

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

AA 184/10  
5280565

BETWEEN                      JIAN ZHANG  
   Applicant  
  
AND                                SAM'S FUKUYAMA FOOD  
   SERVICE LTD  
   Respondent

Member of Authority:      Dzintra King  
  
Representatives:            Applicant In Person  
   Tony Kurta, Advocate for Respondent  
  
Investigation Meeting:     22 March 2010  
  
Submissions received:     7 April and 22 April 2010 from Applicant  
   26 March and 19 April 2010 from Respondent  
  
Determination:              23 April 2010

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1]     The applicant, Mr Jian Zhang, says he has been unjustifiably dismissed by the respondent, Sam's Fukuyama Food Service Ltd (Sam's" or "the company.")

[2]     During the hearing the question of whether Mr Zhang had in fact been dismissed arose for the first time.

**Background**

[3]     The company is a chicken processing and distribution company employing 34 people. Messrs Alan Lun and Sam Kong are the company directors. Mr Lun works in the business on a daily basis as managing director. Mr Kong also works in the business.

[4] Mr Zhang was employed as a driver on 8 December 2008. Mr Lun said he himself had worked as a driver and knew many of the delivery routes and how much time it would take load the trucks and make deliveries.

[5] Mr Lun said Mr Zhang's work could be finished well within the 13 hours permitted by the Land Transport Act 1998. However, Mr Zhang was a slow worker.

[6] In September 2008 the company introduced the Driver Daily Responsibilities and Procedures. This followed a NZ Transport Agency audit when it was recommended that the company have work rules and responsibilities for the drivers.

[7] Ms Sarah Gao, the office administrator, organised the compiling of the procedures and posted them on the door of the cabinet where the drivers return their keys. She said they were also on the board in the drivers' room. Each day the drivers took their keys from the key cabinet and returned the keys there at the end of the day. The document was written in English and Mandarin.

[8] Mr Zhang said he had never seen the rules. He maintained that the photos showing the rules on the door had been taken after he was dismissed and that the rules had not been there beforehand. I do not accept this.

### **Warnings**

[9] Mr Zhang was issued with a written warning letter on 3 September 2009. This followed meetings on 24 August and 2 September. It stated he had failed to load goods accurately, failed to pass messages regarding insufficient stock to the Customer Service Department, failed to be polite to customers, failed to complete the driver list and failed to accept the supervision and management of the company. The letter stated that any further poor performance, breaches of company rules or less serious misconduct would result in a second and final written warning being issued.

[10] The procedures for drivers specify that goods should be loaded according to the picking slip, that the storeman should be advised of any shortages or incorrect products and that the Customer Services Department should be notified of insufficient

stock so customers can be advised. It also states that the driver list should be completed each day.

[11] Mr Zhang wrote saying he did not agree and did not accept the warning, together with a detailed explanation as why he was unhappy with it. He maintained the work rules had changed recently and that if he loaded goods according to instructions he would have to work more than 13 hours each day, which was illegal. The work rules to which Mr Zhang refers, and which he claimed were new, were the driver procedures posted on the drivers' key cabinet door. It appears Mr Zhang did not deny having a problem with a particular customer but denied it had to do with his behaviour and was due to the poor quality of the goods being delivered.

[12] On 11 September Mr Lun replied saying that the warning stood. He told Mr Zhang that if he had issues the company could help with he should ask and would receive help.

[13] On 11 September Mr Zhang arrived at work at 6.55am and started to load goods into the truck according to the invoices and the picking slip. He was to drive to Rotorua. About 9.30am a member of the office staff asked Mr Zhang whether he would be back by 8pm. Truck drivers are not permitted to work more than 13 hours. He said he was unsure and needed to discuss it with Mr Lun. About 9.40am Mr Lun and another employee, who was a driver, arrived. Two other employees were directed to take the truck to Rotorua. Mr Lun told Mr Zhang that there was no other work available for him that day and he was to go home. He was paid for three hours only.

[14] The employment agreement provides that the days of work will be Monday to Friday and payment will be by the hour. There is no other reference in the agreement to hours of work. However, the driver procedures state that drivers must attend work between 8am and 4.30pm. The agreement provides that Mr Zhang was employed primarily as a driver but that he could be required to do any job within his capabilities at not less than his usual rate of pay.

[15] Mr Zhang maintained that Mr Lun told him the other driver was back by 6pm but Mr Zhang found the logbook, which showed that at 4.30 the truck was still in Rotorua, so that was inaccurate.

[16] On 14 September Mr Zhang was issued with a second written warning. This warning was for failure to act responsibly as a driver, failure to complete the work in a reasonable time and failure to inform the company of a problem. Mr Zhang was informed that “*Any further poor performance, breaches of company rules or less serious misconduct will result in your dismissal.*” Mr Zhang contacted the Labour Department to arrange mediation.

### **Safety boot issue**

[17] The Driver Daily Responsibilities and Procedures state that “*Drivers should have their own safety boots, maps and logbooks ready before starting work*”.

[18] Mr Kong said that on 13 October he noticed that Mr Zhang was not wearing safety boots. He told him he should be wearing them. Mr Zhang did not say anything so Mr. Kong said he told him he had to wear boots the following day or he could not work for the company. Mr Kong said Mr Zhang would not talk about it and walked away saying “*don’t worry, you can fire me.*” Mr Zhang denies this and says he told Mr Kong he didn’t have boots. I prefer Mr Kong’s evidence.

