

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2016] NZERA Auckland 302  
5579242

BETWEEN                      LIANG ZHANG  
   Applicant  
  
AND                                JBG TRADING LIMITED  
   Respondent

Member of Authority:        Nicola Craig  
  
Representatives:              Eva Kuo for Applicant  
   Royal Reed for Respondent  
  
Investigation Meeting:        7 and 28 April 2016  
  
Submissions Received:        At the investigation meeting on 28 April 2016, and on  
   13 and 20 May 2016  
  
Determination:                5 September 2016

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**DETERMINATION OF THE AUTHORITY**

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- A.     Mr Zhang was not subject to an unjustified action by JBG Trading Limited (JBG) regarding his holiday pay for the Christmas/New Year 2014-2015 close down period.**
- B.     JBG did not breach section 69ZD of the Employment Relations Act 2000 regarding provision of rest breaks for Mr Zhang.**
- C.     Mr Zhang was unjustifiably dismissed by JBG. Within 28 days of the date of this determination JBG is to pay Mr Zhang:**
- (i) \$2,400.00 gross in lost wages; and**
  - (ii) \$4,000.00 as compensation for humiliation, loss of dignity and injury to feelings.**

**D. Costs are reserved.**

**Employment relationship problem**

[1] Mr Liang Zhang was employed by JBG Trading Limited (JBG) as a warehouse assistant for just over a year from 23 July 2014. JBG is a small business selling bathroom fixtures and other products from its Auckland showroom and warehouse. JBG is owned by wife and husband Ms Grace Xie and Mr James Huang, who both work in the business.

[2] Mr Zhang claims that he has unjustified disadvantage personal grievance claims regarding tea breaks and holiday pay, that JBG should be subject to a penalty for not allowing him to take tea breaks, and that he was unjustifiably dismissed by JBG.

[3] Issues were raised regarding whether Mr Zhang still had holiday pay owing and whether proper payments had been made by JBG for tax and Kiwisaver on Mr Zhang's final holiday pay. These issues were able to be dealt with by the parties and so do not require consideration by the Authority.

[4] There were also a number of other issues raised which clearly had importance to the party raising them, but which I find do not form the basis of a claim as such. These include Mr Zhang's concerns about his treatment by JBG when he had a workplace injury causing a scrape and bruising to his leg. Likewise, JBG's concern with Mr Zhang's departure for a month's leave, allegedly at short notice without its approval, and what he did during that time.

[5] At the investigation meeting, evidence was heard from Mr Zhang, Ms Xie, and Mr Huang. Also, Mr Mohammed Donald, who has worked for JBG since September 2015 in the same role as Mr Zhang, gave evidence in support of JBG. The Authority was assisted by an interpreter of the Mandarin language.

[6] At the investigation meeting I observed aspects of what I consider to be "suspicious" thinking by Mr Zhang. An example of this was his persistent evidence that the differences in times on the wall clock in the JBG office/kitchen and his own cell phone were because Ms Xie and/or Mr Huang turned the time on the wall clock

back in order to make him work a bit longer. There was no evidence to support this claim, which was strongly denied by Ms Xie and Mr Huang.

[7] Similarly Mr Zhang alleged that JBG was monitoring him via security cameras. Although JBG had security cameras, there was no evidence that it used evidence from the security cameras against Mr Zhang or even referred to security camera footage in its discussions with him. The purpose of the cameras was to ensure the security of products in the showroom/warehouse.

[8] JBG submitted that Mr Zhang adopted an attitude towards his job which was in the nature of dogmatic. Examples given were refusal to perform simple tasks, and insisting on working to the time on his own mobile phone, instead of relying on the company's clock. I accept from having seen and heard Mr Zhang that he tended to adopt an inflexible approach to his work.

[9] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has not recorded all the evidence and submissions received from the parties but has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter, and specified orders made as a result.

[10] This determination, reserved at the conclusion of the two separated days of investigation meeting, has been issued outside the statutory period of three months after receiving the last submissions from one of the parties. I record that when I advised the Chief of the Authority that this would likely occur he decided, as permitted by s 174C(4) of the Act, that exceptional circumstances existed for providing the written determination of the Authority's findings later than the specified date in s 174C(3)(b) of the Act.

