

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2013] NZERA Auckland 375  
5418230

BETWEEN                      MING MAO  
Applicant

A N D                              NZ VISIONARY VANGUARD  
LIMITED T/A SHYNDAY  
KITCHEN AND BATHROOM  
Respondent

Member of Authority:      Rachel Larmer

Representatives:            May Moncur, Advocate for Applicant  
Don Li, Director of Respondent

Investigation Meeting:     16 August 2013 at Auckland

Submissions Received:     19 August 2013 from Applicant  
20 August 2013 from Respondent  
21 August 2013 from Applicant  
22 August 2013 from Respondent

Date of Determination:     22 August 2013

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**DETERMINATION OF THE AUTHORITY**

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**A.      NZ Visionary Vanguard Limited trading as Shynday Kitchen &  
Bathroom unjustifiably dismissed Mr Ming Mao on 17 April 2013.**

**It is ordered to pay Mr Mao:**

- (a)      \$14,591.70 lost remuneration;**
- (b)      \$2,000 distress compensation;**
- (c)      \$875 towards his legal costs; and**
- (d)      \$71.56 to reimburse his filing fee.**

## **Employment relationship problem**

[1] Mr Mao began work for NZ Visionary Vanguard Limited trading as Shynday Kitchen & Bathroom (Shynday) on 11 June 2012 on a full time basis. He undertook a number of different tasks including delivery jobs, work on the factory floor, operating machines, cleaning, reassembling kitchen cabinets, fitting/installing kitchens, and other general duties. Mr Mao was not provided with a written job description or an employment agreement.

[2] On 11 April 2013 a Labour Inspector visited Shynday after an anonymous complaint was received. This resulted in Shynday being told to provide written employment agreements for staff. The Labour Inspector also identified breaches of the Minimum Wages Act and the Holidays Act which were described as “*systemic in nature, and extends to all employees.*” The Labour Inspector issued a final Improvement Notice which was served on Mr Li on 25 June 2013.

[3] One of the employees the Labour Inspector spoke to on 11 April was Mr Mao. Mr Mao claims that after he was seen speaking to the Labour Inspector his manager informed him not to come to work the next day (12 April) because there was no work for him. Mr Mao says he found out later that Shynday hired a new Indian employee on the day that Mr Mao was told not to come to work.

[4] Shynday was asked to provide the Authority with its Employer Monthly Schedules for April – June 2013 because these should record the names of employees who are employed or start or finish work each month. Shynday did not provide this information. Its explanation was that its accountant held all of its records but that did not explain why the accountant could not provide a copy of them to the Authority.

[5] Shynday’s sole director and shareholder Mr Dongning (Don) Li was unable to advise the Authority of the dates on which the employees identified by Mr Mao had started and/or finished work with Shynday. Mr Li told the Authority that he sold Shynday to the wife and brother of one of his employee’s (Mr Wenjiang (Michael) Xu) on 1 July 2013. Mr Li says he is no longer a director or shareholder of Shynday and has not been since 01 July 2013. He could not explain why the Companies Register still records him as Shynday’s sole shareholder and director.

[6] Mr Xu is the Factory Manager. Mr Mao said he and other employees regard Mr Xu as the “*big boss*”. Mr Xu was the sole shareholder and director of Shynday

International Limited which used the trading name “*Shynday Kitchen & Bathroom*”. Mr Xu used to employ Mr Li as a salesperson. When Mr Xu’s company went into liquidation Mr Xu sold his company to Mr Li. Mr Xu was subsequently employed by Mr Li and he continues to run the factory and deals with the suppliers in China. Although Mr Xu’s company went into liquidation the trading entity “*Shynday Kitchen & Bathrooms*” continued to operate as business as usual but under Mr Li’s apparent ownership.

[7] Somewhat contradictorily, Mr Li also told the Authority that he had instructed his accountant to put Shynday into liquidation. Mr Li could not tell the Authority when he had done that and there was no evidence produced to support that. Mr Li could not explain why Shynday was not recorded as in liquidation or about to go into voluntary liquidation on the Companies Register.

[8] Nor could Mr Li reconcile these two contradictory statements, namely that he had no involvement with the Shynday because he had sold it and that he had arranged for Shynday to be placed in liquidation.

[9] The Labour Inspector advised the Authority that Mr Li had told her Shynday went into liquidation on 16 August 2013. In Mr Li’s communications with the Authority he has also referred to Shynday being in liquidation. As at the date of this determination the Companies Register records that Shynday is still operating and that Mr Li is still the sole shareholder and director.

[10] On 15 April 2013 the Office Manager/Administrator, Mr Robin Peng, handed Mr Mao an employment agreement and asked him to sign it immediately. Mr Mao says he told Mr Peng he did not want to sign the agreement because it stated that he was a casual employee with no set or minimum work hours. It also contained a 90 day trial period despite Mr Mao having been employed for more than a year at that time. Mr Mao says he also raised concerns that the agreement did not provide for tea breaks.

