

**IN THE EMPLOYMENT COURT
AUCKLAND**

**[2010] NZEMPC 54
ARC 44/09**

IN THE MATTER OF a challenge to determination of the
 Employment Relations Authority

BETWEEN JIE CHEN
 Plaintiff

AND NEW ZEALAND SUGAR COMPANY
 LIMITED
 Defendant

Hearing: 26 April 2010
 Auckland

Appearances: Mr Jie Chen in person
 Mr Robert Towner, Counsel for Defendant

Judgment: 14 May 2010

JUDGMENT OF JUDGE M E PERKINS

Introduction

[1] The plaintiff Mr Jie Chen commenced employment with the defendant, New Zealand Sugar Limited (NZ Sugar), on 2 April 2007 as a procurement controller.

[2] Issues arose between Mr Chen and the Supply Chain Manager, Ms Kathryn Gilroy, which culminated in Mr Chen receiving a verbal warning on 11 March 2008.

[3] Mr Chen then resigned his employment on 13 March 2008. He proceeded to raise a grievance about the warning. This remained unresolved after mediation and he then filed a statement of problem to the Employment Relations Authority (the Authority) in January 2009.

[4] A determination was issued by the Authority on 3 June 2009 with the finding that Mr Chen does not have a personal grievance arising from the warning dated 11 March 2008. Costs were reserved.

[5] Mr Chen then filed a challenge to the determination seeking a full hearing of the entire matter (a hearing de novo).

[6] While matters ancillary to the primary issue of the warning have been raised in pleadings in this Court, Mr Chen has confirmed that the challenge does not include a claim that he was unjustifiably dismissed. He gave a similar indication to the Authority prior to it holding the investigation meeting leading to its determination. The matter therefore proceeds in this Court as a disadvantage grievance as it did before the Authority and relates purely to the verbal warning issued on 11 March 2008.

Factual Background

[7] A few months into Mr Chen's employment with NZ Sugar an incident occurred where he was reprimanded by the customer services centre team leader for using the toilet in the centre. Mr Chen claims the team leader was rude to him and he took it up with Ms Gilroy. Ms Gilroy unsurprisingly regarded the incident as somewhat trivial and told both Mr Chen and the team leader to make an effort to resolve the issue amicably between themselves. While it appears that there was an attempt made between Mr Chen and the team leader to resolve the issue, Mr Chen clearly harboured feelings about this incident. The relationship between Mr Chen and the team leader remained strained. In Mr Chen's pleadings in this matter it is stated "this action has caused me huge humiliation and loss of dignity".

[8] On 9 October 2007 Ms Gilroy completed a quarterly performance review for Mr Chen. While Ms Gilroy stated in evidence that earlier to this date she had noticed several issues of concern, she gave him a performance rating of "good competent". Nevertheless, she had noticed that there was an attitudinal problem on Mr Chen's part. For example, in evidence she stated she noticed a pattern developing of his taking at least one sick day per month and taking other leave at short notice. He

would always leave work on the dot at 4.00 pm while others stayed working a bit later to get daily tasks completed on time. In addition, at team meetings he would not participate or make any eye contact with the rest of the supply chain team and would occasionally rudely state to her: "Have you finished yet?" Ms Gilroy stated that she had to speak to him about such comments and in particular as to how they sounded to the rest of the team.

[9] The relationship between Mr Chen and Ms Gilroy became strained further over the October/November period. Mr Chen failed to attend a Refinery Operators Training Course, which Ms Gilroy had specially customised for him. On the day of the course Mr Chen did not show up at work and at midday faxed in a medical certificate. Ms Gilroy stated in evidence that she expected Mr Chen would be there and considered his absence on medical grounds more than coincidental as he had earlier sought leave on the day of the course, which had been declined.

[10] Mr Chen alleged in his evidence and in his pleadings that the company through Ms Gilroy was unlawfully restricting him and other staff to taking only two weeks' annual leave. I take it that he meant by this that annual leave was not to be taken in slots greater than two weeks at a time. Ms Gilroy stated in reply that the company does not have such a policy but that if periods longer than two weeks were to be taken then there needed to be some discussion with management so that back-up resources could be arranged if necessary. Nevertheless, this appears to have been a further bone of contention in Mr Chen's mind.

[11] During October and November 2007 there were also complaints from suppliers and new staff about Mr Chen's attitude and lack of helpfulness to them. Ms Gilroy stated that she endeavoured to mediate relationship building sessions between Mr Chen and his colleagues. There was a continuation of taking sick leave and leave at short notice. Mr Chen asked Ms Gilroy if he could leave early on Thursdays and Fridays at 3.30 pm instead of 4.00 pm to avoid traffic. Ms Gilroy agreed to him leaving early on Fridays as a compromise but apparently Mr Chen was not happy that his request was not fully granted.