### **Issues**

[11] The issues for investigation and determination are:

- (i) Was Mr Zhang subject to an unjustified action by JBG to his disadvantage regarding non-payment for statutory holidays for the Christmas 2014/New Year 2015 period?
- (ii) If so, what remedies (if any) should Mr Zhang be awarded?

- (iii) Was Mr Zhang able to take tea breaks as required by the then current section 69ZD of the Act, and if not, should JBG be subject to a penalty?
- (iv) Was Mr Zhang unjustifiably dismissed by JBG?
- (v) If so, what remedies (if any) should Mr Zhang be awarded?

[12] In the written closing submissions on behalf of Mr Zhang it was contended that I should award a penalty for a breach by JBG of good faith under s 4A of the Act. This claim was said to be based on a collective consideration of all of the employment incidents raised by Mr Zhang in the Authority. However, the only prior mention of good faith by Mr Zhang was in relation to the statutory holiday pay issue. I therefore decline to consider a separate good faith claim.

#### **Payment for statutory holidays**

[13] Mr Zhang's claim is that JBG deliberately failed to pay his holiday pay correctly over the closedown period of Christmas and New Year 2014 – 2015.

[14] JBG opened after Christmas/New Year on 5 January 2015. Mr Zhang's evidence regarding his attempts to follow up on this issue was not entirely consistent.

[15] In his witness statement, Mr Zhang said that he emailed his concerns over holiday pay to Ms Xie, who took charge of JBG's office matters. She forwarded his email to JBG's accountant and told him to contact the accountant directly. Mr Zhang phoned the accountant. The accountant told him that she was instructed by Ms Xie to tell him that he was not entitled to statutory holiday payments.

[16] By contrast at the investigation meeting, Mr Zhang said that he asked Mr Huang why he had not been paid for the statutory holidays. Mr Huang said JBG used a Kiwi accounting firm who told it that it did not have to pay. Mr Zhang said that he got the phone number from Mr Huang and that he phoned the accountant on 5 January 2015, but was not able to get hold of her. On 7 January he phoned again resulting in the accountant agreeing that he should have been paid.

[17] Ms Xie said that Mr Zhang was the first permanent employee which JBG had had and that the company used an accountancy firm for issues such as determining

holiday entitlements. She had drafted a pay slip for Mr Zhang for the holiday period which she sent to the accountant for checking.

[18] Emails were produced showing that Ms Xie responded over the break to Mr Zhang's query, saying she would contact the accountant on 5 January. Ms Xie forwarded Mr Zhang's email querying this issue, on to the accountant. When Mr Zhang kept raising the issue over the next day or two Ms Xie gave him the accountant's phone number. Ms Xie said that the issue was solved as soon as the accountant got back from holiday a couple of days later. Payment was arranged on the same day that the accountant's advice came through.

[19] Neither party called the accountant to give evidence. Ms Xie denied that she had told the accountant not to pay the statutory days. She also denied Mr Zhang's suggestion that there was some secret agreement between herself or JBG, and the accountant.

[20] Mr Zhang was clearly unimpressed that he felt he had to contact the accountant to follow up on this issue, when an answer was not forthcoming on his first day back at work. However, in order to establish a grievance he must establish that there was an unjustified action by JBG to his disadvantage.

[21] I do not accept Mr Zhang's evidence that JBG deliberately decided not to pay him for statutory holidays knowing that it was required to do so. Nor do I accept that there was a secret agreement between the company and its accountant. I am satisfied that JBG relied on the advice from the accountant regarding what it had to pay for the holiday period.

[22] There was no evidence of any particular disadvantage to Mr Zhang. Mr Zhang clearly faced a short period of delay in payment, but there was no evidence of this having any particular impact on him. I am therefore not satisfied that the element of disadvantage is established.

[23] In the event that I am wrong regarding whether a grievance is established, I do not regard the evidence as supporting a remedy. Mr Zhang lost no money or other benefit as a result (once payment was made) and there was no evidence of resulting humiliation, loss of dignity or injury to feelings.

**Tea Breaks**

[24] Mr Zhang claimed in an amended statement of problem that he was not able to take tea or rest breaks when he was working at JBG, and that was in breach of s 69ZD of the Act. The claim did not concern meal breaks.

[25] The historical version of s 69ZD which was in place at the time of most of Mr Zhang's employment with JBG, specified two 10-minute paid rest breaks<sup>1</sup>. This provision was replaced from 6 March 2015 with a provision requiring reasonable opportunities for rest.