[11] Mr Mao claims Mr Peng told him if he did not sign the agreement he would not be allowed to come back to work any more. Mr Peng admits he told Mr Mao he had to sign if he wanted to continue working based on instructions from Mr Li. Mr Mao says after being told that he signed the employment agreement under duress because he was a migrant worker and did not want to lose his job.

[12] Two days later, on 17 April 2013 Mr Mao was called to a meeting with Mr Peng and Mr Li. Mr Mao was handed a letter dated 17 April which referred to Shynday being “*in a great deal of financial crisis.*” The letter records that Mr Li was considering whether Mr Mao could remain with the company and that his employment was “*on hold immediately*” because the company was unable to provide work for him. Mr Mao was instructed to return all company property immediately.

[13] The letter records Mr Li will make a decision about whether Mr Mao would be made redundant by 01 May and that Mr Mao would be paid until the final decision was made. Mr Mao was invited to approach Mr Li over the next two weeks to discuss the matter.

[14] Mr Mao subsequently met with Mr Xu and asked him why he was being made redundant when Shynday was still hiring new workers and when it was asking existing staff to work extra hours. Mr Mao says Mr Xu did not have a satisfactory answer and tried to avoid his questions.

[15] On 22 April Mr Mao was told to come into the office to collect his wages for the period 18 April to 1 May. When he attended on the company on 23 April to do so he was presented with an “*Employment Termination Agreement*” and told he would not receive his wages unless he signed it. The Agreement required Mr Mao to compromise any claims he had against Shynday in order to receive his wages so Mr Mao declined to sign it because he believed he had been treated unfairly.

[16] On 26 April Mr Mao received a letter entitled “*Position Redundancy*”. This confirmed that his position ceased to exist and that he was redundant.

[17] Mr Mao was dismissed without notice or without pay in lieu of notice. He received no pay after 17 April.

[18] Mr Mao claims he was unjustifiably dismissed because he persistently asked for a written employment agreement and raised ongoing concerns about his wages not being paid on time. Shynday denies that Mr Mao was unjustifiably dismissed. It says he was made redundant following a fair and proper process because the company was facing severe financial difficulties.

## **Issues**

[19] The issues to be determined include:

- (a) When was Mr Mao dismissed?
- (b) Was Mr Mao's dismissal justified?
- (c) If not, what if any remedies should be awarded?
- (d) What, if any, costs should be awarded?

### **When was Mr Mao dismissed?**

[20] Shynday claims Mr Mao was dismissed by letter dated 26 April 2013. I do not accept that. Mr Li told Mr Mao on 17 April to leave work immediately. He was not provided with any work after that. Mr Mao was not paid from 17 April. Mr Mao was instructed to return all company property on 17 April and he did so.

[21] I find that Mr Mao was summarily dismissed on 17 April 2013.

### **Was Mr Mao's dismissal justified?**

#### *Justification test*

[22] Shynday bears the onus of justifying Mr Mao's dismissal. Justification is to be determined in accordance with the justification test in s.103A of the Employment Relations Act 2000 (the Act). This requires the Authority to objectively assess "*whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal [...] occurred*".

[23] When applying the justification test the Authority must consider whether Shynday has complied with the four procedural fairness tests set out in s.103A(3) of the Act. A fair and reasonable employer is expected to comply with its statutory obligations. This includes the duty of good faith in s.4(1A) of the Act which requires an employer which is considering making a decision that may impact on an employee's on-going employment to provide the employee with access to relevant information and an opportunity to comment on it before a final decision is made.

*Substantive justification*

[24] I am satisfied Shynday was facing financial difficulties and needed to reduce costs. One of its customer's had gone into liquidation owing it over \$200,000. At the time that Mr Mao was dismissed Shynday had three months' rent arrears and its landlord was threatening it with eviction proceedings. It is still in arrears with its rent. It was also common ground that Shynday regularly failed to pay its employee's on time.

[25] There is also a question about whether Shynday has deducted and paid the correct PAYE to the Inland Revenue Department (IRD). That is something Mr Mao needs to raise directly with IRD, which may wish to investigate Shynday's alleged failure to meet its tax obligations.

[26] Mr Li told me Mr Mao and Mr Sun<sup>1</sup> they were the only two staff to be made redundant. Shynday is unable to satisfy me that Mr Mao was genuinely redundant because there were other employees who did the same job as him but who remained employed. Shynday did not go through a fair or proper selection process. Nor did it explain to Mr Mao why he had been selected for redundancy over his colleagues.

[27] Shynday targeted Mr Mao for redundancy because it considered him to be a poor performer. However, it did not raise that with him so he was deprived of any opportunity to respond to Shynday's adverse view of his performance. That was unfair and unreasonable and a breach of good faith.

[28] I also consider the genuineness of Mr Mao's dismissal is undermined because Shynday advertised for and employed new staff after Mr Mao was dismissed. Shynday says that occurred because it always needed experienced kitchen installers/fitters. That was the job Mr Mao did. Shynday explained that by saying Mr Mao was supposed to be experienced but his work was not up to standard.

