

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2012] NZERA Auckland 51
5345174

BETWEEN GUANJUN ZHANG
 Applicant

AND JOHNSON GROUP NZ
 LIMITED
 Respondent

Member of Authority: James Crichton

Representatives: Michael Kan, Counsel for Applicant
 Royal Reed, Counsel for Respondent

Investigation Meeting: 19 December 2011 at Auckland

Determination: 13 February 2011

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant (Mr Zhang) alleges that he was unjustifiably dismissed from his employment by the respondent (Johnson Group) and also contends that there are wages owing to him as well. It is common ground that the wage arrears have now been paid in full so the only issue for determination by the Authority is the alleged unjustified dismissal. That claim is hotly disputed by Johnson Group which says that Mr Zhang resigned his employment. That resignation, according to Johnson Group, was in the context of a possible redundancy situation which had been fully disclosed by Johnson Group to all staff.

[2] Mr Zhang commenced employment around 20 September 2010. The work was physical in nature and, by common consent, dirty. Amongst other things, workers such as Mr Zhang were involved in sorting, preparing and packing materials.

[3] Evidence for Johnson Group was that from October 2010, the company was experiencing “*economic hardships*” and the Authority is satisfied with the evidence

of co-workers of Mr Zhang that from that time onwards, there were various gatherings initiated by Johnson Group where Mr Johnston Zhang the director of the respondent spoke to the gathered staff about the company's predicament.

[4] There was a discussion between the parties on 18 February 2011 at which, according to Mr Zhang in his brief of evidence, Johnson Group gave him perfunctory notice of his dismissal and handed him a pre-prepared letter of termination. Aside entirely from the fact that this account of proceedings is disputed by Johnson Group, it is also inconsistent with what Mr Zhang told the Authority at its investigation meeting. The so called letter of dismissal is, in the Authority's view no such thing, but simply a signed record of the relationship coming to an end without a reason being specified. Furthermore, a letter of resignation prepared on Johnson Group letterhead has been signed by Mr Zhang. Johnson Group say Mr Zhang asked them to prepare the letter of resignation after the 18 February meeting, because Mr Zhang has no English and he wanted an English version for his new employer.

[5] Johnson Group produced notes of the meeting and, through counsel, put those notes to Mr Zhang. Amongst other things, the notes identify a different number of people attending the meeting and most important of all, an entirely different purpose for the meeting. The purpose of the meeting identified by Johnson Group was to consider a variety of requests from Mr Zhang in the context of his notified oral resignation.

[6] Mr Johnston Zhang told the Authority that he was away from the business when he got a telephone call from Casey who was Johnson Group's administration person. She told Mr Johnston Zhang that Mr Zhang had indicated his wish to leave the employment. Apparently, Casey was instructed to organise the meeting about which the parties are in dispute and it was she who took the notes of the meeting which were put to Mr Zhang in the investigation meeting to challenge his evidence about the subject matter of the meeting.

[7] Although Casey was not made available to the Authority, another factory worker who was employed by Johnson Group, Mr Zeng, was made available. Mr Zeng was present at the disputed meeting and his evidence was that the meeting was called to respond to three issues raised by Mr Zhang, namely his proposed resignation, his request to be reimbursed for protective work shoes and his request to be paid for two days at the beginning of the employment when he had worked as a

volunteer. Mr Zeng said that Mr Johnston Zhang told Mr Zhang to give the company two weeks' notice (which was agreed to) and that would allow Johnson Group to resolve the two other issues raised by Mr Zhang. Mr Zeng says:

The atmosphere of the meeting was very pleasant at all times. [Mr Zhang] also appeared to be pleased as the director [Mr Johnston Zhang] had agreed to reimburse him for the shoes and volunteer work.

A resignation letter was prepared at the request of [Mr Zhang]. The letter was prepared by the administration staff of the employer company as [Mr Zhang] had limited English skills.

The employer company did not ask [Mr Zhang] to terminate his employment or suggest anything of the sort.

In fact, the director of the employer company [Mr Johnston Zhang] mentioned at the meeting that [Mr Zhang's] resignation was a surprise for him as there had not been any prior discussions of this and he was not aware that [Mr Zhang] had been looking for opportunities elsewhere.

However I was not surprised by [Mr Zhang's] resignation as he had previously told me that he had obtained another better job in West Auckland.

[8] That evidence of Mr Zeng, which the Authority has quoted from in some detail, was persuasive evidence. Mr Zeng's evidence was consistent with the evidence of Mr Johnston Zhang, the employer's director.

[9] Once the termination of the employment took effect, it is common ground that Mr Zhang made a number of visits to the premises of Johnson Group, one of which was in the company of his brother-in-law. The employer's evidence is that, during these visits, Mr Zhang was very happy and appeared to be pleased to see everybody but not in the sense of missing them and, according to Mr Zeng, Mr Zhang told Mr Zeng about his new position, the better salary that he was getting and generally his happiness at the change that he had made.

