

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**AA 436/09
5164746**

BETWEEN YING JUAN ZHUANG
 Applicant

AND FIRST MOBILE NEW ZEALAND
 LIMITED
 Respondent

Member of Authority: Leon Robinson

Representatives: Royal Reed, Counsel for Applicant
 Margaret Robins, Counsel for Respondent

Investigation Meeting: 13 October 2009

Submissions Received: 23 October 2009
 30 October 2009
 6 November 2009

Determination: 7 December 2009

DETERMINATION OF THE AUTHORITY

The problem

[1] The applicant Ms Ying Juan (Aileen) Zhuang ("Ms Zhuang") was formerly employed by the respondent First Mobile New Zealand Limited ("First Mobile") as a sales consultant. The employment was terminated for redundancy. Ms Zhuang challenges that termination and claims that she was disadvantaged unjustifiably and is owed commission.

[2] The parties were unable to resolve their differences by mediation.

The facts

[3] Ms Zhuang was first employed as a sales consultant by First Mobile's predecessor First Mobile National Limited in July 2007. The terms of that employment were recorded in a written individual employment agreement signed by her on 20 July 2007 ("the IEA").

[4] The IEA contained this term:-

Remuneration

Your letter of appointment specifies your annual salary or hourly rate and any relevant benefits. Please refer to the current First Mobile guidelines for commission payments to determine any additional entitlements.

[5] The letter of appointment dated 16 July 2007 stated:-

Remuneration & Benefits

You are paid a salary of \$40,000 per annum.

You are also entitled to product/service benefits as outlined below:

First Mobile will provide you with a mobile phone and sim card for your use and cover \$100 of your monthly phone account. Any costs over and above that amount will be deducted from your salary.

[6] Ms Zhuang worked at the Newmarket store until 2.00pm each weekday and then worked part time hours as a nanny for First Mobile National Limited's shareholder and director Mr Richard Palleson ("Mr Palleson").

[7] The business of First Mobile National Limited was purchased by First Mobile and Ms Zhuang accepted an offer of employment on identical terms with First Mobile as from 1 December 2007. Ms Zhuang continued to work as nanny for Mr Palleson and unusually, was remunerated for that work by First Mobile. The Authority finds she ceased performing that other work at about Christmas 2007. When First Mobile learned of that fact in March 2008 it directed Ms Zhuang to work full time hours as sales consultant at the Newmarket store.

[8] Also in March 2008, First Mobile learned it had been paying commission to Ms Zhuang when she was not entitled. First Mobile's Retail Performance Manager Mr Ben Foote ("Mr Foote") raised the matter with her.

[9] By letter dated 25 April 2008, Ms Zhuang was advised that as from 14 May 2008 she would be employed at First Mobile's Onehunga kiosk operation from 9.30am to 5.30pm Wednesday through Sunday each week.

[10] By letter dated 3 June 2008 Mr Foote wrote to Ms Zhuang advising that First Mobile intended to recover the commissions it had wrongly paid to her by making deductions from her salary.

[11] Ms Zhuang wrote this email of 15 June 2008 to Mr Foote:-

Hello Ben:

Its Aileen here, I'm emailing with regards to my commission reduction issue. I went to the Labour Department and also a Personal Employment Lawyer on Tuesday 10/06/2008 they both advised me that if I disagree with the commission reduction defined as the "Overpayment" I could write a "Personal Grievance Letter" in reply to the letter the company wrote me on the 3/06/2008.

So I am going to get my Personal Employment Lawer(sic) to write this letter to me and I require some information from you:

[12] Ms Zhuang approached Mr Pallesen at his home seeking his assistance in relation to First Mobile's advised intention to recover overpaid commission from her. The Authority finds that on Ms Zhuang's behalf, Mr Pallesen telephoned First Mobile's Chief Executive Officer Mr Sean Hannan ("Mr Hannan") and Mr Hannan agreed that First Mobile would not pursue the overpaid commission.

[13] Mr Foote composed a letter dated 4 March 2009 inviting Ms Zhuang to meet with him the following day to discuss potential restructuring of First Mobile's Onehunga operation. The letter advised his intention was to meet and outline proposed changes in detail and the reasons for why change was considered necessary. The letter also advised Ms Zhuang's input was invited. It is accepted that Ms Zhuang did not receive this letter. Mr Foote telephoned Ms Zhuang and communicated the advice in the letter to her.

[14] On 5 March 2009 Ms Zhuang met with Mr Foote and the proposed restructuring was discussed with her. Following the meeting Mr Foote sent this email to Ms Zhuang:-

I just wanted to flick you this quick email to be sure we are on the same page about what was discussed today.

Meeting purpose:

Discussing the idea that we need to make some changes in positions at Onehunga.

Reason for this:

1. Main reason is financial as the store is and has been losing money each month excluding December and we need to reduce cost

2.Secondary reason is due to operational standards and the store would be better managed and run by a full time manager (as agreed by yourself at the meeting for the purposes of customer issues)

Proposed concept:

Onehunga could have:

full time manager 3 part time staff working 3 days 11am to 4pm (as discussed the mix of days between the staff may not be three each depending on the person and availability)

Why this idea:

Reduction in hours by approximately 30 per week for the store as a whole meaning significant wage cost savings

Full time manager actually providing better support for the store and customers

If this idea was to proceed this would mean:

The current full time role (currently held by yourself) wouldn't be required in the store and would therefore become redundant

What would this mean for you:

1.You could apply for the managers role

2.You could take any of the part time roles without application process

3.We could seek to find you employment in another of our stores depending on availability of roles

As emphasised at this point I know we need to make changes to the way Onehunga operates but I am not 100% sure what that should be. I would really love your feedback on this idea to ensure we make the right decision. As discussed I need this feedback by the end of Sunday. The reason for the short time frame is for a few reasons:

1.To turn around the store financial situation ASAP

2.The other main employee in Onehunga (Curtis) is no longer able to work their hours so we need to hire someone ASAP and would rather hire them knowing what their hours will be. If we delay for too long the manager and yourself will end up working almost 7 days to cover the store which is less than ideal.

