

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2011] NZERA Auckland 281
5308721

BETWEEN WENXIAN JIANG
 Applicant

AND KVB KUNLUN NEW
 ZEALAND LIMITED
 Respondent

Member of Authority: Robin Arthur

Representatives: Richard Zhao and Frank Deliu for the Applicant
 Jo Douglas for the Respondent

Investigation Meeting: 24 March 2011

Submissions: 24 March and 5 April 2011 from the Applicant
 and 4 April 2011 from the Respondent

Determination: 29 June 2011

DETERMINATION OF THE AUTHORITY

- A. KVB Kunlun New Zealand Limited's decision to dismiss Wenxian Jiang was justified. Mr Jiang's personal grievance application is declined.**
- B. Costs are reserved.**

Employment Relationship Problem

[1] Wenxian Jiang, also known as Brian Jiang, worked for KVB Kunlun New Zealand Limited (KVB) from January 2007 until he was dismissed on 25 February 2010.

[2] He was dismissed for serious misconduct. KVB said Mr Jiang had intentionally failed to carry out reasonable and proper instructions of management.

The instruction referred to was first given to Mr Jiang and other KVB staff in an email on 4 December 2009 from KVB's Australasian head of compliance Stephen McCoy.

[3] The email stated that "*no contact is to be made, or received from*" four named clients including Jimmy Kan and his sisters Susan Yip and Carmen Kan. It continued with the following additional, specific instructions:

In essence, under no circumstances, is KVB or any representative to approach and/or speak to these clients.

If any of the above clients makes contact with you, you are to immediately refer the call to either [KVB New Zealand Country Manager] Greg Boland or Stephen McCoy. Do not offer any assistance, advice or make conversation with any of these clients.

[4] Each staff member sent the email was asked to acknowledge their "*receipt and understanding of requirements of this email and its contents*".

[5] KVB is a licensed share broking firm and an authorised futures dealer. In mid 2009 it began an investigation into issues concerning the accounts of Mr Kan, Ms Yip and Ms Kan. KVB sought repayment of amounts owed on some or all of these accounts and the clients disputed how the amounts came to be owed.

[6] On 3 December 2009 a representative from a firm of private investigators acting for these clients had met with KVB New Zealand Country Manager Greg Boland. During the meeting an allegation was made that unauthorised transactions had been performed in the account of one client. KVB recommended the alleged activity, which it described as serious and criminal, should be reported to the Police and advised it would assist the Police with any inquiries made. The response by the clients' representative included a request that KVB and its representatives make "*no contact whatsoever ... at any time of the day or night*" with the four clients. The representative also advised the matter had been referred to the Police.

[7] Mr McCoy's 4 December email to KVB staff was sent in response to the "*no contact*" request from the clients' representative.

[8] Mr Jiang did not see Mr McCoy's email on 4 December but had done by 7 December because he discussed it that day with Mr Boland. Mr Jiang asked whether

the restriction applied to personal contact. He says Mr Boland did not answer his question. However Mr Boland says Mr Jiang did not ask about personal contact, only whether the restriction applied to him and Mr Boland confirmed that it did.

[9] On 8 December 2009 Mr Jiang replied to Mr McCoy's 4 December email with a three word message: "*Acknowledge and understand*".

[10] Mr Jiang had first met Jimmy Kan and Susan Yip when they become clients of KVB in late 2007 or early 2008. He considered they had since become close friends who treated him almost as a member of their families.

[11] There is a dispute between the evidence of Mr Jiang and Mr Boland as to whether Mr Boland knew of this personal or social connection between Mr Jiang, Mr Kan and Ms Yip. Mr Boland's evidence was that he knew Ms Yip had bought soup and a cake into KVB's offices for Mr Jiang but he understood these were 'thank you' presents for business assistance.

[12] During the Christmas holidays in 2009 Mr Jiang attended a barbeque at Jimmy Kan's house. Susan Yip also attended.

[13] Shortly after New Year he also had dinner with Jimmy Kan, Susan Yip and other members of their families at a Chinese restaurant in Greenlane. A few days later Ms Yip was part of a group he had yum char with at a restaurant in Newmarket.

