Employment Court of New Zealand

Zhang v Sam's Fukuyama Food Service Ltd [2011] NZEmpC 28 (30 March 2011)

Last Updated: 29 April 2011

IN THE EMPLOYMENT COURT AUCKLAND

[2011] NZEmpC 28

ARC 46/10

IN THE MATTER OF a challenge to a determination of the

Employment Relations Authority

BETWEEN JIAN ZHANG Plaintiff

AND SAM'S FUKUYAMA FOOD SERVICE LTD

Defendant

Hearing: 24 February 2011

25 February 2011 (Heard at Auckland)

Appearances: Garry Pollak, Counsel for the Plaintiff

Tony Kurta, Advocate for the Defendant

Judgment: 30 March 2011

JUDGMENT OF JUDGE A D FORD

The challenge

[1] The plaintiff, Mr Jian Zhang, has challenged by way of hearing de novo the whole of a determination[1] of the Employment Relations Authority (the Authority) dated 23 April 2010. While the Authority found that he had been unjustifiably dismissed, it also concluded that his contributory conduct was so serious that it disentitled him to any remedies.

[2] All the witnesses who gave evidence in the case, with one exception, spoke

Chinese and the Court records its appreciation to the official interpreter who at times did not have an easy task. Before the Authority, Mr Zhang represented himself and I

have no doubt that he would have been disadvantaged in not being represented by counsel. That difficulty for the plaintiff was more than adequately addressed at the hearing in this Court.

[3] The issues which the case initially appeared to involve seemed to reduce in number as the hearing progressed. In the end, because of a responsible concession made by Mr Kurta during his final submissions, there really remains only the one matter for the Court to determine and that relates to the issue of contribution in terms of s 124 of the Employment Relations Act 2000 (the Act). Did the actions of Mr Zhang contribute towards the situation that gave rise to his dismissal and, if so, did they require a reduction in the remedies that would otherwise have been awarded? There was also a late development which I will need to deal with in relation to a claim for reinstatement. Before turning to these issues, however, it is necessary to explain more about the background to Mr Zhang's personal grievance.

Mr Zhang's employment

[4] Sam's Fukuyama Food Service Ltd, (the company or the defendant) is a chicken processing and distribution company operating out of Panmure, Auckland. The business was established approximately 12 years ago by its two current directors, Mr Alan Lun and Mr Sam Kong. Mr Lun, the managing director of the company, looks after internal management, including the staff and Mr Kong is responsible for quality control of the products as well as "protection equipment". The company employs 34 people.

[5] Mr Zhang commenced working for the defendant on 8 December 2008 as a driver. He was not given an employment agreement and he told the Court that most of the other Chinese drivers did not have written employment agreements either, but he said that he understood his hourly rate and some basic work conditions. After three months, Mr Zhang became a permanent employee and his hourly wages were increased. They were increased again in July 2009.

[6] Mr Zhang told the Court that on Friday, 7 August 2009 he made a delivery of goods to Rotorua and while he was in Rotorua he met up with a driver from another company who told him that his truck was overloaded. Mr Zhang said that he was

concerned that, in breach of the law, he was being required to overload his vehicle and so he later raised the matter privately with Mr Lun. He said that Mr Lun did not say anything in reply but simply shook his head and Mr Zhang then left his office.

[7] On 1 September 2009, Mr Zhang alone among the drivers was given an individual employment agreement to consider. He noticed that it contained disciplinary procedures including provisions for a first and then a final written warning prior to dismissal. He signed the agreement on 10 September. He told the Court that: "...looking back I have no doubt whatsoever that this was done for the purpose of trying to dismiss me for raising my concerns about the practice of illegally overloading trucks on a regular basis."