[19] On 14 October Mr Kong noticed that Mr Zhang was not wearing boots. He talked to Mr Lun and said if Mr Zhang kept on ignoring the company’s policies and would not listen, he wanted to dismiss him. He had Ms Gao type up a dismissal letter as his English was not very good. The letter was typed in case he needed it.

[20] On 14 October Mr Kong signed a letter of dismissal. This read:

*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 you to.*

*This termination of employment will be effective on 15<sup>th</sup> Oct 2009.*

[21] He left the letter on his desk. When Mr Zhang returned to the workplace Mr Kong asked him to come into the office. Mr Kong said he started to talk to Mr Zhang and told him he was still not wearing safety boots. He tried to discuss the matter with him. If Mr Zhang could not afford to buy the boots the company would buy them.

[22] Mr Kong said Mr Zhang went up to his desk, saw the letter, took it and said “*Is this for me?*” He asked if he was going to be dismissed. Mr Kong told him that would be the case if he was doing things against company policy.

[23] When Mr Zhang was near to the door he told Mr Kong he would see him in court. Mr Zhang denies saying this.

[24] Ms Gao said she was only a few metres from Mr Kong’s office and there were windows. Mr Zhang returned from his deliveries at 4.10pm. Mr Kong asked him to go to the office. Mr Zhang said “*You fired me only for this little thing?*” Mr Kong said something like he had fired him but it was not for a little thing. Mr Zhang replied that he would see Mr Kong in court.

[25] Mr Zhang maintained that he did not say anything during the meeting. I do not accept this. Mr Zhang also maintained that Mr Kong gave him the letter. I prefer Mr Kong’s and Ms Gao’s evidence.

[26] That same day Mr Zhang provided a letter to Mr Kong saying he believed he had been unfairly dismissed.

### **Was there a dismissal?**

[27] Although Mr Kong did not give the letter to Mr Zhang there was a dismissal. Mr Kong said he had made the decision to dismiss and that it was made because Mr Zhang did not follow instructions or policy in terms of site safety and did not listen to the employer. I accept the respondent’s evidence that Mr Zhang asserted that the wearing of safety boots was only a little thing and continued to assert that after Mr

Kong told him it was not. That assertion by Mr Zhang constituted a statement that he would continue to breach the company's policy and not wear safety boots. In that circumstance, the dismissal came into effect.

### **Mr Zhang's views about his dismissal**

[28] Mr Zhang maintained there was a plot to dismiss him. He said not wearing the boots was not the genuine reason for his dismissal. He said the company made up stories and gave misleading information and they punished him because he raised issues regarding illegal matters, namely a purported overloading of trucks and overtime matters.

[29] I am satisfied Mr Zhang knew about the requirement to have safety boots. Mr Lun said he had told Mr Zhang that he needed boots and the driver instructions were clearly visible on the door of the key cabinet. I do not accept Mr Zhang's evidence that the information was placed there only after he left. Ms Gao said she had taken photos and sent them to the NZ Transport Agency after the audit. This was before Mr Zhang started employment with the company.

### **Disadvantage claim**

[30] In his closing submissions Mr Zhang claimed for the first time that he had been unjustifiably disadvantaged by the issuing of the two employment warnings. I am satisfied that the company was entitled to issue the warnings. Mr Zhang had notice of what he was required to do – the driver procedures – and he should have notified the company that he was likely to exceed the 13 hour limit on 11 September.

### **Justifiability of the dismissal**

[31] The employment agreement contains a provision regarding disciplinary procedures. It provides that if dismissal is a possible outcome there is a right to bring a representative or advocate. Mr Zhang was not told the meeting with Mr Kong was a disciplinary meeting likely to result in his dismissal and he had no opportunity to bring a representative. In that regard, the dismissal was unfair and contrary to the employment agreement provisions.

[32] There was no conspiracy or plot or improper motivation in any of the disciplinary actions taken by the company.

[33] Mr Zhang was on notice that if he did not wear safety boots his employment was in question. He chose not to do so. He had two previous warnings. I have considered whether the failure to tell Mr Zhang that the meeting was to discuss possible dismissal and that he could bring a representative vitiates the dismissal.

[34] Section 103A requires consideration of what would a fair and reasonable employer have done in all the circumstances. The decision of the employer to dismiss is judged against the objective standard of a fair and reasonable employer.

[35] A fair and reasonable employer would have ensured that the provisions of the employment agreement were complied with. On that basis, the dismissal was unjustified.

### **Contribution**

[36] Contributory conduct needs to be considered. This requires a consideration of causation, proportionality and justice. There is no doubt that Mr Zhang's actions contributed to the situation giving rise to the grievance. His failure to abide by the driver procedures led to the warnings and ultimately to the dismissal. His conduct was blameworthy. It was the substantial cause of his dismissal.

[37] If a fair process had been followed it is highly unlikely if not totally certain that a justifiable dismissal would have resulted.

[38] That being the case, Mr Zhang has not suffered a loss able to remedied by compensation or reimbursement. His conduct was so serious that it disentitles him from any remedies, including reinstatement.

**Short payment**

[39] Another issue is the three hour payment on 11 September resulting from Mr Zhang being sent home. Clearly Mr Zhang could not have driven to Rotorua as it unlikely he could complete the task in the 13 permissible hours. The Driver Procedures require drivers to be at work from 8am to 4.30pm. Mr Zhang is to be paid for five additional hours. The amount is \$82.50.

**Costs**

[40] If the parties are unable to resolve the issue of costs, the applicant should file a memorandum within 28 days of the date of this determination. The respondent is to file a memorandum in reply within 14 days of receipt of the applicant's memorandum.

Dzintra King

Member of the Employment Relations Authority