[26] The employment agreement did not refer to rest or tea breaks.

[27] JBG's position was that Mr Zhang was able to take tea breaks, that he did so and also made himself a number of cups of Chinese tea a day.

[28] Due to the fact there were no other employees at the time Mr Zhang worked for JBG, this issue is largely one of credibility between Mr Zhang on the one hand, and Ms Xie and Mr Huang on the other.

[29] Mr Donald, the current warehouse assistant, gave evidence in support of JBG that he is "technically allowed" 10 minutes for each of his two tea breaks but occasionally takes 15-20 minutes for a break if things were not busy. Mr Donald also said that he sometimes takes longer lunch breaks than the prescribed 30 minutes. Also, at other times when there are no assigned tasks to complete, he is free to rest.

[30] I accept Mr Donald's evidence. However, as Mr Donald did not work at JBG at the same time as Mr Zhang, I give less weight to his evidence than if they were contemporaneous co-workers.

[31] A large amount of evidence was given by both sides regarding what Mr Zhang's tasks were, how many times customers had to be attended to in the warehouse and how long various activities took. This evidence related to Mr Zhang's performance issues, but was also argued to establish that Mr Zhang either had, or did not have, time for tea breaks.

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<sup>1</sup> S69ZD(5).

[32] JBG provided copies of invoice book pages to show that there were usually only around two to four customer invoices a day, and thus a small number of customers coming into the warehouse and requiring Mr Zhang's time.

[33] Submissions for Mr Zhang referred to his evidence as being that he was "expected to work non-stop" and he did. I accept that Mr Zhang had tasks other than helping customers who went into the warehouse. However, I am not persuaded that the warehouse work was so intensive that Mr Zhang had no time at all for rest breaks. It seemed unlikely that a company which had sales of such small numbers could require such a level of work, particularly when Mr Huang did some of the same work as well.

[34] Ms Xie and Mr Huang both say that they had a discussion with Mr Zhang when he started, telling him what the breaks were and saying that because it was a retail business, the timing of the breaks needed to be flexible around customers coming in.

[35] Mr Huang worked predominantly in the warehouse with Mr Zhang and so was more aware of what was occurring there than Ms Xie, who worked in the show room. Mr Huang says that breaks were usually at 11 am for 10 minutes, and 3pm for 10 minutes, and that he and Mr Zhang often had their breaks together.

[36] I accept the argument made on behalf of Mr Zhang that the rest breaks should be for a block of time, rather than just enough for a sip of tea.

[37] I am not satisfied that JBG was in breach of its obligations under s s 69ZD of the Act. I prefer the evidence of Ms Xie and Mr Huang that discussion about breaks occurred when Mr Zhang started and that tea breaks were provided for and taken, albeit with occasional interruptions due to customers arriving to take warehouse stock.

### **Resignation or dismissal?**

[38] Mr Zhang claims that he was unjustifiably dismissed by JBG on 27 July 2015. He received a notice on 27 July stating:

This is one week notice to end your employment in JBG Trading Ltd.

[39] JBG appeared not to accept that it had dismissed Mr Zhang. However, I note that the statement in reply refers to the employer having to dismiss Mr Zhang because he had seriously damaged the employment relationship.

[40] JBG's primary argument is that it effectively accepted Mr Zhang's repeated comments that he was going to leave, as a resignation. The email from Ms Xie to Mr Zhang of 27 July attaching the notice referred to above, states:

You threats us many times that you will leave this company, now we agree with you and attach notice here.

During your employment in our company, your rude attitude resulted in many serious unreasonable arguments and conflicts with us. I have given you many warnings to call police if you don't stop your out of control behaviours. Your performance seriously influence our business.

[41] However, even on Ms Xie's, and Mr Huang's, evidence, there was nothing said by Mr Zhang to amount to a resignation. According to their evidence, Mr Zhang said things such as "I have told you I will leave soon" and " You advertise for staff but you cannot get staff. I will not work very long". I find that these were merely expressions of intention or desire to leave in the future. I therefore do not accept that Mr Zhang resigned.

[42] I find that Mr Zhang was dismissed by JBG on 27 July 2015.

### **Was the dismissal justified?**

[43] I heard a considerable amount of evidence regarding workplace events. JBG says that it had performance and behavioural issues with Mr Zhang and that it had given him warnings. The themes raised by JBG include failure to follow instructions, refusal to work to the company clock, some damage to goods, and rudeness. During cross examination Mr Zhang accepted that there were some workplace incidents, but largely did not accept any poor performance or bad manners on his part.