The warnings

[8] Much of the evidence related to the method of loading goods into the delivery trucks. At meetings on 24 August and 2 September 2009, Mr Zhang was told by Mr Lun that he was to change the system he had been using of loading the goods according to the company's picking slips and in future trucks were to be loaded according to the invoices and the picking slips. I suspected that the reference to "picking slips" should more accurately be "packing slips" but when I put that proposition to Mr Lun he confirmed that the document in question was called a "picking slip". It is not necessary in this judgment for me to explain the different methods of loading. Suffice to say that Mr Zhang told the Court, in evidence which I accept, that it took him considerably longer to load his truck under the new system.

[9] On 3 September 2009, Mr Zhang received his first written warning. He was

accused of breaching the company's policy in:

- Failure to load goods accurately according to Invoices and Picking

Slip.

- Failure to pass the message of insufficient stock to Customer Service Department to advise the customers in advance before you leave the [premises].

- Failure to provide the excellent customer service by using polite manners. Too many complaints from customers against your service.

...

- Failure to complete Driver List properly, i.e. the plate of the vehicle, leaving/returning time, daily mileages and the temperature of the truck body.

Failure to accept supervision and management of the company.

Any further poor performance, breaches of company rules or less serious misconduct will result in a second (final) written warning being issued. Warnings lapse one year from the date of issue.

[10] With the assistance of his wife, Mr Zhang wrote a response in the English language dated 5 September 2009 to Mr Lun's warning letter. He pointed out that he had always loaded the goods the way he had been trained when he joined the company and he needed time to adapt to the new loading rule which "...increased the work intensity and work time". Mr Zhang told the Court that at his meetings with Mr Lun on 24 August and 2 September the only matter that had been discussed was the method of loading goods which was the point made under the first bullet point of the warning letter. None of the other matters referred to under the remaining four bullet points had been raised with him.

[11] On 14 September 2009, Mr Zhang received a response from Mr Lun confirming that his warning letter still stood. He went on to say:

Even if I accepted some of what you said (and I don't) you still deserve a warning, I suggest you take note of what you have been given the warning for rather than try and make excuses, as we have already talked about these things,. If you still have any issue which we can help with you can ask and you will receive help.

[12] On the same date, 14 September 2009, Mr Zhang received a second written warning from Mr Lun. It followed an incident on Friday, 11 September 2009. On that day Mr Zhang was to take a delivery of goods to Rotorua. He said he knew that it was illegal for him to drive for over 13 hours in any one day. He began work at

6.55 am and he started packing the goods into his truck according to the new instructions. However, he had a large consignment that day comprising approximately 400 boxes weighing about four tonnes. At 9.30 am he was asked by Mr Lun's niece if he would be back in Auckland by 8.00 pm. He told her that he was not sure but be needed to discuss this with Mr Lun. Approximately 10 minutes later, when he had nearly finished loading the goods, two other drivers arrived on the

scene and Mr Zhang learned that they had been directed to make the delivery to Rotorua. When Mr Zhang returned to the staff room, Mr Lun came and told him that he was to go home as there was no job for him that day. He was paid only three hours' wages.

[13] The second written warning letter dated 14 September stated:

Failure to provide the responsibility as employee/driver Go-slow; failure to complete the job in reasonable time Failure to inform the company timely when the problem arise

you have been issued this second written warning. This follows your first warning,

...

Any further poor performance, breaches of company rules or less serious misconduct will result in your dismissal. Warnings lapse one year from the date of issue.

[14] Mr Zhang said that although the warning letter stated that the other driver had returned from Rotorua at 6.00 pm, that time was not correct because he later sighted the driver's logbook and calculated from entries in the logbook that the vehicle would have arrived back at around 7.30 pm. He also made the point that two employees had been sent on that delivery whereas he had not been offered the assistance of another worker. Mr Zhang said that none of the issues referred to under the three bullet points in the second warning letter had ever been discussed with him.

