

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI  
TĀMAKI MAKAURAU ROHE**

[2025] NZERA 272  
3267620

BETWEEN

XINYUE (AYLA) YAO  
Applicant

AND

PHYTOMED MEDICINAL  
HERBS LIMITED  
Respondent

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| Member of Authority:                        | Jeremy Lynch   |
| Representatives:                            | Applicant in person<br>Michael Chamberlain for the Respondent                      |
| Investigation Meeting:                      | On the papers  |
| Submissions and Other<br>Material Received: | 15 March and 17 April 2025 from the Applicant<br>28 March 2025 from the Respondent |
| Determination:                              | 16 May 2025  |

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] Phytomed Medicinal Herbs Limited (Phytomed) manufactures and markets herbal extracts.

[2] Xinyue (Ayla) Yao was first employed by Phytomed in 2016. She held various roles within the business, being appointed to the role of senior China Market Sales and Marketing Manager, a role which she held until her employment ended by way of resignation in March 2024.

[3] Ms Yao became eligible to participate Phytomed's Sales Incentive Scheme (the incentive scheme) in 2018.

[4] Ms Yao says that Phytomed has incorrectly calculated the payment she was entitled to under the incentive scheme for the financial year ending 31 March 2023 (the 2023 year). She brings a claim for arrears of unpaid sales incentive payment, together with costs.

[5] Phytomed accepts that Ms Yao was a participant in the incentive scheme, however it denies miscalculating her incentive payment, and denies that Ms Yao is owed any arrears.

### **The Authority's investigation**

[6] The parties agreed that this employment relationship problem could be investigated 'on the papers'.

[7] Ms Yao lodged a sworn affidavit in support of her claims. In addition, Ms Yao lodged an affidavit in reply.

[8] For Phytomed, an affidavit was lodged by Michael Chamberlain, its Chief Executive Officer and Director.

[9] Both parties lodged closing submissions. Ms Yao also lodged submissions in reply.

[10] The Authority has carefully considered all the material provided.

[11] As permitted by s 174E of the Employment Relations Act 2000 (the Act), this determination has not recorded everything received from the parties, but has stated findings of fact and law, expressed conclusions and specified orders made as a result.

### **The issues**

[12] The issues for investigation and determination are:

- (a) what amount should Ms Yao have received from Phytomed under the incentive scheme for the 2023 year?
- (b) Should either party be required to contribute to the other's costs?

## **Background**

### *The employment agreement*

[13] Ms Yao was first employed by Phytomed in 2016, on a part-time fixed-term basis. She accepted a permanent role in 2017. In 2018 Ms Yao's role job title and remuneration changed. Both changes were recorded in a new employment agreement, signed by the parties in November 2018.

[14] In June 2021 Ms Yao's role and remuneration changed again. These changes were recorded in a renegotiated employment agreement, signed by Ms Yao on 17 June 2021.

[15] The cover letter to the June 2021 employment agreement sets out that Ms Yao was eligible to participate in the incentive scheme. Clause 8 of the employment agreement provides:

#### **8. Sales Incentive Scheme**

- 8.1 The Employee shall be eligible to participate in the Employer's Sales Incentive Scheme .
- 8.2 The Sales Incentive Scheme will be defined by the Employer and may be amended by the Employer, at any time, at the Employer's sole discretion, with targets reviewed on a bi-annual basis.
- 8.3 Payments will be made at the start of each new financial year.
- 8.4 The Employee must be employed at the time of payment to receive any sales incentive payments and must not be working through a notice period.
- 8.5 All payments are gross and will be taxed at the appropriate rate.
- 8.6 The Employer reserves the right to suspend or entirely remove the Sales Incentive Scheme should the Employee be subject to disciplinary action for underperformance, misconduct or serious misconduct of any kind.
- 8.7 The Employer reserves the right to amend or remove the Sales Incentive Scheme at any time to meet business needs.
- 8.8 Should the Sales Incentive Scheme cease no compensation is payable to the Employee.

[16] The employment agreement contains an 'entire agreement' clause:

- 43.1 The terms and conditions set out in this Individual Employment Agreement replace any previous agreements and understandings and represent the entire agreement between the Employee and the Employer.
- 43.2 The Employer and Employee can agree to change the terms of this agreement at any time. Any changes must be in writing and agreed to by both Employer and Employee.