### *Written Notes*

[44] JBG produced pages of what was described as a log book, but were actually single sheets of paper. They contained notes of events during Mr Zhang's

employment, written by Ms Xie, some directly from her knowledge, some based on Mr Huang's information to her. Some referred to incidents only, some to discussions or meetings with Mr Zhang. They generally contained less detail than would often be the case for notes of employment meetings. The pages all relate to the period from 14 May 2015 onwards, except for one. They are the main source of written evidence regarding events during Mr Zhang's employment.

[45] It is submitted on behalf of Mr Zhang that the pages were prepared retrospectively in order to provide justification of the employer's allegations. I accept that there was little way to independently check the date or times on the pages, but I am satisfied that the notes were made contemporaneously with the events. At the investigation meeting Mr Zhang was able to recall a number of incidents which were consistent with the log book, such as damage to company property, his injury and incidents related to his leaving the company.

[46] On Mr Zhang's behalf it is submitted that the log book pages were prepared by the employer from an employer's perspective rather than being an accurate record. I accept that the log book pages were prepared from the employer's perspective and do not cover all significant events during the employment. They mostly do not contain a detailed record of the events referred to. I accept that Mr Zhang was not shown the pages during his employment, and thus did not have the opportunity to comment on their accuracy.

[47] The pages assist JBG to establish that Mr Zhang was given what the company regarded as a warning, on occasions during his employment. However, they do not help establish other usual requirements for disciplinary processes.

[48] There is no evidence that Mr Zhang was advised in advance that the discussions or meetings were of a disciplinary nature. Likewise there is no indication that Mr Zhang was advised that he was entitled to representation or support at the meetings. It is not clear that Mr Zhang always had an opportunity to respond to allegations before he was issued with a warning.

[49] I am satisfied that JBG raised various issues with Mr Zhang regarding his performance and manner. Overall I prefer Ms Xie's, and Mr Huang's, evidence

regarding those events. They were more consistent, both internally, with what documentary evidence there was, and with each other's evidence.

#### *Final events*

[50] I turn now to events towards the end of Mr Zhang's employment.

[51] Ms Xie and Mr Huang agree that on 21 July 2015 they decided to give Mr Zhang a final chance to improve his attitude and performance. There had been no log book pages since 15 July and it was not apparent from the couple's evidence that any specific events of poor or bad behaviour by Mr Zhang actually occurred in the period between 15 and 21 July. Ms Xie did say that Mr Zhang was in a state of "semi-resignation" and was not doing the work. A meeting was held on 21 July where JBG indicated that it was unhappy with Mr Zhang's bad manners.

[52] The company has difficulties with relying on this approach to justify the later dismissal.

[53] Firstly, based on Ms Xie's, and Mr Huang's, evidence, JBG did not tell Mr Zhang that it was giving him this period; a final chance to improve. Mr Zhang was therefore not conscious of the opportunity to satisfy JBG that he had improved.

[54] Another serious difficulty is that there did not seem to be any further events in the final week, that would justify taking further action against Mr Zhang. There are no log book records of anything between 21 and 27 July. Rather it appears that Ms Xie and Mr Huang simply decided that they had had enough of Mr Zhang.

#### *The Law*

[55] Under s 103A of the Act the test of justification is whether a fair and reasonable employer could have acted in this way in all the circumstances.

[56] I am not satisfied that a fair and reasonable employer could have acted in this way. Giving Mr Zhang a final chance to improve may have been justified but the resulting dismissal suffers from the significant flaws of Mr Zhang not being warned that the chance was being given and there not being evidence of him doing anything wrong in that period.

[57] A fair and reasonable employer would have made it clear to Mr Zhang on 21 July that his employment was in jeopardy and would not then make a decision to dismiss if there had been no repetition of poor performance or misconduct in that period.

[58] I accept that JBG is a small company and Mr Zhang was its first permanent employee. However, I cannot accept that the defects in the way which JBG carried out this process are minor or do not result in Mr Zhang being treated unfairly.

[59] I therefore find that Mr Zhang to have been unjustifiably dismissed.

## **Remedies**

### *Lost Wages*

[60] Mr Zhang claims lost wages of \$3,600 gross, covering the six weeks before which he was able to start other employment.