[29] Mr Li's explanation that advertisements in a Chinese newspaper for staff after Mr Mao was made redundant had nothing to do with Shynday is not accepted because the contact details in the advertisements Mr Mao presented to the Authority were Shynday's contact details.

[30] I am not satisfied Mr Mao's dismissal was substantively justified.

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<sup>1</sup> Mr Sun's dismissal grievance was heard at the same time as Mr Mao's.

### *Procedural fairness*

[31] I also find that Shynday did not conduct a fair or proper process before it dismissed Mr Mao. First of all, it pressured him into signing a casual employment agreement under threat of termination of employment. Then the day after he had signed the new casual employment agreement it called him to an unscheduled meeting and dismissed him.

[32] I do not accept Mr Li's evidence that the 17 April meeting was a consultation meeting. Mr Mao had no advance notice of the meeting. He was not provided with any information in advance of the meeting. He was not in a position to understand that his on-going employment was in jeopardy or to provide feedback that could affect Shynday's decision to dismiss him.

[33] Mr Mao was given a letter in English in the meeting, a language he is not fluent in. He had no opportunity to take advice or be accompanied at the meeting by a representative or support person. These deficiencies would not have been of concern if the 17 April meeting was merely to table to proposal and a subsequent feedback/consultation meeting was scheduled. However that is not the case. These were fundamental procedural errors because Mr Mao was summarily dismissed at this meeting.

[34] I find that Shynday has not complied with its statutory obligations. It breached its s.4(1A) good faith obligations and it did not comply with any of the four procedural fairness tests in s.103A(3) of the Act. These breaches fundamentally undermine Shynday's ability to justify its dismissal of Mr Mao.

### *Outcome*

[35] I find that Shynday's dismissal of Mr Mao on the grounds of redundancy was substantively and procedurally unjustified. How Shynday "*acted, and its actions*"<sup>2</sup> were not what a fair and reasonable employer could have done in all the circumstances. It is therefore unable to discharge the onus of justifying Mr Mao's dismissal.

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<sup>2</sup> S.103A of the Act.

## **What remedies should be awarded?**

### *Mitigation*

[36] Mr Mao provided a list of the companies he had approached for work. He says he has had trouble finding paid employment despite undertaking two unpaid employment trails. I am satisfied he has taken adequate steps to attempt to mitigate his loss.

### [37] *Lost remuneration*

[38] Mr Mao has not been employed since his dismissal. At the time of this determination Mr Mao has been out of work for 18 weeks. He is entitled to recover the remuneration he has lost over that period.

[39] In the absence of any payroll information from Shynday I have to rely on the wages information Mr Mao supplied. Mr Mao says that during his employment he worked on average 52.3 hours per week and earned on average \$810.65 per week. He worked six days a week and was paid \$15.50 per hour.

[40] Shynday is ordered to pay Mr Mao \$14,591.70 under s.128(3) of the Act.

### *Notice pay*

[41] Mr Mao seeks two weeks' unpaid notice pay. I decline to award notice pay because his award of lost remuneration already covers the entire period he has been out of work.

### *Distress compensation*

[42] The evidence Mr Mao provided in support of his claim for distress compensation was minimal. Mr Mao says he was hurt, distressed and suffered extreme financial pressure. He also says he did not sleep well for many weeks after his dismissal. Compensation must be related to the actual evidence of distress which means an award at the lower end of the scale is appropriate.

[43] Shynday is ordered to pay Mr Mao \$2,000 compensation under s.123(1)(c)(i) of the Act to compensate him for the humiliation, loss of dignity and injury to feelings he has suffered.

### **Costs**

[44] Mr Mao as the successful party is entitled to a contribution towards his actual legal costs. Mr Mao has incurred costs in excess of \$7,500. He seeks an award of \$3,500 costs.

[45] I adopt the Authority's usual notional daily tariff based approach to costs, which is currently \$3,500 per day. Although Mr Mao's matter involved a one day investigation meeting Mr Sun (also represented by Ms Moncur) had his dismissal grievance heard at the same time. It is therefore appropriate to allocate the investigation meeting time equally between Mr Mao and Mr Sun.

[46] I therefore approach Mr Mao's costs on the basis it was a half day investigation meeting, so the notional starting daily tariff is \$1,750.

[47] Ms Moncur submits the notional starting tariff should be doubled because Shynday did not comply with the Authority's directions which she submits lengthened the time required for the investigation meeting.

[48] I consider that Shynday's actions in this regard are cancelled out by Ms Moncur's decision to introduce many new documents for the first time after the investigation meeting had started. She did not bring copies of the new documents so the meeting was adjourned to enable them to be copied, distributed and reviewed. The new documents were in Mandarin so further time was lost because of the need to have the new documents translated. I do not accept the notional starting tariff should be increased.

[49] In terms of factors warranting a decrease, I am satisfied Shynday is facing financial difficulties so I consider it appropriate to halve the notional starting tariff to reflect that. Shynday is ordered to pay Mr Mao \$875 towards his actual legal costs together with \$71.56 to reimburse his filing fee.

**Rachel Larmer**  
**Member of the Employment Relations Authority**