[15] Another development in the narrative which assumed some significance was that on Friday, 11 September 2009, Mr Zhang approached the Labour Department for mediation assistance. He told the Court that when he was sent home that day he realised that he could not solve the problem by himself. He had noted that cl 23 of his employment agreement provided that if a workplace problem could not be resolved with the employer then "...either party may seek independent advice and/or use the mediation services of the Labour Department" and a contact telephone number was provided. Mr Lun said that he knew that Mr Zhang had called the Labour Department because he made the call from his office. It was put to Mr Lun

in cross-examination that he did not like the fact that Mr Zhang had complained to the government (Labour Department) Mr Lun replied:

I had no choice to face the problem. No one like that. But I have to face it.

The dismissal

[16] Mr Zhang told the Court that before the mediation could be arranged and confirmed, he was dismissed. He explained that on 13 October 2009, the other company director, Mr Kong, mentioned to him that he was not wearing safety boots. Mr Zhang told him that he did not have any safety boots and proceeded to carry on with his duties. When he arrived at work the following day he noticed that something must have happened because everyone was busy removing boxes from trucks. He later found out that the first truck to leave the premises that morning had been stopped by the police for overloading.

[17] Mr Zhang said that after he finished work on 14 October he was required to go to Mr Kong's office and Mr Kong handed him a letter of dismissal. He said that after he handed him the letter, Mr Kong simply told him, "Go away. You may go away now." The letter said:

14th Oct 2009

To: Jian (Jack) Zhang

Re: Dismissal of employment

This is to formally advise that a notice of dismissal on employment will be given to you.

Due to your no use of safety boots during work, which has been flouting the company rules formulated in the "Individual Employment Agreement" and "Driver Daily Responsibilities and Procedures", I will be taking over the position of the driver that I have appointed to you.

This termination of employment will be effective on 15th October 2009. Sam Kong

Company Director

[18] Mr Zhang said that he was "quite shocked" to learn why he had been

dismissed. He said that he had been working for the company for over 10 months

and had never worn safety boots and "...it was quite unfair to be dismissed out of the

blue for that reason". He added:

41. If Mr Sam Kong had told me that not wearing safety boots would result in my dismissal or anything like that, I would have immediately bought my own safety boots. I certainly would not have jeopardised my job over safety boots. However, I was not given that opportunity. It was most important to me to keep my job because of personal financial pressures.

42. After I was dismissed I learnt that almost immediately the drivers were provided with safety boots and I learnt subsequently that it was my Employer's responsibility to provide protective clothing and equipment. This had never been the case.

[19] Mr Kong's evidence relating to the dismissal was quite different. He told the Court that when he saw Mr Zhang on 13 October 2009 not wearing safety boots he told him that "...he should wear them tomorrow, or he couldn't work here". As to the dismissal letter, he said:

3. On 14 October when I checked Mr Zhang was still not wearing his safety boots so I asked him into the office to talk about it when he came back from the run he was doing. I had Sarah type up a dismissal letter and it was on my desk just in case. I said he still didn't have his boots, and he walked up to my desk and took the letter, which was sitting there along with other papers. I needed to talk about it, because if people didn't have enough money for boots or it was a problem I would sometimes help them out. But he just took it and read it. He said it was only a little thing and I said it wasn't. He said that was okay, he would see me in court. I understand he still thinks it is a little thing.

4. At that time the drivers had and usually wore boots which they provided themselves, except for Mr Zhang. That is why I spoke to Mr Zhang about it.

[20] In cross-examination Mr Kong admitted that he had found out that Mr Zhang had gone to the government (the Labour Department) a few days before he dismissed him. Mr Kong accepted that he had regularly seen Mr Zhang at work but he did not agree to the proposition that he had seen him on a daily basis. He was unable, however, to satisfactorily explain why he had not taken up the issue regarding safety boots with Mr Zhang in a formal way at some earlier point in time. He was also forced to accept that, contrary to his dismissal letter, there was nothing in the employment agreement relating to safety boots. The employment agreement simply

required the employee to "always wear appropriate supplied health and safety

equipment".

