

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2013] NZERA Auckland 343  
5420560

BETWEEN                      YINGHENG ZHONG  
Applicant

A N D                              NZ NATURAL DAIRY  
LIMITED  
Respondent

Member of Authority:      Anna Fitzgibbon

Representatives:            May Moncur, Advocate for Applicant  
No appearance for Respondent

Investigation Meeting:     1 August 2013 at Auckland

Date of Determination:     7 August 2013

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**DETERMINATION OF THE AUTHORITY**

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- A.    The applicant, Ms YingHeng Zhong was unjustifiably constructively dismissed by the respondent, NZ Natural Dairy Limited (NZ Natural Dairy);**
- B.    NZ Natural Dairy is ordered to pay Ms Zhong loss of income of \$2,666 gross.**
- C.    NZ Natural Dairy is ordered to pay Ms Zhong compensation of \$1500 for humiliation, loss of dignity and injury to feelings pursuant to s.123(1)(c)(i) of the Employment Relations Act (“the Act”);**
- D.    NZ Natural Dairy is ordered to pay costs to Ms Zhong of \$500 plus the filing fee of \$71.56.**

### **Non-appearance of respondent**

[1] NZ Natural Dairy failed to file a statement in reply and failed to attend the investigation meeting. I am satisfied that NZ Natural Dairy was properly served with the statement of problem and subsequent correspondence from the Authority together with a notice of investigation meeting. In those circumstances, I proceeded to investigate the matter in the absence of NZ Natural Dairy.

### **Employment relationship problem**

[2] Ms (Rachel) Zhong was employed by NZ Natural Dairy on 30 April 2012 as a full time accounts clerk. Ms Zhong signed an individual employment agreement (the employment agreement) on 3 May 2012. Ms Zhong had graduated from the University of Auckland with a Bachelor of Commerce degree and was pleased to be able to use her qualifications in a full time accounts position.

[3] Ms Zhong's salary was \$32,000 gross per annum which under the employment agreement was to be paid at the end of each month.

[4] From the start of her employment, Ms Zhong's salary was paid erratically. She was frequently paid late and was never paid her full salary in one sum, rather it was paid in parts. Ms Zhong tolerated the situation for the first four months of her employment because she was pleased to have the role. However, by September 2012 Ms Zhong was becoming stressed by the situation and began requesting that her salary be paid on time. Ms Zhong began sending emails about the situation but the matter was not resolved.

[5] Ms Zhong's bank statements show that on 10 January 2013, she was paid half of the salary that was owing to her for the month of December 2012 and the second half of her salary for December 2012 was paid on 24 January 2013. This pattern continued throughout February and March. In April matters worsened and Ms Zhong was only paid part of her salary for March on 24 April.

[6] Having raised the matter continuously Ms Zhong became very concerned at having an unstable income. On 23 April 2013, Ms Zhong forwarded an email to Ms Malia Pouhila, the HR manager as follows:

*Hi Malia, I've just called Joanna, she said she will go back to office and pass the recorder to you. Do you think my salary outstanding*

*\$1059.41 and PAYE deductions for myself (approximately \$54xx) can be paid by this week? I also request my salary of April can be paid on 30/04 which is our normal pay date.*

*Even though I never get the wages paid on time since I came back to work April last year, I am still follow up any queries from HK Auditors and HK Accounting Team, NZND FBT, GST and income tax return issues with BDO, NZND Media's GST return, payroll calculation and PAYE Filing and other accounting duties stated in my contract. Honestly, I appreciate I learn a lot from my position and enjoy the challenge to myself as well. But the salary is the main source of income to me, I have to pay my living costs, my mortgage and others. I am very disappointed that the top management always lie to us and never take our payroll as the first priority. If they have no money, how come they could pay salary to staffs from Factory, farms and HK office on time? Do you think they are too harsh and unfair to us?*

*Rachel*

[7] Ms Pouhila sent an email to Ms Zhong on 24 April stating:

*Hi Rachel,*

*According to your work schedule that you created and I agreed to – to help your situation, you should be at the office from 10am-2pm today. I am in the office and you have not been here. You emailed me the bank account balances this morning but did not tell me that you are absent today. If there is something you want to discuss with me, then let's discuss it. We need to resolve any issues that you may have, and that can only happen if it is addressed. I need you to contact me ASAP to pay wages.*