[14] On 10 February Mr Boland was told by a police officer that a KVB employee had been in contact with the Yips. Mr Boland then asked three employees if they had contact with the Yips. Each employee, including Mr Jiang, denied having any contact. Mr Jiang later explained that he said no when asked because he believed Mr Boland's question referred only to contact while at work and not in his personal life.

[15] On 12 February 2010 Mr Jiang was interviewed by a police officer. He was asked if he "*had coffee*" with Ms Yip in Newmarket. Mr Jiang replied no.

[16] Immediately after the interview that day Mr Boland and KVB's managing director Stefan Liu met with Mr Jiang. In that meeting Mr Jiang acknowledged he

had met Ms Yip at Newmarket and said he misunderstood the police officer's question because of the specific reference to coffee. He said he had yum char but not coffee with Ms Yip and other members of the Yip family at Newmarket.

[17] In his conversation with Mr Boland and Mr Liu on 12 February Mr Jiang referred to his close personal relationship with the Yip and Kan families. Mr Boland and Mr Liu say they made it clear to Mr Jiang that the restriction on contact with Jimmy Kan and Susan Yip included both business and personal contact. Mr Jiang says he told Mr Boland and Mr Liu that he understood the restriction did not extend to his personal life or what he did in his own time. He says neither Mr Boland nor Mr Liu told him that his understanding was wrong. Mr Boland denies this and says he made it clear that Mr Jiang had to "*choose between KVB on the one hand and the Yip/Kan family on the other hand*".

[18] Two days later Mr Jiang attended a Chinese New Year celebration with the Yip family that also included celebrating the birthday of one of their children. He later told the Authority those celebration plans were made weeks in advance.

[19] On 16 February Mr Jiang provided written answers to some questions put to him in writing by Mr Boland the day before. His answers disclosed that he had met with members of the Yip and Kan families "*roughly 3 or 4 times*" since the 4 December 2009 email and had dinner with them on 14 February 2010. He said he had invited them for dinner in Greenlane during the New Year holidays. He described having met them initially as "*walk-in customers*" of KVB but later becoming "*good friends*". He referred to having visited Ms Yip's house to teach her how to use trading software provided by KVB. He wrote that "*[t]hey treat me like a family member*".

[20] On 17 February Mr Boland suspended Mr Jiang on full pay and asked him to attend a disciplinary meeting. He was advised he could bring a legal representative or other support person to the meeting.

[21] That meeting began on 19 December but was adjourned after Mr Jiang confirmed he wanted a representative and needed time to make arrangements.

[22] When the disciplinary meeting reconvened on 25 February Mr Jiang was

accompanied by a representative. After discussion with Mr Jiang, Mr Boland decided to dismiss him and gave the following reasons. He said Mr Jiang was given a specific instruction about contact with the Yip family but had then “*told a blatant lie*” when asked on 10 February if he met the Yips and had then failed to carry out the instruction he was given on 12 February “*not to contact the Yip family at all*”.

[23] The dismissal was confirmed in a letter dated 26 February 2010 which stated Mr Jiang had “*failed to comply with the required standards of conduct*” and his actions were serious misconduct.

[24] Mr Jiang raised a personal grievance against his dismissal in early April 2010 through solicitors who were then acting for him. The matter was not resolved in mediation and Mr Jiang lodged a personal grievance application in the Authority on 24 September 2010.

The investigation

[25] For the purposes of the Authority investigation meeting written witness statements were lodged by Mr Jiang, Mr Kan, Ms Yip, Mr Boland, Mr McCoy and Mr Liu. With the exception of Mr Liu, each of these witnesses attended the investigation meeting in person and, under oath or affirmation, confirmed the contents of their written statement. They each gave further oral evidence by way of answers to questions from the Authority member or the parties’ representatives. Mr Liu gave evidence by telephone conference from Hong Kong, affirming his written statement and answering questions. Where they required assistance the witnesses were assisted by an interpreter of the Cantonese and Mandarin dialects of the Chinese language.

[26] The parties provided closing submissions in writing. As permitted under s174 of the Employment Relations Act 2000 (the Act) this determination does not record all the evidence and submissions received but states the Authority’s findings of facts and law and expresses conclusions on the matters requiring determination.