[12] Matters came to a head in December 2007 when the then Human Resources Manager for NZ Sugar, Ms Catriona Strong, overheard Mr Chen speaking rudely to Ms Gilroy. This related to an issue of Mr Chen being asked to deliver a Christmas gift received from a customer to the human resources department. Ms Strong was so shocked by the rudeness of Mr Chen towards Ms Gilroy that she facilitated a counselling session at which she set ground rules that Mr Chen had to comply with. Mr Chen in his evidence does not deny speaking rudely to Ms Gilroy on this occasion. Ms Gilroy reported that Mr Chen's attitude towards the counselling session appeared to be one of disinterest. He was required to respect Ms Gilroy as his manager, contribute to team spirit and was told that if he did not uphold the agreement in relation to his behaviour then disciplinary action might result. The discussion was recorded in a memorandum dated 13 December 2007.

[13] It appears that this meeting facilitated by Ms Strong on 13 December 2007 failed to effect any long-term change in Mr Chen's attitude. Later in December Mr Chen criticised Ms Gilroy's handling of a team meeting; to such an extent apparently that other team members objected to his attitude in front of both Ms Gilroy and Ms Strong who was overseeing the meeting. Mr Chen did not dispute this incident in his evidence. He then failed to attend a joint sales and marketing and supply chain Christmas party being the only team member not to attend. Ms Gilroy regarded this as a failure to participate in team building activities. To be fair to Mr Chen he did not participate in after hours team get-togethers because he does not drink alcohol and considered the functions involved a lot of late night drinking. He did attend the company Christmas lunch just prior to Christmas.

[14] In January 2008 Ms Gilroy arrived back to work from leave to be faced with an email from Mr Chen advising that he disagreed with the outcomes of the December counselling session. At some point in January 2008 he pointedly asked Ms Gilroy how he could make a complaint against her. Somewhat graciously on her part she directed him to human resources and the managers of the Employment Assistance Programme within the company. His churlish response to this was to ask whether he could approach the General Manager and Ms Gilroy indicated that he could.

[15] Further issues of dispute arose between Mr Chen and Ms Gilroy in February 2008. One was Ms Gilroy's restructuring of the team and reallocation of tasks with which Mr Chen was not happy. A further incident arose when Mr Chen was deputised for another employee who needed to be suddenly away from work to look after his wife. An argument developed between Mr Chen and the employee who was responsible for giving him directions. Ms Gilroy had to intervene.

[16] During March 2008 Mr Chen was going to be required to cover for another employee. At a meeting held on 7 March 2008 to discuss this Mr Chen was disrespectful, argumentative and rude to Ms Gilroy again. He indulged in his previously complained of behaviour by asking Ms Gilroy near the conclusion of the meeting: "Are you finished yet?" The tone and the manner with which Mr Chen addressed this question to Ms Gilroy made her concerned as it went against the behaviours that had been discussed at the meeting in December 2007. Mr Chen did apologise for his behaviour but in view of the repetitive nature of it Ms Gilroy decided, following a discussion with Human Resources, to commence a disciplinary process. A disciplinary meeting was held on 11 March 2008. The meeting was facilitated by Ms Strong. At the meeting Mr Chen apologised for his behaviour and there was an agreement at the outcome of the meeting that Mr Chen would participate in weekly coaching sessions facilitated by Ms Gilroy. Mr Chen was issued with a verbal warning for his failure to act in accordance with the ground rules and guidelines, which had been set by Ms Strong at the meeting on 13 December 2007. The verbal warning was confirmed in a NZ Sugar record. The record noted that the issuing of the verbal warning would remain on Mr Chen's personal file for a period of six months. It was stated that a review of the matter would take place on 14 April 2008.

[17] Mr Chen reacted inappropriately to the verbal warning. The following day on 12 March 2008 he sent an email to Ms Gilroy advising that he did not agree to anything that she had said at the meeting on 11 March 2008. The text of his email on that date to Ms Gilroy is as follows:

I did not agree anything you said in yesterday's meeting actually i am disputed everything you said and wrote. Besides, even if a coaching session is required, shouldn't it be done by an independent party?

[18] Ms Gilroy indicated to him that any failure by him to attend the coaching session programme would result in further disciplinary action against him. Mr Chen's response to this was a further email as follows:

As indicated previously, [none] of your allegations are justified. Therefore, please don't put me under further pressure as this may be used against you.