[10] Even after the personal grievance was raised by Mr Zhang's first solicitor, Mr Wang, the relationship between Mr Zhang and Mr Johnston Zhang appeared to continue to be a positive one. Indeed, Mr Johnston Zhang told the Authority that Mr Zhang had said that the only reason he had been to his solicitor was because he had not been paid the correct rate of pay. In fact it is common ground that Mr Zhang was incorrectly paid throughout the employment at a rate lower than the minimum adult rate then applying in the jurisdiction. That deficit was remedied by Johnson

Group before the statement in reply was filed. According to Mr Johnston Zhang, Mr Zhang maintained that it was his lawyer (Mr Wang) who told him that he should claim the compensation.

[11] But Mr Johnston Zhang did not leave it at that point; he rang Mr Wang directly and, amongst other things, sought to get Mr Wang to agree that Mr Zhang had not sought compensation at all and it was all the lawyer's idea. Mr Johnston Zhang's evidence to the Authority was that Mr Wang was adamant that his obligation was to look after his client and that he had acted on instructions.

[12] According to Mr Johnston Zhang's evidence to the Authority, having spoken to Mr Wang, he then rang Mr Zhang again, amongst other things recording the conversation, and again got from Mr Zhang the contention that it was Mr Wang's idea to claim for compensation and all the other things that were in the initial personal grievance letter. Mr Zhang said that all he wanted was to be paid the right rate of pay.

[13] In addition to the dispute about whether it was Mr Wang or his former client who was insistent upon compensation, there is another dispute involving Mr Wang which the Authority must take account of. Mr Wang sought leave to withdraw as solicitor on the record for Mr Zhang because of his ethical obligation to tell Mr Zhang about the nature of the conversation that he says he had with Mr Johnston Zhang. It is common ground that Mr Wang and Mr Johnston Zhang had the telephone discussion which the Authority refers to above. Mr Wang says this happened on 14 March 2011 and that it happened immediately after Mr Wang had faxed to Johnson Group Mr Zhang's personal grievance letter.

[14] In his evidence to the Authority, Mr Johnston Zhang told the Authority that he said to Mr Wang during the course of the telephone discussion that Mr Zhang was a good worker and that he was not keen to have lost his services. Amongst other things, Mr Johnston Zhang told the Authority that one of the reasons he felt that way about Mr Zhang was that Mr Zhang had himself been an employer and knew how difficult it was to be an employer. Essentially, the thrust of Mr Johnston Zhang's evidence was that he had no complaints about Mr Zhang's work.

[15] However, Mr Wang, Mr Zhang's former solicitor, felt under an ethical obligation to disclose first to Mr Zhang (his former client) and then to the Authority, having been released from his instructions, that Mr Johnston Zhang had said to him

something like “*every boss likes good workers. Mr Zhang is too old. He can hardly complete a package a day. He himself knows it*”.

[16] Then, after the investigation meeting had been completed, Mr Wang felt constrained to file a further document with the Authority in which he again referred to the matters in dispute between the parties and especially drew the Authority’s attention to a telephone discussion which he says that he had with Mr Johnston Zhang two days after the Authority’s investigation meeting in which he claimed that Mr Johnston Zhang threatened him that if he (Mr Wang) presented himself in the Authority, he would “*be in big trouble*”. Mr Johnston Zhang is also alleged to have threatened to take Mr Wang to the Law Society.

[17] Mr Wang, in his communication, then comments on the fact that his former client, Mr Zhang, had tried to, in effect, blame him (Mr Wang) for the various claims made with the personal grievance letter. Mr Wang told the Authority that he had discussed that with Mr Zhang and, while Mr Zhang had confirmed that that was precisely what he had done, his explanation was that it was a cultural thing where the employee does not want to directly be in conflict with the employer.

[18] Mr Wang also comments in this document on the fact that the legal practitioner who replaced him as Mr Zhang’s counsel at the Authority’s investigation meeting, Mr Michael Kan, had, towards the end of the investigation meeting, sought leave to withdraw on the basis that he no longer had current instructions. It was suggested by Mr Wang that Mr Zhang was prejudiced by this development and that there ought to be a rehearing.

[19] Yet another document was filed by Mr Wang some five days after the previous one and this simply repeats some of the material but discloses that Mr Wang has been concerned enough to review his file to ensure that he has not done anything unethical in relation to the matter.

[20] So far as Mr Wang’s involvement in these proceedings is concerned, the Authority is happy to record that it is untroubled by Mr Wang’s involvement in the matter before the Authority and is not persuaded that Mr Wang has done anything improper in relation to this proceeding.