[21] In relation to the other document referred to in the dismissal letter, the "Driver Daily Responsibilities and Procedures", Mr Zhang had earlier told the Court, in evidence which I accept, that he had never seen that document before. He found out after his dismissal that it had been posted on the front door of a cabinet where the drivers' keys were kept and it had also been displayed in the drivers' room.

[22] At one point in his cross-examination, Mr Kong made the rather surprising suggestion that Mr Zhang had intended to go on the unemployment benefit so that he could "...get a lot of monies to sue us through the New Zealand law in the Court". This proposition was followed up by Mr Pollak:

Q. I see okay so you are suggesting that he deliberately got himself dismissed so he could get $190 or $200 extra a week? Are you suggesting Mr Kong that Mr Zhang got himself deliberately dismissed so he could go on the unemployment benefit?

A. He deliberately – that's my own opinion he deliberately arranged to be dismissed and get the advantage, money from us and the unemployment benefit both.

Discussion

[23] I say at the outset that I found Mr Zhang an entirely credible witness and, with one or two inconsequential exceptions, I accept his narrative of the relevant events. Wherever there is a conflict between Mr Zhang's evidence and the evidence given by Mr Lun or Mr Kong, I prefer to accept that given by the plaintiff.

[24] There is no dispute between party representatives in relation to the legal issues. Both accept that the test for determining whether the plaintiff 's dismissal was justified is the test for justification set out in s 103A of the Act. The issue is to be determined on an objective basis by considering whether the employer's actions, and how the employer acted, were what a fair and reasonable employer would have done in all the circumstances at the time the dismissal occurred.

[25] Mr Pollak submitted:

14. The Plaintiff contends, obviously, that the warnings were unjustifiable and unfair, and believes that the Defendant has treated him harshly and unreasonably and before anything could be resolved by mediation, the Defendant made a decision to dismiss the Plaintiff and did so as retaliation for him raising his concerns about overloading and for involving the Government, and by this I mean Labour Department Mediation.

[26] I accept Mr Pollak's submission. The plaintiff impressed me as a conscientious employee who was anxious not to get offside with the law. He did not want to be accused of overloading his delivery truck. When his workplace problems appeared to be getting out of hand, he consulted his employment agreement and then took the initiative suggested in the agreement of contacting the Labour Department to arrange mediation. Mr Lun and Mr Kong, on the other hand, appeared to be intent on reading sinister connotations into all the plaintiff's actions. They were particularly concerned about Mr Zhang's approach to the Labour Department which they seemed to look upon as a complaint to the government. The timing and indecent haste of the whole disciplinary process, in my judgment, can only be explained in terms of the retaliatory reaction suggested by counsel.

[27] Another difficulty for the defendant in seeking to justify the dismissal is that the reason given for the dismissal, namely the failure to wear safety boots, was not one of the matters that had previously been raised with Mr Zhang in either of the two written warning letters he had received. The disciplinary procedures provided for in the employment agreement required a dismissal, on grounds not warranting instant dismissal, to be preceded by two written warnings identifying the specific rule, poor performance or unsatisfactory behaviour relied upon for the dismissal. A similar situation was recognised by Judge Travis in *Villegas v Visypak (NZ) Ltd* where it was

noted:[2]

The reasons given for the dismissal, however, do not appear to rely on the hierarchy of warnings...

[28] As already indicated, in the end Mr Kurta, quite responsibly, did not try to defend the company's actions culminating in the dismissal. The disciplinary procedures described in the employment agreement required the employee to be

asked for an explanation about any alleged breach before any warning was issued

and they provided that if a warning was to be issued, then the employee would be told what was expected by way of improvement and given the opportunity to improve. The agreement also provided for Mr Zhang to bring a representative or advocate with him to any disciplinary meeting but, again, that provision was not complied with. Mr Zhang, in other words, had never been given proper opportunity at a disciplinary meeting to explain that he had never worn safety boots and, in his experience, safety boots had never been an issue between the defendant and its drivers. It is axiomatic that a fair and reasonable employer will comply with the disciplinary procedures prescribed in its own employment agreements. For the reasons indicated, I have no difficulty in concluding that the plaintiff's dismissal in the present case was completely unjustified.

