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Sun v Pitango Innovative Cuisine Limited AA374/10 (Auckland) [2010] NZERA 682 (20 August 2010)

Last Updated: 9 November 2010

IN THE EMPLOYMENT RELATIONS AUTHORITY AUCKLAND

AA 374/10 5156473

BETWEEN GEORGE SUN

Applicant

AND PITANGO INNOVATIVE

CUISINE LIMITED Respondent

Member of Authority: Alastair Dumbleton

Representatives: Applicant in Person

Wade Gillooly, advocate for Respondent

Investigation Meeting: 11 May 2010

Determination: 20 August 2010

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The Authority has investigated the termination of employment of the applicant Mr George Sun by the respondent Pitango Innovative Cuisine Ltd (Pitango).

[2] There is no dispute that the employment ended with the dismissal of Mr Sun on 23 February 2009, or that about three weeks later he raised a personal grievance in respect of that action. The Authority has investigated whether the dismissal was 'justifiable' within the test of s 103A of the Employment relations Act 2000.

[3] Mr Sun complains it was not and has claimed as remedies reinstatement, reimbursement of lost wages, compensation for mental stress, and reimbursement of other expenses including the cost of medical advice.

[4] The parties attended mediation but were unable to resolve the employment relationship problem.

[5] Mr Sun gave evidence with the assistance of a Mandarin interpreter. For Pitango evidence was given by its Production Manager, Mr Larry Liu, and submissions were made by Mr Wade Gillooly, General Manager of the company.

[6] Pitango's position on Mr Sun's dismissal was committed to writing on 12 April 2009, when Mr Liu wrote to Mr Sun advising that his employment had been terminated by dismissal on 23 February 2009. He said:

The grounds for your dismissal were for driving a forklift in a reckless manner which could have caused serious and harmful injuries. The speed at which you were driving the forklift was unacceptable. In addition you were not licensed to drive or operate the forklift (unless you are supervised by a licensed forklift employee). This constitutes a serious breach of Pitango's Health & Safety policy. The actions were deemed to be of serious misconduct and hence your employment was terminated immediately.

Pitango has a responsibility to uphold a safe working environment and staff also have a responsibility to adhere to company policies -this is a condition of employment. Regular staff meetings have been held warning all staff of the significant hazards

involved in operating forklifts and the need for operators to be licensed at all times. You have been part of these meetings (the most recent meeting was on Feb 20th, 2009) and were warned verbally several times prior to the 23rd February.

[7] I find that Mr Sun was employed in August 2008 by Mr Liu to work as a truck driver for Pitango, subject to him acquiring the relevant licence. On 23 February 2009 early in the morning Mr Liu looked out of his office and saw Mr Sun driving a forklift. He said he heard a loud braking noise and screeching. He regarded the speed the forklift was being driven at as excessive and well over the safe limit of 10kph. The driving was unsafe and unacceptable because it was in an area where there were a high number of movements by staff to and from the factory entrance.

[8] Mr Liu called Mr Sun to his office immediately and asked him why he was driving so fast and dangerously. He also pointed out to Mr Sun that he was not permitted to drive the forklift at all unless under supervision. Mr Sun replied that he was driving fast so that he could finish the job quickly. Mr Liu said Mr Sun became angry and advised that he did not want to drive the forklift but only the truck.

[9] Mr Liu then advised Mr Sun of his view that there had been a serious breach of company health and safety policy, which provided grounds for instant dismissal. He says that Mr Sun replied by "you are not rid of me and I will make a reprisal." He left Pitango and the company accepts he was dismissed at this time.

[10] Mr Liu said he then called a staff meeting to remind employees of the importance of workplace safety and the need to take responsibility for the care of themselves and others.

[11] Mr Liu's evidence was that Mr Sun returned to Pitango on 2 March 2009 and asked for his job back. Mr Liu advised him, I find, that if in good faith he could provide an explanation for his actions and an apology for his reckless behaviour and also a commitment to working safely, his situation would be reconsidered. Mr Sun had replied that he would think about it and return to Mr Liu.

[12] The next Mr Liu heard was from a Health and Safety Inspector on 30 March 2009, advising that concerns had had been raised about health and safety at Pitango. One of those concerns was that forklift drivers were unlicensed.

[13] Pitango provided information to the Inspector as requested, Mr Gillooly noting his belief that a complaint had been made to the Inspector by a "disgruntled former staff member." As to the use of unlicensed forklift drivers, Mr Gillooly said that all nominated drivers were licensed and held certificates and that anyone caught driving a forklift while unlicensed would be severely reprimanded.

[14] The Inspector later visited Pitango's premises before advising on 6 May 2009 that no further action would be taken with regard to the complaint that had been made

on 25 March 2009.

[15] I accept that although Mr Sun had obtained a forklift licence in 2001, it was issued in Australia and only valid for use in that country.

[16] I accept that Mr Liu knew Mr Sun was not licensed to drive the forklift and that Mr Liu reasonably believed from his direct observation that Mr Sun was not under supervision when seen driving the forklift on the morning of 23 February. I also accept that Mr Liu was in a position to reasonably judge that the forklift was travelling at a speed which was so excessive as to be dangerous and unsafe.

[17] Further, I find from a record of the meeting produced by Pitango that on 20 February at a meeting of all staff, Mr Liu had reminded them about work safety and had specifically singled out Mr Sun as earlier having driven a forklift at such a speed as to be dangerous to other workers. I accept the evidence of Mr Liu that he raised this by way of a warning to Mr Sun on 20 February that he was to be careful about safety.

[18] In determining whether a dismissal is justifiable, the Authority is required by s.103A of the Employment Relations Act to objectively consider what a fair and reasonable employer would have done in all the circumstances at the time the dismissal occurred.

[19] Most important of those circumstances is the conduct of Mr Sun putting at immediate risk the safety of employees of Pitango. Although it might be arguable that the warning Mr Sun had received on 20 February was not technically a disciplinary warning, I accept that it amounted to a plain instruction to obey safety requirements. I accept that a clear breach of such an instruction, as occurred I find on 23 February, was sufficient to provide a basis on which a fair and reasonable employer would decide to dismiss. The behaviour of Mr Sun in driving the forklift dangerously and in doing so while unlicensed and unsupervised was serious misconduct.

[20] I find that the employer followed a fair procedure which in the circumstances required the alleged misconduct to be put to Mr Sun for explanation and for consideration to be given to any explanation before deciding on any disciplinary action. Bearing in mind the paramount importance of safety, the procedure followed was adequate in its fairness and

reasonableness.

[21] Accordingly, I find the dismissal of Mr Sun was justifiable.

Determination

[22] Mr Sun does not have a sustainable claim of personal grievance and no orders are therefore required to be made against Pitango.

[23] As the parties were self-represented there is no issue as to costs.

A Dumbleton

Member of the Employment Relations Authority

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