*Kind regards,*

[8] Ms Zhong responded asking for her March salary to be paid and her April salary be paid on 30 April. Further correspondence between Ms Zhong and Ms Pouhila continued and on 26 April 2013 Ms Zhong sent an email to the Operations Manager, Ms Peggy Xie, the subject line of which was “*Payroll Outstanding and Final pay*”. The email stated:

*Hi Peggy,*

*... I understand the company has been under financial hardship all the time and I nearly has no complaint about the wages arrears. However, I have to work under a very stressful environment. Our creditors, landlord and staffs keep chasing their outstanding and the overdue bills. They make me nervous and anxious when I am sitting in the office or even I'm off work. Again the salary of March has been delayed already one month. It seems the financial status won't be improved in the foreseeable future. My salary from Natural Dairy is the main source of income. I don't think I could tolerate such unstable income source to lead my life. I have to make a reluctant*

*decision to leave the company because of the wage arrears and my last day should be 02 May 2013.*

[9] Ms Zhong included a schedule of outstanding salary from March 2013 and requested payment of her salary and final pay. Ms Zhong's resignation took effect on 2 May 2013.

[10] Following her resignation, Ms Zhong continued with two very part time jobs she had before starting at NZ Natural Dairy and began looking for full time work in July. Ms Zhong has still not been able to obtain a full time position. Ms Zhong claims her resignation was a constructive dismissal which in the circumstances was unjustified. Ms Zhong seeks loss of income as a result of her alleged dismissal together with compensation for hurt and humiliation suffered and costs.

[11] The Court of Appeal considered the correct approach to constructive dismissal cases<sup>1</sup> as follows:

*In such a case as this we consider that the first relevant question is whether the resignation has been caused by a breach of duty on the part of the employer. To determine that question all the circumstances of the resignation have to be examined, not merely of course the terms of the notice or other communication whereby the employee has tendered the resignation. If that question of causation is answered in the affirmative, the next question is whether the breach of duty by the employer was of sufficient seriousness to make it reasonably foreseeable by the employer that the employee would not be prepared to work under the conditions prevailing; in other words, whether a substantial risk of resignation was reasonably foreseeable, having regard to the seriousness of the breach.*

[12] Ms Zhong was entitled to her salary at the end of each month, that was what had been agreed and was a term of her employment agreement. Ms Zhong had repeatedly asked for payment of her salary on the agreed date but NZ Natural Dairy failed to pay her on time. Ms Zhong was never paid her full salary and it was always paid well after it was due. Ms Zhong attempted to resolve the matter but was unsuccessful and reluctantly resigned on 26 April with effect from 2 May.

[13] I find that there was a breach of duty by NZ Natural Dairy to comply with an essential term of Ms Zhong's employment agreement, to pay her salary. At the time of her resignation at the end of April 2013, she had still not been paid

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<sup>1</sup> *Auckland Electric Power Board v. Auckland Provincial District Local Authorities Officers' IUOW Inc* [1994] 1 ERNZ 168 at p.172

her full salary for March 2013. Ms Zhong made it clear that the situation could not continue and in my view it was reasonably foreseeable that there was a substantial risk Ms Zhong would resign because of the continued failure by NZ Natural Dairy to pay her salary on time.

[14] It is my finding that Ms Zhong's resignation constituted a constructive dismissal which was unjustified.

### **Remedies**

[15] Ms Zhong is claiming loss of income as a result of her dismissal. Ms Zhong earned \$2,666 per month gross and under s.128(2) of the Employment Relations Act 2000 (the Act), she is entitled to lost remuneration of three months salary which totals \$7,998.

[16] Ms Zhong is required to mitigate any losses. Ms Zhong did apply for a number of jobs but on the evidence did not do so for almost 2 months following her dismissal. In those circumstances, I order NZ Natural Dairy to pay one month's salary of \$2,666 gross to Ms Zhong.

[17] Ms Zhong's constructive dismissal was unjustified and she seeks compensation for hurt and humiliation suffered. Ms Zhong said that she worked under very stressful circumstances and the instability of her income was a major concern as she had a number of commitments. I order NZ Natural Dairy to pay Ms Zhong the sum of \$1,500 compensation for hurt and humiliation pursuant to s.123 of the Act.

### **Costs**

[18] This matter took approximately less than half a day in the Authority and based on the notional daily rate, I order costs to be paid by NZ Natural Dairy to Ms Zhong of \$500 plus the filing fee of \$71.56

**Anna Fitzgibbon**  
**Member of the Employment Relations Authority**