[17] The final page of the employment agreement contains a declaration, which was signed by Ms Yao on 17 June 2021 (the declaration). The declaration includes an acknowledgement by Ms Yao that she:

- Has read these terms of employment, understands these terms and their implications fully and without question;
- Agrees to be bound by these terms of employment and the Employer's policies and procedures as implemented by the Employer from time to time;
- Has been provided of her right to seek independent advice on the terms of this agreement; and
- Has been provided with reasonable time and opportunity to seek that advice.

[18] On 22 July 2022, Phytomed increased Ms Yao's salary. This was recorded in a letter of the same date, which sets out that "... all other terms and conditions of your employment remain unchanged, as per the terms of your signed employment agreement".

[19] In June 2023 Ms Yao's remuneration increased again. This increase was recorded in a letter dated 30 June 2023, together with the advice that all other terms and conditions of her employment remained unchanged.

#### *2023 bonus calculation*

[20] For the year ending 31 March 2023, Phytomed paid Ms Yao the sum of \$5494.07 (gross) under the incentive scheme. By letter dated 8 December 2023, Phytomed provided a method of calculation, explaining to Ms Yao how this sum had been assessed.

[21] Ms Yao disputes this calculation, and says that under the incentive scheme she was entitled to receive the sum of \$34,397.88 (gross).

#### **Submissions for Ms Yao**

[22] Ms Yao submits (inter alia) that:

- The employment agreement sets out the terms and conditions of employment, of which the incentive scheme is a part.
- The employment agreement outlines the sales targets, and how payments under the incentive scheme will be calculated. Ms Yao also submits that

the employment agreement confirms that "...the bonus scheme was tied to specific sales targets, which had not changed for several years".

- The Authority must interpret the employment agreement "according to the plain meaning of the words used, in their full context". In support of this, Ms Yao submits that it was her understanding that the sales targets used would remain unchanged from 2019, and that Phytomed's lack of communication of any change to the target for the 2023 period constitutes a breach of the agreement.
- The duty of good faith applies, and that duty includes obligations of "openness and honesty, which requires [Phytomed] to provide clear and timely communication regarding any changes to employment terms".
- Phytomed has a duty to communicate any changes to the terms of employment, or the incentive scheme, and that "... any changes to the scheme or sales targets must be communicated clearly and formally, prior to the period for which the bonus is being calculated", and that Phytomed has a duty to do this "ideally in writing".
- Ms Yao had a reasonable expectation of receiving an incentive payment.

### **Submissions for Phytomed**

[23] Phytomed submits (inter alia) that:

- the incentive scheme could be amended at its sole discretion.
- The document provided to Ms Yao together with her employment agreement in 2021 showing various sales results and amounts of incentive payment, does not form part of the terms and conditions of her employment.
- The bonus paid to Ms Yao for the financial year ending 31 March 2023 was in excess of that which could have been paid out under the incentive scheme, which further reflects the discretionary nature of the scheme.

### **The principles of interpretation**

[24] Interpretation principles relating to contracts generally apply to employment

agreements.<sup>1</sup>

[25] The proper approach is objective. The aim is to ascertain the meaning the written agreement would convey to a reasonable person having all the background knowledge that would reasonably have been available to the parties at the time of the agreement.

[26] This objective meaning is taken to be what the parties intended. The context provided by the agreement as a whole and any relevant background informs meaning. Considering the context is necessary in this interpretive process, and the focus is on interpreting the document as a whole, rather than particular words, but the text remains centrally important.

[27] If the language at issue, construed in the context of the whole agreement, has an ordinary and natural meaning, this is a powerful, albeit not conclusive, indicator of what the parties meant. In cases of some real ambiguity or uncertainty, the wider context may point to an interpretation that is not the most obvious one but may help determine the intended meaning.<sup>2</sup>

[28] Evidence is not relevant if it does no more than prove what an individual party intended or understood their words to mean.<sup>3</sup>

[29] An interpretation which flouts business commonsense must yield to one that accords with business commonsense.<sup>4</sup>

## **Discussion**

### *The sales incentive table provided to Ms Yao*

[30] There is no dispute that cl 8 of Ms Yao's employment agreement provides for her participation in the incentive scheme.

[31] Phytomed accepts that Ms Yao was provided with a document together with her 2021 employment agreement. This document sets out a table showing the amounts of incentive payment payable under various sales results (the table). The table shows Ms Yao's salary as at June 2021, and records the various amounts of incentive payment

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<sup>1</sup> *New Zealand Airline Pilots' Assoc Inc v Air New Zealand Limited* [2017] NZSC 111 at [74]-[78].

