

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2013] NZERA Auckland 374  
5418087

BETWEEN

GUOQIANG SUN  
Applicant

A N D

NZ VISIONARY VANGUARD  
LIMITED T/A SHYNDAY  
KITCHEN & 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 & Bathrooms unjustifiably dismissed Mr Guoqiang Sun on 17 April 2013. It is ordered to pay Mr Sun:**
- (a) \$2,580.39 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 Sun started employment with NZ Visionary Vanguard Limited trading as Shynday Kitchen & Bathrooms (Shynday) as a full time employee on 29 October 2012. He was not given a written employment agreement or job description.

[2] Mr Sun says he did a number of different jobs which included doing deliveries, doing jobs on the factory floor and operating the machines that cut the boards for kitchen cabinets.

[3] 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.

[4] One of the employees the Labour Inspector spoke to on 11 April was Mr Sun. Mr Sun claims that Mr Wenjiang (Michael) Xu the Factory Manager looked at him threateningly when he saw Mr Sun speaking to the Labour Inspector. Mr Sun says he felt intimidated by Mr Xu.

[5] Mr Li told the Authority that he sold Shynday to Mr Xu’s wife and brother 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 Sun says Mr Xu is viewed as the “*big boss*”. Mr Xu was the sole shareholder and director of Shynday International Limited which used the trading name “*Shynday Kitchen & Bathrooms*”. Mr Xu used to employ Mr Li as a salesperson.

[7] When Mr Xu’s company went into liquidation Mr Xu sold the trading name to Mr Li who set up the respondent company to run it. 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*” continues to operate as business as usual but under Mr Li’s apparent ownership.

[8] 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.

[9] 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 recently arranged for Shynday to be placed in liquidation.

[10] The Labour Inspector advised the Authority that Mr Li told her Shynday went into liquidation on 16 August 2013. In Mr Li's communications with the Authority he has also referred to Shynday as 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.

[11] After the Labour Inspector's visit on 11 April Mr Sun was given a written employment agreement to sign. The Office Manager/Administrator Mr Robin Peng, told Mr Sun he had to sign the employment agreement immediately but Mr Sun declined to, saying he wanted time to read it.

[12] When he reviewed the employment agreement Mr Sun saw that his position had been recorded as a casual one with no minimum hours of work and therefore no job security. It also included a 90 day trial period provision although he had been working for Shynday for almost six months. Mr Sun did not want to sign the employment agreement because he had been a full time employee since he started work and he wanted his employment agreement to reflect that.

[13] On 14 April Mr Peng again approached Mr Sun and told him he had to sign the employment agreement immediately and that *"The boss asked me to tell you that if you don't sign the agreement, you don't need to come back to work."* Mr Sun is a migrant worker with limited English. He says he felt vulnerable and did not want to lose his job so believing he had no choice Mr Sun signed the employment agreement that day.

[14] Three days later, on 17 April Mr Sun was called to a meeting with the Mr Li and Mr Peng. Mr Sun says he was given a letter that day terminating his employment. The letter was in English which Mr Sun does not fully understand, but he says from

what was explained by Mr Li during the meeting, he knew his employment had been terminated and he would be paid two weeks' pay. Mr Sun was told to return all company property and to leave work immediately. Mr Sun was not given any work and he was not paid after 17 April 2013.

[15] Mr Li claims Mr Sun agreed to leave work without making a claim against Shynday in return for two weeks' wages. Mr Li believes that Mr Sun agreed to that at the time. Mr Sun says he did not.

[16] On 22 April Mr Sun was told to go into the office the next day to collect his wages. When he turned up at the office on 23 April he was given a document headed "*Employment Termination Agreement*" and told he would not receive his two weeks' wages unless he signed the Agreement which compromised his ability to bring any claims against Shynday. Mr Sun refused to sign because he believed he had been treated unfairly.

[17] On 26 April Mr Sun received another letter which informed him that his position no longer existed so he was redundant.

[18] Mr Sun claims his dismissal was substantively and procedurally unjustified. Shynday say that Mr Sun was made redundant because it was in serious financial difficulty and had to reduce costs immediately.

