

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2025] NZERA 235
3278319

BETWEEN WEIMENG ZHOU
Applicant

AND PHYTOMED MEDICINAL
HERBS LIMITED
Respondent

Member of Authority: Jeremy Lynch

Representatives: Applicant in person
Michael Chamberlain for the Respondent

Investigation Meeting: On the papers

Submissions and Other
Material Received: 29 January and 28 February 2025 from the Applicant
12 November 2024 and 28 February 2025 from the
Respondent

Determination: 30 April 2025

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

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

[2] Weimeng Zhou (Ms Zhou) was employed by Phytomed in 2018 in the role of Asian Market Sales and Marketing Specialist. Her employment ended by way of resignation in November 2023.

[3] Ms Zhou says that her employment was subject to a sales commission scheme, under the terms of which, she should have received a significantly greater payment than Phytomed actually paid her for the financial year ending 31 March 2023.

[4] Although Phytomed accepts that Ms Zhou was part of a targeted China-focused incentive arrangement, it denies that Ms Zhou was part of a broader Asia sales revenue-based incentive, and denies that Ms Zhou was subject to a commission scheme.

[5] Phytomed denies that Ms Zhou is owed any arrears of commissions or incentive payments.

The Authority's investigation

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

[7] Ms Zhou lodged a sworn affidavit in support of her claims. In addition, Ms Zhou lodged an unsworn affidavit in response to the affidavit evidence received from Phytomed. Despite the Authority providing multiple opportunities for Ms Zhou to re-lodge her unsworn affidavit in reply as a sworn affidavit, Ms Zhou chose not to do this. Ms Zhou then advised that she did not wish the Authority to take the contents of her unsworn affidavit in response into consideration and withdrew the document.

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

[9] Ms Zhou chose not to lodge closing submissions. Instead, she elected to lodge submissions in reply, after Phytomed lodged its closing submissions.

[10] 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

[11] The issues for investigation and determination are:

- (a) What amount should Ms Zhou have received from Phytomed under the company's incentive scheme for the period ending 31 March 2023?
- (b) Should either party be required to contribute to the other's costs?

Background

The employment agreement

[12] Ms Zhou was first employed by Phytomed in 2018. The parties renegotiated the employment agreement at various times during the employment. The most recent employment agreement was signed by the parties on 14 June 2021.

[13] The cover letter to the June 2021 employment agreement sets out that “This is also confirmation that the China sales incentive has been reinstated, effective 9 June 2021”.

[14] Other than the brief mention of the China sales incentive scheme in Phytomed’s 9 June 2021 cover letter, the employment agreement is silent as to any terms of the scheme, or indeed, any incentive or commission scheme. There is no reference to any type of incentive scheme in the employment agreement, or the attached schedule.

[15] Attached to the employment agreement is a job description for Ms Zhou’s role. There is no mention of any incentive scheme or terms of any such scheme in the job description document.

[16] The employment agreement contains an ‘entire agreement’ clause:

42.1 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.

42.2 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 Phytomed and Ms Zhou on 14 June 2021 (the declaration). The declaration includes an acknowledgement by Ms Zhou 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 Zhou's salary. This was recorded in a letter dated 22 July 2022.

The amount Ms Zhou received under the 2023 China incentive scheme

[19] For the year ending 31 March 2023, Phytomed paid Ms Zhou the sum of \$3,398.85 (gross) under the China sales incentive scheme. By letter dated 8 November 2023, Phytomed provided a method of calculation, explaining to Ms Zhou how this sum had been assessed.

[20] Ms Zhou disputes this, and says that by her calculations she should have in fact received the sum of \$40,462.00 (gross).

The principles of interpretation

[21] Interpretation principles relating to contracts generally apply to employment agreements.¹

[22] 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.

[23] 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.

[24] 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.²

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

² *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].

[25] In *Wellington City Council v Body Corporate 51702 (Wellington)*,³ the Court of Appeal held that:

The essence of the common law theory of contract is consensus. It follows that for there to be an enforceable contract, the parties must have reached consensus on all essential terms; or at least upon objective means of sufficient certainty by which those terms may be determined... Taking price as an example, for a contract to be enforceable the parties must have agreed upon the price, or at least they must have agreed upon objective means of sufficient certainty whereby the price can be determined by someone else... If the price is left for later subjective agreement between the parties, the contract is not enforceable.