Issues

[21] It will be appropriate if the Authority considers the following questions:

- (a) Did the withdrawal of Mr Kan prejudice Mr Zhang's case;
- (b) What happened at the February meeting;
- (c) Was Mr Zhang unjustifiably dismissed?

Did the withdrawal of Mr Kan prejudice Mr Zhang's case?

[22] The Authority is satisfied that Mr Kan's withdrawal had no effect on Mr Zhang's case at all because Mr Zhang's case, in the Authority's opinion, had already collapsed. Mr Zhang was an unprepossessing witness whose written brief of evidence was qualified and amended by Mr Zhang's equivocal oral testimony.

[23] A particular difficulty for Mr Zhang was around the fundamental point about whether he had resigned as the Johnson Group maintained or whether he had been dismissed for redundancy. Mr Zhang's principal building block in his case was the allegation that he had had a short meeting with Mr Johnston Zhang at which he had been handed a pre-prepared notice of termination and required to sign it. That evidence is simply not consistent with notes of the same meeting put into evidence by the employer, nor the evidence of witnesses for the employer.

[24] But if anything, Mr Zhang's principal difficulty seemed to be the variety of different recollections that he had of various significant events, in particular the quite graphic differences between his written brief of evidence and his oral evidence when questioned by the Authority.

[25] Lastly, the Authority was not impressed with Mr Zhang's behaviour in dismissing his then counsel, Mr Kan, who, in the Authority's opinion, had, like Mr Wang before him no doubt, done his level best to provide Mr Zhang with professional representation. Mr Zhang's dismissal of Mr Kan was not only foolish but cavalier and did him no credit.

What happened at the February meeting?

[26] The Authority is satisfied on the balance of probabilities that Mr Zhang's version of events is not to be preferred and that the better view is that advanced by

Johnson Group and witnesses for the employer to the general effect that the subject meeting was called, not at the behest of the employer at all, but because Mr Zhang had indicated his wish to resign and together with two other matters which the Authority has already alluded to, the subject matter of the meeting was concerned with dealing with Mr Zhang's issues rather than any issues raised by the employer.

[27] The Authority is drawn to its preferred conclusion first by the existence of the notes of the meeting put into evidence by Johnson Group, second by the persuasive evidence of Mr Zeng and thirdly by Mr Zhang's evident confusion about what his recollection of events actually was.

Was Mr Zhang unjustifiably dismissed?

[28] The Authority is satisfied that Mr Zhang was not unjustifiably dismissed but resigned his employment in the midst of ongoing discussion about possible future redundancies. The Authority does not accept Mr Zhang's recollection of the February meeting and prefers the recollection and the supporting documentation provided by Johnson Group which of course supports the conclusion that Mr Zhang resigned his employment rather than was dismissed for redundancy.

[29] In addition to the matters of corroboration already referred to in relation to the February meeting, the Authority is also impelled to this conclusion by Mr Zhang's behaviour after the termination of the employment. It is common ground that Mr Zhang attended at the workplace after the employment (he says once but the Authority is satisfied on more than one occasion) and that when there, he appeared to be satisfied with his lot and not in any way disgruntled with the former employer, Johnson Group.

[30] The only "*independent*" evidence which tends to suggest a contrary view to the one the Authority has formed, is the evidence of Mr Wang (Mr Zhang's former solicitor) that in a conversation with Mr Johnston Zhang on 14 March 2011, Mr Johnston Zhang had told Mr Wang that Mr Zhang was too old, that he could hardly "*complete a package a day*" and Mr Zhang knew it. Mr Wang opines that this was the real reason for Mr Zhang being "*dismissed*" from the employment.

[31] But even on Mr Wang's evidence, he does not recall Mr Johnston Zhang claiming that he had dismissed Mr Zhang. The words that Mr Wang attributes to Mr Johnston Zhang are themselves not inconsistent with Johnson Group accepting

Mr Zhang's resignation, even although Mr Johnston Zhang denies saying the words that Mr Wang attributes to him and maintaining in his oral evidence to the Authority that he regarded Mr Zhang as a good worker, at least in part because he had himself been an employer and so he knew how hard it was to make money.

[32] In summary then, the Authority is not persuaded that Mr Zhang was unjustifiably dismissed for redundancy or otherwise and that in fact Mr Zhang resigned his employment as Johnson Group maintained.

Determination

[33] It follows from the foregoing analysis that the applicant's claims are dismissed.

Costs

[34] If the parties are unable to resolve any issues around costs, leave is reserved for a further application to be made to the Authority for costs to be fixed.

[35] The Authority does observe, however, that this may well be a case where it would be appropriate for costs to lie where they fall.

James Crichton
Member of the Employment Relations Authority