<sup>2</sup> *Firm PI 1 Limited v Zurich Australian Insurance Ltd* [2014] NZSC 147 at [60]-[63] and *Bathurst Resources Limited v L&M Coal Holdings Ltd* [2021] NZSC 85 at [43]-[46], [232]-[233] and [250].

<sup>3</sup> *Vector Gas Limited v Bay of Plenty Energy Limited* [2010] NZSC 5 at [19], per Tipping J.

<sup>4</sup> Above n 3, at [22].

as a percentage of her salary. Ms Yao says the table forms part of the terms and conditions of her employment. Phytomed says this information was an “example” provided “for illustrative purposes only”. Phytomed submits that the actual sales target information set out in the table “did not relate to a particular year”, as it was provided in 2021 and therefore could not relate to the 2023 year. There is some force in this submission.

[32] In addition, although there does not appear to be any dispute that this document was provided to Ms Yao together with her renegotiated June 2021 employment agreement, I do not accept that the table forms part of the terms and conditions of Ms Yao’s employment.

[33] The employment agreement comprises some ten pages setting out the main terms and conditions agreed to by the parties. This is followed by a schedule setting out Ms Yao’s job description. The main body of the employment agreement specifically records that “The job description forms part of this employment agreement”, and refers to “...the job description attached to this agreement...”.

[34] Then follows the declaration signed by Ms Yao on 17 June 2021. There is no reference to the table in the main body of the employment agreement, its schedule, or the declaration.

[35] The main body of the employment agreement, the job description and the declaration are numbered from pages 2 to 14 (there is no page 1, and both pages of the job description are numbered as 14). There is no page number on the table. In terms of the order of the documents, the table is placed after the main agreement, and after the declaration containing the parties’ signatures. This suggests that by signing the declaration, the parties confirm consensus with the preceding pages. The table therefore appears to sit outside the parties’ signed agreement.

[36] Furthermore, there is no dispute that Ms Yao received a salary increase on 1 July 2022, and again on 1 July 2023. The parties do not appear to have negotiated updated incentive scheme payments in light of the increase to remuneration, or recorded these in an updated table. This too points to the table being an example only, and not forming part of the terms and conditions of Ms Yao’s employment. If the incentive payment amounts shown in the table were part of Ms Yao’s terms and conditions of employment, under cl 43.2 the parties would be required to update these

with each increase to remuneration. There is no evidence of any such negotiations occurring, or any agreement being reached in terms of updated incentive payments following Ms Yao salary increases.

[37] It flouts business commonsense that the table, provided in 2021, would set out the actual sales targets from which Ms Yao's payment under the incentive scheme for the 2023 year would be calculated, particularly when the employment agreement expressly records that targets would be reviewed on a biannual basis (as discussed below).

[38] Ms Yao's submission that the incentive scheme is part of the terms and conditions of her employment is correct. However, the sales target information contained in the table is not a term or condition of Ms Yao's employment. Therefore an increase to the sales target does not constitute the changing of a term or condition of Ms Yao's employment.

[39] A finding is made that the table does not form part of Ms Yao's entitlements under the employment agreement. Rather, the table sits outside the employment agreement and was provided by way of example only. It does not form part of the terms and conditions of Ms Yao's employment.

#### *Interpretation of the employment agreement*

[40] Ms Yao submits that the Authority must interpret the employment agreement according to the plain meaning of the words used, in the context. This approach is in accordance with the well-established principles of interpretation as set out above.

[41] From the documents attached to Ms Yao's primary affidavit, it is clear that the parties have been in dispute as to the meaning of the phrase "bi-annual basis", as used at cl 8.2 of the employment agreement.

[42] Ms Yao says that this means the sales targets would be reviewed every two years. Phytomed's position is that this means that sales targets were reviewed twice yearly.

[43] The Oxford English dictionary defines biannual as "half-yearly".<sup>5</sup>

[44] It is acknowledged that there is a secondary meaning in the commentary on

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<sup>5</sup> Oxford English Dictionary <[www.oed.com](http://www.oed.com)>.

American dictionary Merriam Webster's website. The Merriam Webster dictionary entry records the primary meaning of biannual as being "occurring twice a year", but notes an alternative definition can be "continuing or lasting for two years".<sup>6</sup>

[45] It is notable that the employment agreement does not use the word 'biennial'.

