

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 224/07
5051618

BETWEEN QING CHAO WU
 Applicant

AND JIREH RESTAURANTS LTD
 Respondent

Member of Authority: James Wilson

Representatives: Qing Chao Wu in person
 Selina Tay for the respondent

Investigation Meeting: 14 May & 18 June 2007

Determination: 1 August 2007

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The applicant, Qing Chao Wu, (Mr Wu) worked for Jireh Restaurants Ltd (Jireh) as a chef. For 10 years prior to the termination of his employment he had been working at the Enjoy Inn restaurant. Mr Wu says that he was unjustifiably dismissed from his employment in June 2006. He seeks *reasonable compensation* from Jireh *to cover all (his) losses*.

[2] Jireh say that Mr Wu was not unjustifiably dismissed. They say that, before the termination of his employment, they had spoken to Mr Wu on a number of occasions regarding his misconduct and the quality of his food. They say that on 13 June 2006 an *intense argument and physical confrontation* took place between Mr Wu and one of his managers, Mr Lam. Despite the company's genuine efforts to resolve this conflict after the incident, they say, Mr Wu refused to return to work. Jireh also say that they offered Mr Wu alternative employment which he refused and in the end, at Mr Wu's request, they resolved the issue by terminating his employment and paying him two weeks in lieu of notice.

The events leading to the termination of Mr Wu's employment

[3] In order to determine whether or not Mr Wu was unjustifiably dismissed it is necessary to outline the conflicting versions of events and, where possible, determine, on balance, whose version most accurately reflects what occurred.

“Previous warnings”

[4] Jireh produced in evidence a copy of a letter dated 10 May 2006 addressed to Mr Wu and headed **written warning**. This letter said:

Despite our repeated verbal warnings issued to you over the last few months to improve your conduct with your fellow co-workers, there has been further misconduct.

We have decided to give you a written warning for your misconduct. You were previously given verbal warnings for yelling and swearing at co-workers.....

Once again we must take this opportunity to remind you that any further repetition of disrespect towards co-workers will lead to further discipline, up to and including dismissal.

The letter was signed by Mr Phillip Chow. Mr Wu says that he had never seen this letter, had never received any verbal warnings and suggested that the letter had been written after he was dismissed to help justify his dismissal. Jireh accepted that there was no formal disciplinary process prior to the issuing of the written warning but insist not only that Mr Wu was given verbal warnings but did receive a copy of this letter on or about 10 May 2006.

[5] Jireh also produced a letter dated 13 June 2006. This letter, also addressed to Mr Wu and signed by Mr Chow, was headed **Written Warning - Notice of Meeting**. This letter said:

There has been further misconduct after the issue of our written warning on 10 May 2006, which necessitates our taking further action.

This letter serves as a written warning for the verbal altercation that occurred between you and Joe Lam in the restaurant.

***Notice** is hereby given that you are to attend a meeting with us on 14 June 2006 at 9:30 a.m.....*

You are advised to bring along a representative and any witness in support of your version of events.

Once again Mr Wu says that he did not see this letter until he received the company's statement in reply. Jireh are adamant that Mr Wu received this letter on or about 13 June 2006.

The dismissal

[6] On 13 June 2006, Jireh says, that there was *an intense argument and physical confrontation* between Mr Wu and one of his managers, Joe Lam. Jireh say that Mr Lam asked Mr Wu to move some goods but Mr Wu refused, and later when asked again, suggested that another staff member should do it. Mr Wu's version of this incident is that, because it was very busy, he asked Mr Lam to move some goods but Mr Lam refused. Mr Wu says there was no confrontation. Mr Wu says that that evening he received two phone calls from Mr Chow. During the first call Mr Chow asked if Mr Wu could go back to work at 9. 30 that evening but Mr Wu replied that he didn't have time. He says that Mr Chow did not answer him when he asked why he was required. During the second call Mr Wu says that Mr Chow said that the company had decided to *disemploy* him and that he could come in the next morning to collect the rest of us pay. Mr Wu says that when he asked why he was being fired Mr Chow did not reply but did tell him he there was no need for him to work the next day.