The issues

[27] The issues for investigation and determination by the Authority were:

- (i) Whether, in deciding to dismiss Mr Jiang on 25 February 2010, KVB acted as a fair and reasonable employer would have in all the circumstances at the time because:
 - (a) there was a lawful and reasonable instruction or instructions given to him; and
 - (b) Mr Jiang did breach those instructions; and
 - (c) such a breach was serious misconduct; and
 - (d) KVB fairly investigated Mr Jiang's actions and decided on his dismissal.
- (ii) Whether Mr Jiang was unjustifiably disadvantaged by his suspension on 17 February 2010; and
- (iii) If there were unjustified actions by KVB, what remedies should be awarded to Mr Jiang, subject to mitigation and contribution; and
- (iv) Costs.

The instructions to Mr Jiang

[28] Mr Jiang submitted that the instruction given in the 4 December email could not lawfully or reasonably apply to his personal contact with Mr Kan and Ms Yip outside of working hours as those relationships were outside the scope of his employment obligations to KVB. While he had met Mr Kan and Ms Yip through work, Mr Jiang submitted their personal relationship developed "*autonomously*" of his professional role and did not damage KVB's business.

[29] I do not accept that submission. I find KVB was, in the circumstances of its particular business and regulatory requirements, and the allegations of impropriety which were under investigation at the time, within its rights to curb and control contact by its staff with those clients. While Mr Jiang regarded himself as a close friend and like a family member, he had only come to know Mr Kan and Ms Yip through the business connection. Without that connection, the relationship would not have existed. He had, for instance, initially come to visit Ms Yip at her home because he was asked to go there and give her and other family members training on how to use the online trading software which they were provided by KVB for financial transactions on their KVB accounts. He had been assigned that task because he had helped Mr Kan and Ms Yip with translation of Cantonese during their first visits to

the KVB offices.

[30] The Court of Appeal has acknowledged that, in the interests of restricting intrusion into employees' private lives, there are very limited circumstances in which an employer can be said to have a legitimate interest in an employee's conduct outside of work. For such a legitimate interest to exist in a particular situation:¹

... there must be a clear relationship between the conduct and the employment. It is not so much a question of where the conduct occurs but rather its impact or potential impact on the employer's business, whether that is because the business may be damaged in some way; because the conduct is incompatible with the proper discharge of the employees' duties; because it impacts upon the employer's obligations to other employees or for any other reason it undermines the trust and confidence necessary between employer and employee.

... It is [not] necessary for there to be demonstrated actual adverse effect on the employment situation before the employer is entitled to conclude that the conduct warrants dismissal.

[31] The relevant conduct by Mr Jiang in this case involved his repeated contact with Mr Kan and Ms Yip and what he told (or did not tell) his managers about that contact. It arose out of a work situation and, importantly, had the potential to adversely affect KVB's business. Those potential effects included the risk of collusion or a conflict of interest between Mr Jiang's business obligations and his personal friendship with those clients.

[32] It follows, I hold, that an instruction not to engage in such contact, was, in the circumstances, lawful and reasonable whether it occurred within or outside working hours.

[33] It does not change the reasonableness of the instruction at the time it was given that the allegation made ultimately resulted in no negative regulatory or Police action against KVB and that the money owed to KVB was paid. According to Mr Boland's evidence the Securities Commission's response to a complaint by Ms Kan found no cause for any action against KVB, the Police inquiries found no grounds for further action, and the clients had since paid amounts owed on their KVB accounts.

¹ *Smith v Christchurch Press Co* [2000] 1 ERNZ 624 at [25] and [28] per Gault J.

Breach of instructions

[34] Mr Jiang was given the same instruction twice – once by email on 4 December 2009 and again verbally on 12 February 2010 by Mr Boland and Mr Liu. Based on Mr Liu’s evidence I find instruction was given to Mr Jiang in both English and Mandarin on 12 February. Based on the evidence of Mr Boland and Mr Liu I find that any ambiguity about whether the 4 December instruction applied to personal contact outside working hours was clearly removed by the 12 February instruction.