[46] Also notable is the fact that the table clearly shows sales targets divided into two periods, being from October to March, and April to September (or in other words, two six-month periods). I am satisfied that in the circumstances of this matter, the correct interpretation of biannual is 'half-yearly'.

[47] In any event, the plain wording of the employment agreement is clear. Clause 8.2 provides that the scheme "may be amended... at any time by [Phytomed] at [Phytomed's] sole discretion, with targets reviewed on a bi-annual basis".

[48] Clause 8.7 provides that Phytomed may "amend or remove the sales incentive scheme at any time to meet business needs".

[49] Under the employment agreement, Phytomed has considerable discretion as to the operation of the incentive scheme. Ms Yao agreed to these terms, as evidenced by her signing the declaration on 17 June 2021.

[50] There is no requirement for any changes to the sales targets to be communicated to Ms Yao in writing prior to the period for which the bonus is being calculated. Under cl 43.2, any change to the employment agreement to include such a requirement would need to be made in writing, and agreed to by both parties. There is no evidence of this having occurred.

[51] There is no requirement under the employment agreement for Phytomed to provide written notice of any changes to the sales target for the 2023 year. Ms Yao's submission that Phytomed's failure to do this constitutes a breach of the agreement therefore fails.

### *Reasonable expectation*

[52] Ms Yao says she had a "reasonable expectation that the terms would remain unchanged, particularly given the absence of any formal notice regarding changes to

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<sup>6</sup> Merriam Webster Dictionary <[www.merriam-webster.com](http://www.merriam-webster.com)>.

the sales target or incentive calculation”.

[53] There is no dispute that for the 2023 year, Phytomed relied on increased sales targets when calculating Ms Yao’s payment under the incentive scheme.

[54] However, as set out above, there was no contractual requirement to notify Ms Yao of any changes to the incentive scheme or sales target. The employment agreement makes it clear that Phytomed retains considerable discretion as to the framework and operation of the scheme, which may be amended, suspended, or removed at any time. In these circumstances, I do not accept that Ms Yao could have had a reasonable expectation that the terms would remain unchanged, or that she would receive any particular amount of payment under the scheme.

[55] In the circumstances of this matter, Ms Yao’s claimed ‘reasonable expectation’ is little more than evidence of her subjective understanding. As set out above, the subjective understanding of one party is not relevant to interpretation.<sup>7</sup> In any event, under cl 8 of the employment agreement, it is possible for Phytomed to remove or amend the scheme (meaning no incentive payment is payable to Ms Yao) at its sole discretion. Ms Yao confirmed her understanding and agreement to this by signing the declaration.

[56] In addition, Phytomed submits that as Ms Yao was “...directly involved in the day-to-day Asia activities and... was aware and integrally part of the calculations that set out the updated target sales revenue...”. Phytomed further submits that Ms Yao “...drove the targets and any argument that the updated target revenue was unknown is incorrect”. Phytomed submits that [Ms Yao] was “...integral in calculating and setting the target...”

[57] Phytomed further submits that:

it was reasonable for the employer to assume that a person who was part of the process, drove the process and undertook the calculations would understand that the agreements change the future sales targets. Phytomed did not apply a “*a significantly higher sales target*” but applied the sales target that was agreed between discussions between the applicant, other management within the company...

[58] I accept this submission. Although not necessary to dispose of this matter, I find

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<sup>7</sup> Above n 3, at [19].

it more likely than not (particularly given the functions of her role) that Ms Yao was aware that sales targets had increased.

*The duty of good faith*

[59] Ms Yao submits the duty of good faith applies in this matter.

[60] Section 3(a) of the Act provides that the object of the Act is:

to build productive employment relationships through the promotion of good faith in all aspects of the employment environment and of the employment relationship...

[61] Section 4 of the Act provides that the obligation of good faith:<sup>8</sup>

requires the parties to an employment relationship to be active and constructive in establishing and maintaining a productive employment relationship in which the parties are, among other things, responsive and communicative...

[62] Ms Yao's submission is therefore correct. The incentive scheme is a term of Ms Yao's employment. The duty of good faith applies in respect of the incentive scheme.

[63] Phytomed, in its dealings with Ms Yao in respect of the incentive scheme, is obligated to be active, constructive and communicative. Although not an express contractual requirement under the employment agreement, the duty of good faith could include the provision of written advice to Ms Yao when setting or changing sales targets. The desirability of such advice being provided in writing is self-evident.