Ms Zhou's entitlements under the employment agreement

[26] In terms of any consensus on the terms of Ms Zhou's incentive scheme, there are very few words to interpret. Phytomed appears to have offered Ms Zhou the opportunity to participate in a "China sales incentive" scheme, and Ms Zhou accepted this.

[27] Ms Zhou's evidence is that because the letter she received from Phytomed in July 2022 confirming an increase to her salary contained the advice, "All other terms and conditions of your employment remain unchanged, as per the terms of your signed employment agreement", that:

This means that besides the increase in base salary, the sales incentive scheme, including sales targets, bonus calculations, and corresponding bonus amounts in the employment contract signed in June 2021, remain unchanged.

[28] There is no evidence of the parties entering into a variation to the employment agreement, as required under cl 42.2 of the agreement (set out above).

[29] Ms Zhou's evidence and submissions rely on two main bases for her view that Phytomed has incorrectly calculated her incentive payment.

Whether any entitlements arise under the bonus table provided in June 2021

[30] Firstly, there is no dispute that Ms Zhou was provided with a document together with her 2021 employment agreement. This document sets out a table showing the quantum of incentive payment for various sales results (the table). Ms Zhou says the table forms part of the terms and conditions of her employment. Phytomed says this information was provided "for illustrative purposes only" and submits that the actual

³ *Wellington City Council v Body Corporate 51702 (Wellington)* [2002] 3 NZLR 486 (CA) at 495.

sales target information set out in the table was provided in 2021, and therefore cannot relate to the 2023 financial year. There is some force in Phytomed's submission.

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

[32] The employment agreement comprises some ten pages setting out the main terms and conditions agreed to by the parties. This is followed by a one page schedule setting out Ms Zhou'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...".

[33] Then follows a declaration page signed by the parties on 14 June 2021. There is no reference to the table in the main body of the employment agreement, its schedule, or the declaration page.

[34] The main body of the employment agreement, the job description and the declaration page are numbered from pages 2 to 14 (there is no page 1). 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' signature. This suggests that by signing the declaration, the parties confirm consensus with the preceding pages. The table therefore sits outside the parties' signed agreement.

[35] In addition, the fact that the example table is dated November 2018 (and therefore cannot relate to 2023 sales targets) supports Phytomed's position that this document was provided by way of an example only.

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

Sales to Bargain Chemist and Blossom International Limited

[37] The other main argument relied on by Ms Zhou is that sales revenue from two particular clients have been excluded from the total annual sales revenue from which Ms Zhou's bonus payment is calculated. Specifically, Ms Zhou says that Phytomed should have included sales revenue from Bargain Chemist (a New Zealand chain of

pharmacies) and from Blossom International Limited (Blossom), with whom Phytomed had entered into a formal arrangement to distribute its products into Vietnam.

[38] The table provided does not list the names of any clients at all. Rather, it simply sets out total annual revenue. As such, Ms Zhou cannot rely on the table to support the position that there was some contractual basis by which Phytomed was obligated to include sales from Bargain Chemist and Blossom when calculating her incentive payment.

[39] There is no evidence that Ms Zhou, at the time that Phytomed reinstated the China sales incentive scheme, requested that sales revenue from either Bargain Chemist or Blossom was to count towards her bonus calculation.

[40] Both parties accept that for the financial year ending 31 March 2021, revenue from both Bargain Chemist and Blossom was included in Phytomed's calculation of Ms Zhou's bonus payment. However, Phytomed's evidence is that this was in error and the 2022 bonus paid to Ms Zhou was incorrect. Ms Zhou's total bonus for this period was \$984.00, Mr Chamberlain's says that because this was a relatively low sum, and because the bonus payment was already some months overdue, that:

... Given that the bonus scheme was discretionary and \$984.00 was not material, relative to the time to do the necessary research, and given there were more pressing priorities within the business, I advised [Ms Zhou] that the Company would agree to pay \$984.00 if she agreed with this amount, which she did...