[7] Mr Wu's a written evidence sets out succinctly his version of what then occurred:

So on the next day, me and Xian went together. After we got there, we were asked to sign and get the rest of our pay. We were informed once more that we are dismissed from our position. I said this is very unreasonable because firstly, we didn't get any warning letters. Secondly, there are absolutely no valid reason for firing us. I also said that we wont take the money unless the company write us an official letter with proper explanations of why we are fired. They said they wont and said that this will be taken as we resigning our position by our own will. We didn't take the money and left. So it's totally not like how they said that we were having meetings trying to resolve the problem. It's because they couldn't find any proper reasons for firing me and refuses to write an official letter. Therefore, they are prolonging the process and that leads to three meetings mentioned and time for them to fake evidence (warning letters and other related reasons).

They purposely made fake evidence, reasons, and words that ruin my reputation for not taking the responsibility of their mistakes. If I am really such a bad person like they describe, how was I able to work in Enjoy Inn Restaurant for the past 10 years? Working

with the previous boss for over 10 years? So what is said by them is not true at all, they were all made up after the day I was fired for no reason.

[8] Jireh's version of these events is that following the confrontation in the workplace on 13 June, and in the light of the previous incidents, the company decided to take disciplinary action and a written warning and notice of meeting to be held on 14 June were issued. At this meeting, according to Jireh there was a misunderstanding: the company understood that Mr Wu had resigned and Mr Wu thought that the company had dismissed him. That meeting ended inconclusively with the only point of agreement being that Mr Wu's employment at Jireh was to end. Jireh says that once this misunderstanding became clear to senior management, Selina Tay, a director of the company, convened further meetings in an attempt to overcome the misunderstanding. During these meetings it appears, according to the minutes taken by the company, that Mr Wu refused to return to work at Enjoy Inn and refused alternative employment at one of the company's other restaurants. Finally when an agreement could not be achieved, the company informed Mr Wu that his employment was at an end with effect from the 21st of June 2006 and paid him his outstanding holiday pay, wages for the time he had not been at work and two weeks in the lieu of notice.

Discussion

[9] As is often the case in disputes such as this, the truth of what actually happened lies somewhere between the versions of events that have been conveyed in the evidence. In this particular dispute much of the evidence was given via a translator and the applicant and several of the respondents witnesses' primary language was Chinese, making the establishment of the facts even more problematic. However by piecing together the evidence of the various witnesses and taking into account the various meeting notes it is possible to establish a reasonable understanding of what probably happened.

[10] I find that it is probable that Mr Wu's relationship with his two managers, Mr Chow and Mr Lam, was somewhat strained and that they almost certainly asked him to moderate his language and behaviour. However even if I accept that Jireh did issue a written warning to Mr Wu on 10 May 2006, it is clear that such a warning was given without any regard to due process. Even if this warning letter was shown to Mr Wu it could almost certainly have been successfully challenged for lack of a fair and reasonable process

[11] I find that in all probability there was a difference of opinion between Mr Wu and Mr Lam on 13 June 2006. The respective parties had a completely different perception of this incident. Mr Lam saw Mr Wu's behaviour as confrontational and insubordinate. Mr Wu felt the matter was inconsequential and no doubt because of his experience felt that he did not need to immediately respond to Mr Lam's requests.

[12] I have no doubt that Mr Chow phoned Mr Wu at least once on the evening of June 13, 2006. I also have no doubt that Mr Wu believed that Mr Chow was advising him that his employment was to be terminated. Whatever the truth of these conversations, by the time he arrived at the meeting on 14 June Mr Wu believed he had been fired. I find that, in a telephone conversation on the evening of June 13, 2006 the words used by Mr Chow conveyed to Mr Wu that he was to be dismissed. This impression was not dispelled at the meeting of 14 June. At the next meeting, on 20 June 2006, Mr Wu's impression that he had been dismissed was compounded when he was presented with a pre-prepared resignation letter, asked to sign it and offered two weeks compensation. Despite Ms Tay's efforts to repair the misunderstanding it seems to me that Mr Wu's pride would not allow him to accept her offer that he return to work.

