

EMPLOYMENT STANDARDS TRIBUNAL

In the matter of an appeal pursuant to Section 112 of the
Employment Standards Act R.S.B.C. 1996, C. 113

- by -

Zhun Gao
("Gao")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Jim Wolfgang

FILE NO.: 97/186

DATE OF HEARING: June 20, 1997

DATE OF DECISION: June 27, 1997

DECISION

APPEARANCES

Zhun Gao	On his own behalf
Lori Pink	McMer-Jer Foods Ltd.
Christina Balcom	McMer-Jer Foods Ltd.
Teresa Walters	McMer-Jer Foods Ltd.
Zhiai Fu	Interpreter

OVERVIEW

This is an appeal by Zhun Gao (“Gao”) pursuant to Section 112 of the *Employment Standards Act* (the “*Act*”) against Determination Letter File No. 81672 which was issued by a delegate of the Director of Employment Standards (the “Director”) on March 10, 1997.

The Determination found that the Employer had just cause for termination and therefore no notice or termination pay would be required.

A second complaint regarding payment of wages owing was not addressed in the Determination Letter on March 18, 1997.

A hearing was held on June 20, 1997 at which time I took evidence under oath. Lori Pink (“Pink”), Store Manager, appeared for McMer-Jer Foods Ltd., (“McMer”), with her were Christina Balcom (“Balcom”) and Teresa Walters (“Walters”), managers for McMer. Zhiai Fu appeared as an interpreter for Gao. The delegate for the Director of Employment Standards did not attend the hearing.

ISSUES TO BE DECIDED

1. Does McMer owe Gao wages?
2. Did McMer have just cause for terminating Gao?

FACTS

Gao was employed by McMer as a maintenance person from July 15, 1996 to October 17, 1997.

Gao attended a half day training and information session for new employees at the Rutherford premises on July 15, 1996.

He worked his first two shifts at the Nicol street location working 23:00 to 07:00 hours performing janitorial duties. The remainder of his employment was at the Rutherford location in the same capacity and hours.

Gao claims he did not receive pay for the training session or the first two days of work. He raised this with at least two managers without success.

The Rutherford location has a store manager, Pink (a first assistant manager), Balcom (a second assistant manager), Walters, plus other managers, including a maintenance manager which Gao reported to. Gao was to take direction from all managers.

Gao claimed he was approached by Walters to drive her home after work. Although it was a violation of policy the other maintenance man who normally drove her home was unable to that night. Gao refused on the grounds that if the restaurant was robbed and he was off the premises he could lose his job, He also did not want to leave only one person at work. He claims Walters got very upset and shouted at him.

The restaurant closes at 23:00 and the drive-in window closes at midnight. The staff then leave except for the night manager who does clean up and counts the receipts. They usually leave the premises by 01: 00. This left Gao in the restaurant with only one other cleaning person until 05:00 when the opening manager would arrive.

McMer's policy on food is very structured, both in the preparation and the consumption by the employees. From the kitchen the cooked product has a limited life in the heated storage area depending on the type of food. If it has not been sold within the specific time limits it is placed in a waste bucket. From there it is counted by the staff for audit control and put in the garbage.

The employees have access to food, but only with the permission of a manager. The food is to be eaten on the premises and under no circumstances is it to be taken out of the building. Employees are not allowed to remove food out of the garbage.

Gao's first incident occurred on September 13, 1996. A number of young people gather around Rutherford store late at night and have been observed damaging parked cars. Gao brought his dog to work, leaving it in the car for protection. After coming on shift he took food

from the garbage to feed the dog.. He was observed by the manager, Walters, and reprimanded. The incident was entered on his employee record as “theft of product”, and warned he could be fired. Gao indicates on the employee record that he had not been previously warned about taking food for the dog. He claims he did not take food for the dog again, in fact, he stopped bringing the dog to work.

The second incident occurred in October 17, 1996, when Gao was observed taking three or four small pies from the bin and putting them in his car. This was after the restaurant had closed. The night manager confronted him, claiming, “you’re stealing, I caught you red-handed”.