[61] JBG questions Mr Zhang's claim, partly on the basis that the statement of problem claims four weeks' lost wages, whereas the amended statement of problem claims six weeks' wages.

[62] The statement of problem was filed on 31 August 2015, and Mr Zhang had only been dismissed on 27 July 2015. By the time the amended statement of problem was filed on 9 December 2015 Mr Zhang had obtained other work starting 15 September 2015, and so the end of the period of wage loss since dismissal was established. I therefore find the expansion of the lost wages claim to be explicable.

[63] Mr Zhang said that he had spoken to colleagues and gained leads for possible jobs. He then contacted these companies and made appointments. He also applied for some other jobs. I am satisfied that Mr Zhang attempted to mitigate his loss.

[64] In terms of the calculations, I am not satisfied that Mr Zhang had six weeks of wage loss. He was dismissed on Monday 27 July 2015, but was given a week's notice. His payslips indicate that he was paid until the end of that week, being 31 July 2015. His wage loss therefore runs from 3 August 2015, giving only five weeks' wage loss. At \$600 gross per week, that makes \$3000 gross of total lost wages.

[65] Under s 128(2) of the Act I must order JBG to pay Mr Zhang the lesser of actual lost remuneration or three months' salary. I would therefore have awarded Mr Zhang \$3,000 but this is subject to my contribution finding below.

*Compensation under s 123(1)(c)(i)*

[66] Mr Zhang claims \$9,000 for humiliation, loss of dignity and injury to feelings.

[67] Mr Zhang gave some, but not extensive, evidence of the effects of the dismissal on him. He felt very sad. He would occasionally take a drive so that his neighbours thought he was still at work. He was affected by his neighbour's kindness of giving him bread after finding out about the dismissal. I accept that Mr Zhang's sense of dignity was negatively affected by the dismissal.

[68] It was argued on Mr Zhang's behalf that post-dismissal statements in emails on behalf of JBG which were described as threatening were an aggravating factor. However, there was a lack of evidence about what Mr Zhang made of these statements or the effects on him.

[69] In determining the appropriate award I have considered my acceptance of Ms Xie and Mr Huang's evidence that Mr Zhang had expressed his intention to leave JBG.

[70] I would have awarded Mr Zhang \$5,000 under s 123(1)(c)(i) of the Act as compensation for humiliation, loss of dignity and injury to feelings, subject to my findings on contribution below.

*Contribution*

[71] I am required under s 124 of the Act to consider the extent to which the actions of Mr Zhang have contributed to the situation that gave rise to the personal grievance. If the actions of Mr Zhang are to be taken into account they must be both causative of the outcome and blameworthy<sup>2</sup>.

[72] I find that Mr Zhang's behaviour, particularly occasions of rudeness and failure to do what he was asked, as well as his expressions of intention to leave in

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<sup>2</sup> *Harris v The Warehouse Ltd* [2014] NZEmpC 188 at [178]

future, were a cause of the situation giving rise to the dismissal. I find that Mr Zhang can be seen as being at fault regarding this behaviour.

[73] In *Paykel Ltd v Morton*<sup>3</sup> Judge Colgan held that not every imperfection or peripheral fault by an employee should attract a deduction. Further, a reduction of 25 percent is described as one of particular significance.

[74] In the present case I deduct 20 percent from remedies for Mr Zhang's contribution. I consider that Mr Zhang's conduct was more than could be described as an imperfection, but significantly less than would justify a substantial reduction.

[75] I order JBG to pay Mr Zhang \$2,400.00 gross in lost wages within 28 days of the date of this determination. I order JBG to pay Mr Zhang the sum of \$4,000.00 as compensation for humiliation, loss of dignity and injury to feelings, within 28 days of the date of this determination.

### **Costs**

[76] Costs are reserved. The parties are invited to resolve the matter. If they are unable to do so Mr Zhang shall have 28 days from the date of this determination in which to file and serve a memorandum on the matter. JBG shall have a further 14 days in which to file and serve a memorandum in reply. All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

[77] The parties could expect the Authority to determine costs, if asked to do so, on its usual 'daily tariff' basis unless particular circumstances or factors require an adjustment upwards or downwards

Nicola Craig

Member of the Employment Relations Authority

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<sup>3</sup> [1994]1 ERNZ 875