[35] I prefer, as more likely and credible, the evidence of Mr Boland and Mr Liu that, during the 12 February conversation, they challenged and corrected any misconception Mr Jiang may have had about personal contact being acceptable to KVB. Despite that explicit directive, Mr Jiang went ahead and attended the Chinese New Year dinner on 14 February with Ms Yip and other family members. His own evidence was that the dinner was planned weeks ahead so he must have known of it and his plan to attend when he was speaking with Mr Boland and Mr Liu on 12 February. In that respect his actions in then not complying with the instruction was deliberate and done knowingly.

[36] I also accept as more likely than not that Mr Jiang’s social contact with the Yips and the Kans in the previous weeks was done in knowing contravention of the 4 December instruction. That is likely because Mr Jiang held the view from the beginning that he repeated in the Authority investigation meeting: “*Even today I’m still thinking it’s nothing to do with them. It’s my personal life*”. However, even if KVB’s requirement was not absolutely clear to him until the conversation on 12 February, Mr Jiang then, by his actions on 14 February, clearly and deliberately breached what I have found was a lawful and reasonable instruction.

Was the breach serious misconduct?

[37] The employment agreement between Mr Jiang and KVB allowed for immediate dismissal if he committed “*serious misconduct*”. The agreement also required Mr Jiang to comply with KVB’s policies, which included its policy manual. The manual included “*intentional failure to carry out the reasonable and proper instructions of management*” as an example of serious misconduct.

[38] Mr Jiang submitted that, even if he was found to have breached a lawful and reasonable instruction, his conduct was not serious misconduct because he had honestly believed the 4 December email and Mr Boland's questions to him on 10 February to apply only to "*professional contact*". He submitted that he had truthfully answered questions of him by KVB managers and, on 12 February, had only given an incorrect answer to a police officer because of an honest mistake in understanding the question. He submitted that his honesty was supported by his prompt admission of the mistake during the 12 February conversation with Mr Boland and Mr Liu and his suggestion that he could contact the police officer and correct the misleading impression given by his first answer.

[39] Contrary to those submissions, I find a fair and reasonable employer would have reached the conclusions Mr Jiang's actions were serious misconduct in all the circumstances at the time. In doing so I accept KVB's submissions and find that:

- (i) conduct outside of working hours can amount to serious misconduct if there is a sufficient nexus between that conduct and the employment relationship;² and
- (ii) Mr Jiang took the view that KVB was not entitled to restrict his contact with the Yip and Kan families, so it is more likely than not that his non-compliance with the instructions was by choice; and
- (iii) Mr Jiang, more likely than not, had deliberately misled Mr Boland by responding "*no*" when specifically asked on 10 February if he had contact with the Yips; and
- (iv) Mr Jiang continued with that contact after the specific instructions given to him on 12 February when he can have been in no doubt about its meaning.

[40] Mr Jiang's oral evidence confirmed the clarity of the instruction given to him by Mr Boland on 12 February. He described Mr Boland's comments this way:

[Mr Boland] asked me a question of yes or no, like multiple choice. On right hand side is KVB and left hand is your friends. Make your choice. I said I'm uncomfortable to answer that question. Why you make me make a choice like that.

² *Smith*, above.

[41] Despite the clear description given to him, Mr Jiang went ahead with a pre-planned social occasion with the Yip family, in the full knowledge that it was unacceptable to KVB. It was conduct, I hold, that a fair and reasonable employer would find went to the heart of its trust and confidence that Mr Jiang would faithfully serve KVB's business interests rather than whatever personal loyalties he had developed with Mr Kan and Ms Yip.

[42] It does not matter whether Mr Jiang knew at the time exactly what reasons KVB had for prohibiting contact with those clients. In this case there was some evidence Mr Jiang did know the reason for it, or at least its background, because he was probably present as a translator in a meeting with Mr Kan and Ms Yip at KVB some months earlier where concerns between them and KVB were first aired. He denies or does not recall being at such a meeting but my conclusion does not rely on that disputed point. In many businesses there will sometimes be reasons that staff members cannot be told the full reasons for a specific instruction – such as in this case where there were allegations of possible fraud which may have happened inside or outside KVB – but that does not make the instruction of itself unreasonable or allow an employee to deliberately disobey it.