Contribution

[29] In his written submissions dealing with the issue of contribution under s 124 of the Act, Mr Kurta dealt with the subject in one paragraph:

48. It is submitted that Z's contribution is one of those instances where it was 100%. The Authority, as it is bound to do, took Z's contribution into account. Z was not a good employee in any respect, even if that was principally because of certain character/personality flaws, and contributed totally to his dismissal. It was indeed inevitable.

[30] I say at once that I reject that submission. I do not accept the proposition that Mr Zhang was "not a good employee in any respect". In speaking to his submissions, however, Mr Kurta referred to certain other matters which he submitted could properly be taken into account in determining the issue of contribution. As I understood the submission, the other matters included Mr Zhang's conduct in raising the issue of overloading and in approaching the Labour Department for mediation as well as his actions in carrying out a survey of his customers and in taking photographs of another driver.

[31] The survey Mr Kurta refers to is a customer survey which Mr Zhang carried out between 7 and 10 September 2009 in

response to the allegation made under the third bullet point in the first warning letter dated 3 September 2009 that there were “Too many complaints from the customers against your service”. That issue had never been raised with Mr Zhang previously and when he surveyed his customers he

found that there was no substance to it. He told the Court his survey found that most of his customers were very satisfied with his service. The issue regarding the photographs arose because on 15 October 2009, the day after his dismissal, Mr Zhang had taken photographs of another company driver loading or unloading his truck at Panmure. The point Mr Zhang drew to the Court’s attention in relation to the photographs was that the driver was not wearing safety boots.

[32] In *Villegas* in relation to the issue of contribution under s 124, Judge Travis said:[3]

That is a particularly relevant consideration when addressing the prime remedy of reinstatement. Previous authorities have established that the actions of an employee must be blameworthy conduct before they can constitute contributory conduct and affect the nature and extent of the remedies to be awarded.

[33] I respectfully agree with that statement of principle. A reduction of remedy under s 124 is appropriate only in cases where the employee’s contributing actions are culpable or blameworthy. If an employee’s actions are lawful and reasonable then it cannot be said that they qualify under s 124 for a reduction in remedies. None of the particular matters identified by Mr Kurta amount to culpable or blameworthy conduct and I am not disposed to make any reduction under s 124 for contributory conduct.

Remedies

[34] The plaintiff seeks reinstatement and s 125 of the Act provides that where a personal grievance for unjustified dismissal is upheld then “wherever practicable” the remedies are to include reinstatement. When the issue of Mr Zhang’s reinstatement was raised with Mr Lun, he told the Court:

He is most welcome to come back to work for us if he do according to the responsibility and the procedures.

[35] Several days after the conclusion of the hearing, in fact, after this judgment had been drafted, Mr Kurta made application to the Court for leave to introduce new

evidence in relation to the reinstatement issues. It was clear from the application,

however, that the evidence was not fresh evidence in the traditional sense because it could have been adduced at the hearing. After Mr Zhang made the remark recorded in para [34] he was asked by Mr Kurta whether they currently had a driver’s vacancy. Mr Lun suggested that it was more appropriate for Mr Kurta to put that question to one of the other witnesses for the defendant, Ms Sarah [Quian] Gao. In his application for leave, Mr Kurta frankly acknowledged that he had inadvertently overlooked following the matter up with Ms Gao when she subsequently gave her evidence. The so-called “new evidence” took the form of an affidavit from Ms Gao deposing that they did not have a spare driver’s position because the company was in the process of changing most of its drivers to contractors and when that process was finally completed they were likely to have 10 contractors and two employee drivers as cover.