Gao claims the food was for his own use, as he was going to eat them later in his shift. He claims he observed both employees and managers taking food, some even taking it from the cooler, without incident.

Gao raised his voice, denying he stole. Walters then went to bring Gao’s employee record to document the incident. Walters claims she asked Gao to sit down so she could discuss the matter with him. She claims he refused and took the file from her and threw across the room. She wrote the second warning and wanted Gao to sign the record, which he refused.

Gao indicates that a charge of stealing is a major offense in his culture and that he did raise his voice. He claims he never took any food that could be sold, and that he had permission from the maintenance manager to take food. He claims that the maintenance manager, Dave, said “After the doors close we could eat”. He also stated his family did not eat “Western” food and he was denied permission to bring his own food from home to cook at the restaurant. He further denies throwing his file across the room.

Walters claimed that Gao became angry and began shouting and said “You are not a manager, just a little girl. Every one quit cause of you. You bad manager. You always trying to get me in shit. I’ll hurt you. You always leave early, you not off until 2:00 am.” He was asked to leave but refused.

Gao claims he did not leave when asked because his job was to clean the premises and it would be irresponsible for him to go. He claims Walters raised her voice at him and became very angry, but he does admit to saying the above.

Walters phoned a more senior manager, Balcom, for assistance. Balcom says she could hear Gao shouting in the background when she spoke to Walters. She asked to speak to Gao and told him not to shout at Walters and to go back to work. He hung up on her. From her recollection this all took place between 01:00 and 01:30. Balcom called back a few minutes later and asked to speak to Gao, he refused. She again called Walters in half an hour and could still hear Gao shouting in the background.

Walters went downstairs and locked herself in the office until the opening manager arrived at 05:00.

Pink indicated Gao was a very good, conscientious worker. He may have had a language problem but should have asked to have any policy he did not understand explained to him in more detail.

ANALYSIS

To deal with Gao's first complaint concerning pay, Pink, after investigation, agreed Gao had not been paid for either the half day of training or the first two days of work. She agreed to issue a check and delivered it to Gao that day, which was done.

Gao was somewhat confused by the structure of management at McMer. There are nine managers at that location, all which could give direction to Gao. This invites the possibility of conflicting instructions. He believed he worked for Pink and received directions from the maintenance manager.

As he has some difficulty with language he had not fully understood the policies that were that were presented to him during his training and was reluctant to ask for help.

Gao's refusal to drive Walters home, which was against policy, I believe, may have become a factor. Gao said, "She was looking for a reason to get rid of me."

When questioned to explain his statement "I'll hurt you", Gao indicates he never meant it in a physical sense. He felt she had hurt other people with her treatment of them and he wanted her to feel what it was like. Gao has a daughter the same age as Walters and it was difficult for him to accept her as manager.

While Gao failed to follow the rules in taking food, in his mind, he did not steal. He was alone with only one other person for up to four hours per day. If he had any intention to steal, to me, that would have been the obvious time.

Throughout the incident the other maintenance man was working on the premises. It is unfortunate that neither the Branch nor McMer gives us any evidence of his recollection of events.

In all probability Walters did use the term "you're stealing" and this was very disturbing to Gao, however, it can not be used as a justification for what followed.

The main issue here is not about taking food although it was the trigger to what transpired. The reason for termination was insubordination particularly under McMer's rules. I believe some of

the problems were a result of cultural differences which are deep-rooted. By losing his temper, shouting, refusing to follow orders, over such an extended period of time, possibly as long as one and half hours put Gao in an irreversible position.

For the above reasons I find no termination pay is owing to Gao.

ORDER

I order, under Section 115 of the *Act*, that Determination Letter File No. 81672 be amended by adding the payment of \$160.00 wages plus vacation pay less deductions be paid to Gao. No other change is made in the Determination.

James E. Wolfgang
Adjudicator
Employment Standards Tribunal