Was KVB's disciplinary investigation fair?

[43] Two aspects of KVB's disciplinary process might reasonably be criticised as below the standard of fairness – firstly, how it suspended Mr Jiang on 17 February and secondly, how its managers continued its initial 19 February disciplinary meeting for a short period after agreeing that it could be delayed to allow Mr Jiang more time to arrange a representative as he requested. However neither shortcoming resulted, I find, in an unjustified disadvantage to Mr Jiang or made KVB's subsequent actions unjustified.

[44] The employment agreement allowed for suspension on pay while an allegation of serious misconduct was investigated. Mr Boland did not give Mr Jiang an opportunity to comment on the proposal for his suspension on pay before implementing it however the suspension was for a short period and did not affect the

ability of KVB to justify its subsequent decision to dismiss Mr Jiang.³

[45] When the disciplinary meeting began on 19 February Mr Liu properly checked with Mr Jiang whether he needed more time to get a representative and agreed to postpone the meeting for that purpose. It should have stopped then but in fact continued for about another 20 or so minutes, with questions from the KVB managers and responses from Mr Jiang. However no real unfairness resulted as Mr Jiang had a full opportunity to provide a complete explanation of his actions at the 25 February disciplinary meeting and KVB's dismissal decision was based on that discussion not the one on 19 February.

Determination

[46] For the reasons given, I find KVB's decision to dismiss Mr Jiang was justified. Mr Jiang's personal grievance application is dismissed.

Other matters

[47] I record here the outcome of an objection from Mr Jiang's counsel to questions being asked of Mr Jiang about a document lodged by KVB with its statement of reply. The document was said to be a transcript in English of a telephone call between Mr Jiang, while at work in KVB's offices, and Mr Kan on 2 March 2009. KVB managers did not have the transcript or information about the call at the time of Mr Jiang's dismissal but heard it afterwards. According to the transcript Mr Kan offered to give Mr Jiang \$5000 to help him with expenses when Mr Jiang's parents were visiting New Zealand from China.

[48] The objection was, primarily, that KVB had not provided the actual electronic recording or who had interpreted their (presumably) Cantonese conversation into written English. On that basis it was said to lack an evidential foundation and should not be the basis of questions from the Authority member or parties' representatives.

[49] I declined to exclude the document on the basis of that objection. The document was lodged with KVB's statement in reply on 11 October 2010 and no

³ *Kereopa v Go Bus Transport Limited* (EC Auckland, AC 25A/09, 18 September 2009) at [29].

objection taken to it by counsel during the Authority's case management conference a few weeks later. There was no privacy issue as KVB staff and clients had signed agreements acknowledging calls at work could be recorded. The truth of the contents of the document, if confirmed, might have been relevant to the assessment of contributions by Mr Jiang if the Authority's determination of his grievance application had reached a different conclusion, even though it related to after-discovered conduct. However its relevance could not be conclusively known at the point in the investigation where the objection was raised. As it happened, even if the contribution issue had needed to be considered, there was better oral evidence directly from Mr Kan and Mr Jiang – that Mr Jiang had received and repaid a loan of \$10,000 from Mr Kan in 2009 and had not taken a cash gift of \$5000 from him. Although after-discovered conduct, the loan may have breached contractual duties of Mr Jiang to KVB not to place himself in a position of obligation to clients that might lead to the appearance of a conflict of interest, to disclose potential conflicts to his managers, and not to accept loans if doing so could reasonably be construed as creating a conflict of interest. Its relevance and application, if any, on the contribution point was properly a point for closing submissions rather than objection during the investigation.

Costs

[50] Costs are reserved. The parties are encouraged to agree any issue of costs between themselves. If the parties are not able to agree and an Authority determination of costs is required, KVB should lodge and serve a memorandum as to costs within 28 days of the date of this determination. Mr Jiang would then have 14 days from the date of service to lodge a reply memorandum. No application will be considered outside this timetable without prior leave. If the Authority were required to determine costs, it would most likely be on the notional daily rate of \$3000, subject to any relevant information in the parties' memoranda and the application of the principles discussed in *PBO v DaCruz* [2005] ERNZ 808.

Robin Arthur
Member of the Employment Relations Authority