[64] A party in breach of the duty of good faith is liable to a penalty. However, Ms Yao does not bring any claim for a breach of good faith, and does not seek a penalty in relation to this. As there is no such claim before the Authority, the Authority makes no findings as to good faith.

*No personal grievance claim before the Authority*

[65] In her reply submissions Ms Yao refers to the Authority's determination in *French v SGS New Zealand Limited*.<sup>9</sup> Ms Yao submits the situation in *French* involved a dispute over commission payments and is therefore similar to her own situation. Ms Yao notes that Mr French was awarded \$24,000 in compensation by the Authority.

[66] Ms Yao's situation is distinguishable from the situation in *French*. Mr French

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<sup>8</sup> Employment Relations Act 2000 s 4(1A)(b).

<sup>9</sup> *French v SGS New Zealand Limited* [2014] NZERA Auckland 102.

had brought a personal grievance alleging he had suffered disadvantage because his employer had failed to engage with him in respect of his commission arrangements.<sup>10</sup> Mr French's employment agreement obligated his employer to review and discuss sales targets with him for the following 12 month period, prior to these being set.<sup>11</sup>

[67] Mr French was awarded \$24,000 under s 123(1)(c)(ii) of the Act, to compensate him for the loss of a monetary benefit.

[68] Ms Yao's employment agreement contains no requirement for sales targets to be discussed with her prior to being set.

[69] Moreover, Ms Yao has not raised a personal grievance. An award of compensation under s 123(1)(c)(ii) of the Act is a personal grievance remedy. There is no claim before the Authority for any personal grievance remedies.

*The payment made to Ms Yao under the incentive scheme for 2023*

[70] This is not a situation in which Phytomed has declined to pay any bonus to Ms Yao in reliance on the discretionary nature of the incentive scheme.

[71] Phytomed's evidence is that under the terms of the incentive scheme, there were two different approaches open to it in the calculation of Ms Yao's incentive payment.

[72] Mr Chamberlain's affidavit sets out the method of calculation under each approach.

[73] Mr Chamberlain says that under one approach, Ms Yao's incentive payment would have been \$3,316.50 (gross). Under the other approach, the payment would be \$5,494.07 (gross).

[74] Mr Chamberlain says that:

Given the two interpretations and as a gesture to create good will, I made the decision that Phytomed in this case would pay the higher discretionary bonus. Phytomed therefore paid [Ms Yao] \$5,494.07.

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<sup>10</sup> Above n 8, at [5].

<sup>11</sup> Above n 8, at [11].

[75] The calculation provided by Phytomed is not unreasonable, and does not breach the provisions of the incentive scheme under the employment agreement. It was open to Phytomed to calculate Ms Yao's payment under the incentive scheme in this way.

### **Outcome**

[76] The terms of the parties' employment agreement in respect of the incentive scheme make clear that Phytomed enjoys the ability to define and amend the scheme at its sole discretion, and to set the sales targets. There is no contractual requirement for Phytomed to consult with Ms Yao over sales targets. Nor is there any contractual entitlement to any particular amount of payment under the incentive scheme.

[77] For the reasons set out above, Phytomed has acted consistently with cl 8 of the employment agreement.

[78] Xinyue Yao has not established that her payment under the incentive scheme has been incorrectly calculated. Neither the incentive payment made to Ms Yao for the 2023 year nor the calculation in respect of this payment are disturbed by this determination.

### **Costs**

[79] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves. The Authority notes the advice set out in Mr Chamberlain's affidavit that "At this stage Phytomed does not intend to seek the recovery of the costs it has incurred".

[80] If the parties are unable to resolve costs, and an Authority determination on costs is needed, Phytomed may lodge, and then should serve, a memorandum on costs within 28 days of the date of this determination. From the date of service of that memorandum Ms Yao will then have 14 days to lodge any reply memorandum. On request by either party, an extension of time for the parties to continue to negotiate costs between themselves may be granted.

[81] The parties can anticipate the Authority will determine costs, if asked to do so, on its usual “daily tariff” basis, unless circumstances or factors require an adjustment upwards or downwards.<sup>12</sup>

Jeremy Lynch  
Member of the Employment Relations Authority

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<sup>12</sup> For further information about the factors considered in assessing costs see:  
[www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1](http://www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1)