[13] Mr Wu chose to represent himself throughout the Authority's investigation of his employment relationship problem. In his statement of the problem he did not spell out in formal terms that he believed he had a personal grievance against his employer. He simply stated that he believed that he had been dismissed from his position for no reason and without warning and sought compensation for that dismissal. Despite not being familiar with the legal terms usually used to describe his grievance Mr Wu was able to articulate his frustration and anger at the injustice he believed had been done to him by his employer. I find that Mr Wu was unjustifiably dismissed and does have a personal grievance against Jireh for which he is entitled to compensation.

Mr Wu's grievance

[14] The warnings purportedly given to Mr Wu on 10 May and 13 June 2006 were given without regard to due process. (I say purportedly because Mr Wu emphatically denies having received either warning). Mr Wu was not advised that his employer was considering giving him a warning nor advised of his rights in respect to representation. Even though inviting him to a meeting to discuss what had occurred the 13 June letter included the statement that the letter itself served as a written warning. While Jireh may have, in good faith, intended to investigate the alleged altercation the letter indicates that the company had already made a decision in respect to the outcome of that

investigation. Mr Wu has not pursued a personal grievance in respect to these warnings. However his employer subsequently used these warnings to help to justify their eventual decision to terminate Mr Wu's employment.

[15] Jireh say that they did not dismiss Mr Wu but rather, when he refused to return to work, accepted his (unwritten) resignation. As set out above I find that in reality one of Jireh's managers conveyed the very clear impression to Mr Wu that he was dismissed. This dismissal was carried out with no regard to proper process and, I find, Jireh then attempted to legitimise its actions by asking Mr Wu to sign a letter of resignation. At this point it was reasonable for Mr Wu to assume that he was dismissed and he has correctly claimed that this dismissal was unjustified. In formal terms Mr Wu has a personal grievance against his employer, Jireh Restaurants Ltd, in that they unjustifiably dismissed him from his employment.

Remedies

[16] In terms of section 124 of the Employment Relations Act I am required to consider the extent to which Mr Wu's actions contributed towards the situation which gave rise to his personal grievance and, if Mr Wu did contribute to this situation, reduce the remedies payable to him accordingly. The situation which gave rise to the *misunderstanding* which subsequently led to the termination of Mr Wu's employment was the complete lack of proper process followed by Jireh. To the point of Ms Tay's intervention Mr Wu could not be said to have contributed to the situation. However it is important to acknowledge that Ms Tay made genuine efforts to resolve this misunderstanding. Mr Wu chose not to accept her offers of either a return to work at Enjoy Inn Restaurant or alternative employment. I accept that Mr Wu's dignity had been wounded by the way in which he had been treated and he was entitled to believe that his employer wished him to leave. On the other hand, had he been more open to the suggestions made by Ms Tay his employment could perhaps have been salvaged. In this respect Mr Wu did contribute to the situation and as set out below this contribution was such as to nullify his entitlement to be reimbursed for any wages he may have lost as a result of the termination of his employment at Jireh.

[17] Given Mr Wu's refusal to accept Ms Tay's suggestions, it would be inappropriate to award him compensation for any wages he subsequently lost. In any event he very quickly found employment assisting in his wife's business. However Mr Wu did suffer hurt and humiliation as a result of the actions of his employer in terminating his employment. He is entitled to be compensated for this hurt and humiliation. **In terms of section 123(1)(c)(i) of the Employment**

Relations Act, Jireh Restaurants Ltd is to pay Qing Chao Wu \$5,000 without deduction, as compensation for the hurt and humiliation he has experienced as a result of his unjustifiable dismissal

Costs

[18] Mr Wu was not legally represented in bringing his case to the Authority and is not therefore entitled to an award in respect to costs, other than the reimbursement of his \$70 filing fee. **Jireh Restaurants Ltd is to pay Mr Wu \$70 in reimbursement of that fee.**

James Wilson

Member of the Employment Relations Authority