[19] Ms Gilroy quite justifiably took the tone of this email to be threatening.

[20] Ms Strong took a stern approach to these communications, which she regarded as unacceptable and inappropriate. A further meeting was held on 13 March facilitated by Ms Strong. At that meeting Mr Chen asked that the slate be wiped clean or that the coaching sessions be run by someone else. The meeting was adjourned so that Ms Gilroy could think about these options. It was clear at this stage that Mr Chen was endeavouring to set the agenda. Later that day Mr Chen spoke to Ms Strong and suggested that another alternative might be for him to resign. She indicated to him that this was not an option that the company was considering and that as there were other options on the table he should not make any rash decisions. However, at the end of the day Mr Chen did resign by way of an email which he sent to Ms Strong with a copy to Ms Gilroy. The text of that email (uncorrected) is as follows:

Personal Grievance & Resignation.

Hi, Catriona

The problems I am having are as follows:

My manager

- Make false unfounded allegations against me by not listening to my explanation and still going ahead with the verbal warning notice issuing;
- Keep changing work load without proper prior consultation;
- Ignore constructive suggestions such as proper Inwards Goods station set up to ease unnecessary pressure caused; (I have never ever seen anywhere **booking goods into the system without actually seeing them.**)
- Breach of contract in terms of my responsibility;
- Being dictatorial causing me feeling less valued;
- Act inconsistently in dealing with suppliers, i.e. favour one over the other not based on common practices or protocols;
- Restrict the rights of taking annual leave by dictating the length of any leave taken be not longer than 2 weeks. There is nowhere in my contract suggesting this;

- Put unnecessary pressure onto me making me feel work under duress, which consequently affects me a lot mentally;
- Care only about her being happy not the person/s working around her.

Why I feel aggrieved:

I have been trying to address those issues to her on a number of occasions, formally and informally, but nothing has been improved about them in real effect. I feel I am not contributing but more and more becoming a liability to the company. Everyday coming to work fearing what trap is going to coming my way from the manager has taken a huge toll on me.

As expressed in the previous occasions, respecting should work both ways and be upheld by all people including managers. In my case, I have been treated with no respect at all from the manager who has been judgemental by saying me being naïve, rude, childish, etc making me feel disadvantaged.

As recently as today, 13th March 2008, I made a commitment, in front of HR Manager, suggesting that we, both me and Kathy, forget about what has happened and move on & start fresh, I am very disappointed that suggestion didn't get echoed on the spot.

Given the situation where the working relationship has been immensely quote "eroded" end quote and my manager doesn't have the courage to make similar commitment in order to move thing forward. For the sake of the company having a peaceful working environment for the rest of the people, I have been forced to think that leaving company has emerged being the best option.

What solution I seek to resolve the matter:

In the mean time I wish to reserve the right to proceed with this personal grievance process. With extreme regret, i am hereby tendering my resignation. Please arrange proper handover as soon as possible. My requested finish date with NZ Sugar is 12th April unless I am informed of otherwise.

Best regards
Jie

[21] I have set this letter out in full because it indicates the difference in perception between Ms Gilroy and Mr Chen as to the events preceding the resignation. A marked difference in perception also came through by virtue of the pleadings in the third amended statement of claim filed by Mr Chen, a somewhat cursory brief of evidence, the manner of some of his cross-examination of Ms Gilroy during the hearing and in his brief opening submissions. However, the view I reach is that Mr Chen was reluctant to the point of obstinacy to accept the direction of his superiors within the company structure. While he disputed the need to set ground rules and the verbal warning he has not at any stage denied his actual behaviour towards Ms Gilroy as described in her evidence and contained in contemporary documents.

Legal issues

[22] Mr Chen in his submissions raised the issue of whether the company complied with proper process under the policy manual including the procedure to be adopted for the issuing of verbal warnings. He also submitted that the actions of the employer in this case would not withstand the test required to be applied under s 103A of the Employment Relations Act 2000 (the Act).

[23] In his submissions Mr Towner, for the defendant, accepted that a verbal warning can amount to a disadvantage as there follows a period when the employment of the employee is less secure for the duration of the warning. However, as he submitted a verbal warning in the circumstances of this case amounts only to a temporary disadvantage. I accept Mr Towner's submission that NZ Sugar was entitled to insist on reasonable standards of behaviour from Mr Chen towards his immediate supervisor Ms Gilroy.