[36] As it turned out, Mr Pollak did not object to the application for leave and brief submissions were filed in response together with a supporting affidavit from the plaintiff. In his affidavit Mr Zhang confirmed that if he was reinstated he would consider the option of being an owner-driver and although he was not sure of the details of what was proposed, he said that he would expect to be treated like anyone else.

[37] In his supplementary submissions, Mr Kurta argued that in the circumstances it was not practicable to reinstate the plaintiff. Apart from the operational changes referred to, Mr Kurta raised two other factors which he submitted were relevant to determining practicability. They were what he referred to as the “previously generally dysfunctional relationship between the parties and the fact that the plaintiff had subsequently resigned from a full-time permanent position.” Mr Pollak, in response, made the point that it was unfortunate that the issues raised by Ms Gao had not been “...delved into during the hearing and we would have to point out the anomalous situation of Quian Gao’s evidence as opposed to the critically significant evidence of Mr Lun.” Mr Pollak submitted that it was clear that in reality the plaintiff could be reinstated to his former employment and counsel accepted that “he must of course obey reasonable and lawful instructions”.

[38] The defendant accepted that the onus was on the employer to demonstrate that reinstatement was not practicable. I do not consider that the plaintiff’s subsequent employment relationship and its ending have any bearing on the practicality of reinstatement with the defendant company nor do I accept that the previous relationship between the plaintiff and the defendant could properly be described as “dysfunctional”. I find the latter submission incongruous given the very clear concession made by Mr Lun, para [34], who after all is the defendant’s managing director in charge of staff.

[39] In relation to the defendant’s reorganisation of its operations, I agree with Mr Pollak that it was unfortunate that this issue had not been raised at the hearing where it could properly have been explored through cross-examination. The situation, however, appears to be not dissimilar to that facing the Court in *Goodman Fielder New Zealand Ltd v Ali (No 2)*.[4] In

that case the defendant had been dismissed and sought reinstatement. Between the time of the dismissal and the Court hearing, the company had made structural changes to its operations. After describing the changes, the Court stated:

In these circumstances it would be unjust to permit the employer to benefit from its structural changes by precluding Mr Ali's reinstatement in employment that is an effective remedy for his unjustified dismissal. I find that although opposed by the employer's managers and inconvenient to it, reinstatement is not impracticable as that notion has been applied in previous cases.

[40] The defendant has known, at least since the filing of the plaintiff 's statement of claim in May 2010 (if not before), that reinstatement was a possibility. It would appear from Ms Gao's affidavit that the restructuring she describes is a relatively recent development and it is still ongoing. In her final paragraph she states:

6. In the meantime, largely because of language problems, it is a slow process to get our existing drivers suitably qualified and knowledgeable about being contractors and we need extra drivers while they learn more.

[41] As noted above, the plaintiff is prepared and willing to consider a contractual relationship. In all the circumstances, I am satisfied that the defendant has sufficient

flexibility to reintegrate the plaintiff into its workforce. The defendant has not discharged its burden of establishing that reinstatement would not be practicable and I order that Mr Zhang is to be reinstated in his former employment within 14 days of the date of this judgment.

[42] The second remedy sought by the plaintiff is compensation for his loss of wages since his dismissal. His claim under this head is based on his average weekly wage prior to his dismissal of $898.16. The amount claimed makes appropriate allowance for other income earned. In support of his claim, Mr Zhang told the Court:

My dismissal has been a nightmare for me. After I was dismissed I tried my best to find a new job and have tried everywhere without a great deal of success. I applied for Chinese teacher roles, installation positions, salesman, building sites, postie, self-employed contractors and I borrowed some money to take driving lessons to improve my driver's license from class 2 to class 4. I have applied for approximately 121 jobs but other than the odd bit of work I have not received regular employment.

Mr Zhang produced an exercise book which contained a record of every position he had applied for. It was an impressive production.