[41] I accept Phytomed's evidence that the inclusion of revenue from Bargain Chemist and Blossom for the 2022 incentive scheme period was in error. There is no evidence that the parties agreed that Ms Zhou had a contractual entitlement to incentive payments on sales to these clients.

[42] In addition, the only written evidence of consensus reached, refers to 'China sales'. Neither Bargain Chemist nor Blossom could reasonably be said to form part of China sales. Bargain Chemist is a chain of retail pharmacies in New Zealand, and there is no dispute that Blossom's focus is on sales into Vietnam.

Increased sales target

[43] Ms Zhou also submits that Phytomed was not entitled to set a higher sales target for the financial year ending 31 March 2023. She says that under s 130 of the Act, "An

employer is required to communicate changes in employment terms, including performance expectations, in a timely and transparent manner”. Section 130 of the Act provides that an employer is required to keep a wages and time record. This section is therefore not relevant to the issues around Ms Zhou’s bonus. Phytomed’s decision to increase its annual sales target did not change Ms Zhou’s terms of employment, or modify performance expectations as she submits.

[44] There is no evidence that the parties agreed on any particular sales target for the year ending 31 March 2023.

[45] It is not unusual for sales targets to be raised over time. The fact that Phytomed set a sales target during the previous financial year does not create an immutable term of Ms Zhou’s employment, which can never be increased.

Estoppel

[46] In Ms Zhou’s reply submissions, an estoppel argument is raised for the first time.

[47] Ms Zhou says that Phytomed’s inclusion of revenue from Bargain Chemist and Blossom in 2022 created a precedent that revenue from these two clients would form part of the total sales revenue from which her bonus was to be calculated thereafter. Ms Zhou says that having included revenue from these two clients for the year ending 31 March 2022, Phytomed is estopped from excluding revenue from these same clients for the 2023 financial year.

[48] In *Checkmate Precision Cutting Tools Limited v Tomo* the Employment Court held:⁴

The underlying purpose of the doctrine of estoppel is to prevent a party from going back on his/her word (whether express or implied) when it would be unconscionable to do so. There must be clear words or conduct by one party which creates a belief or expectation in the other, and the party to whom the representation or promise was made must have relied on it to such an extent that it would be inequitable to allow the promisor to go back on his/her word...

[49] Even if Ms Zhou was able to establish that Phytomed, either by clear words or conduct, had created an expectation that revenue from Bargain Chemist and Blossom would be included in the calculation of her bonus payment, there is no evidence that

⁴ *Checkmate Precision Cutting Tools Limited v Tomo* [2023] NZEmpC 54 at [20].

Ms Zhou relied on any such representation to such an extent that it would be inequitable to allow Phytomed to go back on its word.

[50] Ms Zhou says that Phytomed's previous CEO and its accountant confirmed to her that Bargain Chemist and Blossom were "...part of the NZ Tourism account...". However, the internal classification of these sales is not evidence that Phytomed made a representation that all such sales revenue would count towards the calculation of Ms Zhou's bonus. Ms Zhou was required to (and indeed, did) perform the normal duties of her role, including duties in respect of Bargain Chemist and Blossom. There is no evidence that Ms Zhou acted any differently in terms of duties in respect of these clients for the year ending 31 March 2023, than she did in respect of the financial year ending 31 March 2022.

[51] The estoppel argument does not succeed. The evidence does not establish that Phytomed represented to Ms Zhou that Bargain Chemist and Blossom would be included in the calculation of her bonus for the year ending 31 March 2023, nor is there any evidence of Ms Zhou relying on this representation to her detriment.

Outcome

[52] Weimeng Zhou has not established that her payment under the China sales incentive scheme has been incorrectly calculated. Neither the incentive payment made to Ms Zhou for the financial year ended 31 March 2023 nor the calculation in respect of this payment are disturbed by this determination.

[53] The terms of the parties' agreement in respect of the China sales incentive scheme are insufficiently certain to establish Ms Zhou's claim.

Costs

[54] 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".

[55] 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 Zhou 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.

[56] 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.⁵

Jeremy Lynch
Member of the Employment Relations Authority

⁵ For further information about the factors considered in assessing costs see:
www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1