[24] As I indicated earlier, from the pleadings now included in the third amended statement of claim there is some suggestion that Mr Chen is claiming remedies only appropriate to a claim for unjustifiable dismissal. He indicated in his evidence that he has not been in employment since the resignation and I gained the impression that he may be endeavouring to raise an argument of constructive dismissal. As I have indicated there was clear notification from him prior to the hearing of this matter that he was relying only on the disadvantage he alleges from the verbal warning. I need to indicate that even if Mr Chen was endeavouring to claim an unjustifiable constructive dismissal, there was no action of the employer in this case, which would substantiate such a claim.

[25] For Mr Chen to succeed in this challenge the Court would need to find that the actions of the employer, which have affected Mr Chen to his disadvantage, were unjustifiable. The test of justification contained in s 103A of the Act reads as follows:

For the purposes of section 103(1)(a) and (b), the question of whether a dismissal or an action was justifiable must 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 or action occurred.

Findings

[26] While it is clear that there may be some different perceptions to this matter arising from different cultural points of view, Mr Chen during the course of his employment had sufficient insight to perceive that the way that he reacted to Ms Gilroy on occasion was unacceptable. He chose to apologise on at least two separate occasions for his behaviour, although, in his pleadings he has attempted to resile from one of the apologies (see paragraph 17, third Amended Statement of Claim, dated 8 September 2009). Ms Strong was correct in perceiving that she needed to intervene in the way she did in December 2007. At that point standards were set as to how Mr Chen was to behave not only towards Ms Gilroy but also towards his fellow employees who were part of a team where cooperation between them was required.

[27] By March 2008 there was behaviour on Mr Chen's part, which he did not dispute, clearly requiring the issuing of a formal warning. Even though he had demonstrated some insight earlier, I do not think that Mr Chen was aware at that stage of how serious the matter had become. Despite Mr Chen's assertions to the contrary the company had clearly adopted appropriate procedures. It could have been open to the management to have issued a warning to Mr Chen in December 2007 from what Ms Strong had observed taking place between Mr Chen and Ms Gilroy over the Christmas gift situation. Ms Strong nevertheless chose to endeavour to mediate between the two of them setting ground rules as to future conduct. The series of incidents leading to the verbal warning did not therefore demonstrate behaviour, which had suddenly arisen. I agree with the statement of the Member of the Authority, which is a fair summary of the justification for the employer issuing the warning:

[23] The Authority is satisfied that the employer's actions were justified. Ms Gilroy on behalf of the employer was entitled to set reasonable ground rules or behaviours to be observed by Mr Chen and she was also entitled to require him to undertake periodic coaching. Mr Chen unfortunately questioned or challenged Ms Gilroy's authority as his manager and appeared to her to reject the outcome of the meeting held in late December. He also addressed Ms Gilroy in a disrespectful manner in front of other employees at the meeting in March.

[28] As the Member of the Authority went on to state, the moderation of the employer in issuing the warning was demonstrated by the fact that it was tempered

by a limited duration of six months. This was not a final warning even though Mr Chen's pattern of behaviour had continued over quite a lengthy period of time. Even when Mr Chen made suggestions of resignation the company management discouraged him from taking that step. He refused to accept the fact that the warning was justified in a graceful way and instead reacted in what I regard as a threatening way towards Ms Gilroy. Indeed he quite gratuitously contacted her again on the penultimate day of his employment to confirm that he would be taking a personal grievance and seeking legal advice. Ms Gilroy interpreted his advice as a final effort to intimidate her.

[29] Mr Chen's resignation in the face of a verbal warning issued in an effort to correct his attitude and behaviour was a complete over-reaction on his part. The verbal warning issued by NZ Sugar at that stage of the employment was necessary. It was open to NZ Sugar to consider the entire history of the employment not just the incident which precipitated the decision to issue a warning. Judged on an objective basis it was what a fair and reasonable employer would have done in all the circumstances at the time that the action occurred. There is no personal grievance arising from the issuing of the verbal warning. Accordingly, the challenge is dismissed.

[30] So far as costs are concerned I note that the Member of the Authority has reserved the matter of costs. Even though timetabling was set for the raising of the issue of costs in the Authority events were overtaken by filing of the challenge on 1 July 2009. I am prepared to receive submissions in respect of costs both in this Court and the Authority. If the defendant seeks costs then submissions are to be prepared and filed within 21 days. Mr Chen shall then have a further 14 days to file any submissions in answer. If the company wishes to reply to Mr Chen's submissions then it shall have a further seven days after that to do so.

M E Perkins
Judge

Judgment signed at 10am on 14 May 2010