[43] Expanding in his examination-in-chief on his reference [para 42] to "the odd bit of work", Mr Zhang told the Court that one of the positions he obtained was with Johnson Group (NZ) Ltd. Documents produced recorded that he worked as a driver for the Johnson Group between 27 September 2010 and 19 November 2010. The circumstances surrounding the termination of that employment relationship were not disclosed to the Court. Mr Zhang said that a confidential settlement agreement was entered into and Mr Kurta was directly involved in so far as he acted for the Johnson Group. I am prepared to allow the plaintiff's claim for lost remuneration from the date of the expiry of his two weeks' pay in lieu of notice down to 27 September 2010 in a sum based on his average weekly wage less his earnings from any other source. I anticipate that the parties will be able to reach agreement on the appropriate figure in this regard but, if necessary, leave is reserved to seek further directions from the Court.

[44] Finally, the plaintiff seeks an award for humiliation, loss of dignity and injury to feelings pursuant to s 123(1)(c)(i) of the Act in the sum of $15,000. In evidence in support of this aspect of his claim, Mr Zhang explained that he is married with two young children aged nine and five and his wife is a full-time university student. He said that he had just purchased a new home and some furniture and his job was particularly important to him because of his personal circumstances. He explained that after he received the first warning, he did everything he could to avoid losing his job but after he turned to the Labour Department and was waiting for the mediation he was dismissed. He said that he was particularly hurt to later learn that Mr Lun had told the other drivers that he had complained to the government and therefore any conflict was in the public domain. Mr Zhang continued:

49. After my dismissal, I still had to pay for the mortgage and living costs and borrowed money from friends, relatives and selling items of property that we had. I could not sleep well and started getting headaches and vomited on occasions. I went to see my family doctor and looking back because I was so upset I even lost my temper with my family from time to time which I regret.

[45] Although no medical evidence was called in support of his claim, I accept from all the evidence I heard, that the plaintiff has made out his non-economic loss claim and under this head I award him the sum of $9,000. In fixing this sum I have taken into account my reinstatement order.

[46] The plaintiff having succeeded in his challenge is entitled to costs. If agreement cannot be reached between the parties on this issue then leave is granted for Mr Pollak to file a memorandum within 28 days from the date of this judgment and Mr Kurta is to have a similar period in which to respond.

[47] There is one final matter. Section 123(1)(ca) of the Act provides that in settling a grievance the Court may, in certain defined circumstances, make recommendations to the employer concerning the action the employer should take to prevent similar employment relationship problems reoccurring.

[48] Even though the two company directors appeared and gave evidence at the hearing, I still have a lingering concern that they do not properly understand the employment scene in New Zealand nor the obligations of an employer under the Act.

For example, it was clear from the evidence that although the company's own employment agreement provided for mediation, Mr Lun and Mr Kong had no real appreciation of what mediation actually involved. They saw it as a "complaint to the government". My concern in this regard was reinforced when, towards the end of his evidence, I asked Mr Kong whether he understood the provisions in the employment agreement which allowed a worker to have a friend or advocate attend a disciplinary meeting. He replied:

Not very clear. Not very clear. It's not very clear to me.

[49] The company appears to run an efficient business providing a valuable service to the commercial community but it is important that it complies with the employment laws of this country. In the hope that it may be of assistance to Mr Lun and Mr Kong, I strongly recommend that a meeting be arranged with an appropriate official or officials in the Labour Department who can explain to them (through a competent interpreter) how mediation operates and the basic obligations of an employer. I also recommend that before taking any disciplinary steps against employees in future, the company should seek appropriate legal advice. To facilitate the implementation of my recommendations, I direct the Registrar to forward a copy of this judgment to Mr Richard Henshaw, Auckland Legal Manager of the Labour Department. I also request the Registrar to follow up the matter and report back to me on developments in this regard sometime prior to the end of May 2011.

A D Ford

Judge

This judgment was signed at 11.45 pm on 30 March 2011

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[1] AA 184/10.

[2] [2010] NZEmpC 154 at [49].

[3] At [52].

[4] [2003] NZEmpC 100; [2003] 2 ERNZ 656.
