when directed at him, created no disadvantage to Mr Chen in his employment. Subsequent actions of the employer based on a misunderstanding that a disciplinary warning had been given might at a future time have created a disadvantage, and Mr Chen would then have been able to challenge any such action by the grievance remedy.

Justification

[22] The test of justification is set out at s 103A of the Act. The Authority must determine, on an objective basis, whether the employer's actions in purporting to

issue a warning and how the employer acted, were what a fair and reasonable employer would have done in all the circumstances at the time the action occurred.

[23] The Authority is satisfied that the employer's actions were justified. Ms Gilroy on behalf of the employer was entitled to set reasonable ground rules or behaviours to be observed by Mr Chen and she was also entitled to require him to undertake periodic coaching. Mr Chen unfortunately questioned or challenged Ms Gilroy's authority as his manager and appeared to her to reject the outcome of the meeting held in late December. He also addressed Ms Gilroy in a disrespectful manner in front of other employees at the meeting in March.

[24] The good faith requirements of employers and employees as specified at s 4 of the Act include responsiveness and the 'warning' was in reality a clear signal by the employer to Mr Chen that he needed to be more cooperative and responsive in relation to reasonable requirements made of his conduct and in his relationships with his manager. The employer's message was a reasonable attempt to have Mr Chen maintain a productive employment relationship with NZ Sugar through his manager and other employees.

[25] Mr Chen reasonably viewed the placement of a warning on his file as a criticism of him, but in my view that communication by the employer was justified. The 'warning' was tempered by its limited duration of six months, after which it was to be destroyed, as Mr Chen was told. I accept that the absence in the warning of any explicit advice to Mr Chen of the consequences of further lapses of behaviour, is explained by the employer's desire not to alarm him unduly by reference to more serious forms of disciplinary action, such as a final written warning or even dismissal.

[26] The spirit in which this warning had been given should have been obvious to Mr Chen as a responsive and communicative employee.

[27] I am satisfied that NZ Sugar did not want Mr Chen to resign his employment and did not encourage him to do so. That was an over-reaction on his part, but finally it was his choice to resign if he wished to. As earlier noted, the resolution of this disadvantage grievance does not take into account the resignation, which is unlikely to be found to be an unjustified dismissal when the employer's actions preceding it were fair and reasonable, as I have determined.

Determination

[28] For the above reasons, the Authority finds that Mr Chen does not have a personal grievance claim arising from the 'warning' given to him in March 2008. No orders are therefore required to be made against the employer, NZ Sugar.

Costs

[29] Costs are reserved. Any application by New Zealand Sugar is to be made in writing within 21 days of the date of this determination. If application is made, then Mr Chen may reply to it in writing within a further 14 days after that period.

A Dumbleton
Member of the Employment Relations Authority