### **Issues**

[19] The issues to be determined include:

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

### **When was Mr Sun dismissed?**

[20] Shynday claims Mr Sun was dismissed by letter dated 26 April 2013. I do not accept that. Mr Li told Mr Sun on 17 April to leave work immediately. He was not

provided with any work after that. Mr Sun was not paid after 17 April. Mr Sun was instructed to return all company property on 17 April and he did so.

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

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

#### *Justification test*

[22] Shynday bears the onus of justifying Mr Sun'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 Sun 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 employees' wages 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 Sun needs to raise directly with IRD, which may wish to investigate Shynday's alleged failure to properly comply with its tax obligations.

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

[27] Mr Sun says Shynday advertised for new workers after he had been made redundant and he provided the Authority with the timecard of a new employee who he claims was employed after he was dismissed.

[28] 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.

[29] The genuineness of Mr Sun's dismissal is also undermined because Shynday advertised for new staff after Mr Sun was dismissed. Mr Li's explanation that advertisements in a Chinese newspaper for staff after Mr Sun was dismissed had nothing to do with Shynday is not accepted because the contact details in the advertisements Mr Sun presented to the Authority were Shynday's contact details.

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

#### *Procedural fairness*

[31] I also find that Shynday did not follow a fair or proper process before it dismissed Mr Sun. It pressured him into signing a casual employment agreement under threat of termination of employment then three days later summarily dismissed him at an unscheduled meeting.

[32] I do not accept Mr Li's evidence that the 17 April meeting was a consultation meeting. Mr Sun 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.

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

[33] Mr Sun was given a letter in English, a language he does not understand. 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 the proposal and a subsequent feedback/consultation meeting was scheduled. However that is not the case. These were fundamental procedural errors which resulted in substantial unfairness to Mr Sun because he 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 Sun.

#### *Outcome*

[35] I find that Shynday is unable to discharge the onus of establishing that Mr Sun's dismissal was justified. I find that Mr Sun's purported redundancy was substantively and procedurally unjustified because "*how Shynday acted, and its actions*"<sup>2</sup> were not what a fair and reasonable employer could have done in all the circumstances.

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

#### *Mitigation*

[36] I accept that Mr Sun appropriately mitigated his loss because he found new employment on 20 May 2013.

#### *Lost remuneration*

[37] In the absence of any payroll details from Shynday I have to rely on the figures provided by Mr Sun. He says his average hours over his employment were 42.5 hours per week and his average weekly income was \$573.42 gross.

[38] I award Mr Sun 4.5 weeks lost remuneration being the remuneration he lost between his dismissal on 17 April and starting his new job on 20 May. Shynday is ordered to pay Mr Sun \$2,580.39 lost remuneration under s.128(2) of the Act.

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

### *Notice pay*

[39] Mr Sun seeks two weeks' unpaid notice pay. I decline to make any award for notice pay because the award of lost remuneration already covers the entire period Mr Sun was out of work.

### *Distress compensation*

[40] The evidence Mr Sun provided in support of his claim for distress compensation was minimal. Mr Sun says he was very upset and hurt by his dismissal and worried about his ability to pay his mortgage, which he managed to do with support from his family.

[41] Compensation must reflect the actual distress suffered so it has to be directly related to the evidence provided. That means in this case an award at the lower end of the scale is required. Shynday is ordered to pay Mr Sun \$2,000 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**

[42] Mr Sun as the successful party is entitled to a contribution towards his actual legal costs. Mr Sun incurred legal costs in excess of \$7,000. He seeks an award of \$3,500 costs.

[43] I adopt the Authority's usual notional daily tariff based approach to costs, which is currently \$3,500 per day. Although Mr Sun's matter involved a one day investigation meeting Mr Mao (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 Sun and Mr Mao.

[44] I therefore approach Mr Sun's costs on the basis it was a half day investigation meeting, so the notional starting tariff is \$1,750. I must now consider whether there are any factors which warrant adjusting the notional starting tariff.

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

[46] I consider 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.

[47] I do not consider the notional starting tariff should be increased.

[48] In terms of factors warranting a decrease to the notional starting tariff, I am satisfied Shynday is facing financial difficulties so I consider it appropriate to halve the notional starting tariff to reflect that.

[49] Shynday is ordered to pay Mr Sun \$875 towards his actual legal costs together with \$71.56 to reimburse his filing fee.

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