I will make decisions based on your feedback next week and be in touch regarding where to next. What ever happens I will keep you in the loop and give you as much notice as I can to ensure you are not put in any difficult situations.

Thanks Aileen, any questions please let me know

[15] Ms Zhuang replied by email of 7 March 2009 advising she would seek advice from the Department of Labour on 11 March 2009.

[16] Mr Foote wrote this email in reply to Ms Zhuang:-

I am more than happy for you to seek advice on the situation. As mentioned in the letter and on our phone conversation you were welcome to bring a representative to the initial meeting.

I am happy to extend the time period to give feedback until the beginning of Tuesday the 10th so you can contact the labour department.

I have arranged Clare to come and work in Onehunga on Monday and she will be there from 2pm onwards. At 2pm you are able to leave work to get this advice. We will not require you to take leave and can do this on full pay.

I would like to wait until Wednesday for you however there is some urgency around making the decision for the two reasons mentioned previously:

1.We don't have enough staff to cover the store and this cant be resolved before making the decision

2.The store is loosing money and therefore this situation must be rectified ASAP.

I will need to have made my decision by Wednesday at the very latest to ensure I can be fair and reasonable to all parties involved giving them as much notice as I can.

You do not have to give feedback if you don't wish but I would like to hear your thoughts as it will assist in making the decision. The final decision wont solely be based on your feedback so apologies if I gave the impression it rests just on what you have to say.

Please feel free to Call or email if you have any other questions etc

[17] Ms Zhuang wrote a full email response to Mr Foote on 12 March 2009. She was suspicious of the proposed restructure. She considered she was being singled out because she was paid a higher salary compared with other sales representatives. She considered the restructure would not address the store's losses and believed that Mr Foote had not correctly identified the true cause of those losses. She complained about having to work alone and stated that she did not consider her position was redundant.

[18] Before he had received Ms Zhuang's reply, Mr Foote wrote a letter inviting Ms Zhuang to a further meeting on 16 March 2009.

[19] Ms Zhuang attended a meeting on 17 March 2009 with Mr Foote and Resources Manager Ms Joss Noble ("Ms Noble") and Ms Zhuang's email of 12 March 2009 was discussed. Ms Zhuang was provided with monthly loss figures for the Onehunga operation. It was explained to Ms Zhuang that because the employee Curtis could work only 1 day per week, that the employee Deepti would no longer be working at Onehunga and because the part-time store manager had been re-deployed, a restructure was necessary. It was proposed that a full time store manager be appointed with an additional three part time positions which would create overlapping hours to cover busy periods, breaks and sick leave etc. Ms Zhuang said she understood the matter was a business decision. There was full discussion at this meeting and Minutes were taken and provided subsequently to Ms Zhuang. It was agreed to meet again for Ms Zhuang to offer any further input she wished. Ms Zhuang did not respond to requests for a further meeting.

[20] Eventually a further meeting was arranged for 30 March 2009 which Ms Zhuang attended with two support people. Ms Zhuang was given a letter dated 25 March 2009 which stated:-

An initial meeting was held between you and myself at First Mobile Newmarket on 5 March 2009 to discuss the proposed disestablishment of the full-time retail sales consultant role at Onehunga and to provide you with an explanation regarding the need to make proposed changes.

A subsequent meeting was held with myself and Joss Noble (Resources Manager) at First Mobile Head Office on 17 March 2009 discuss your feedback and outline details of alternative roles in the business. Further details were provided to you outlining the proposing savings to the business should the suggested changes take place in an email dated 22 March 2009.

Unfortunately I regret to advise that after due consideration of all options, the proposed changes will proceed. Therefore, this is to confirm that your position of retail sales consultant will be declared redundant as at 5pm, Thursday 30 April 2009. As a result your current employment with First Mobile will be terminated on that date.

Your salary payment is based on a last working day of 30 April 2009. Under the terms of your Individual Employment Agreement dated 16 July 2007 there is no redundancy entitlement. Payments due to you will be as follows:-

A final salary payment, inclusive of the notice period, payable 15 April 2009 (standard payment terms of 2 weeks in arrears and 2 weeks in advance).

All outstanding leave up to and including 30 April 2009, payable 15 May 2009.

The Store Manager's job description and salary details were provided to you on 22 March by email, together the offer of the option of the part time roles available at the Onehunga store. You are welcome to apply for these roles, or a role as a full time sales consultant in another location. Standard First Mobile terms and conditions will apply to these roles.

Aileen, on behalf of the company I would like to thank you for your professionalism and contribution to First Mobile, and reiterate that the offer to apply for other roles is still open.

[21] At the same meeting, Ms Zhuang was offered a sales assistant role at Westcity, a part time sales assistant role at Onehunga and was invited to apply for the manager's role at Onehunga. Ms Zhuang did not pursue these options.

The merits

The claim for commissions

[22] Ms Zhuang was paid commission on her sales from August 2007 until March 2008. The Authority finds that Ms Zhuang had no contractual entitlement to commission. It further finds there was no agreement where oral or written, express or implied, that Ms Zhuang would be paid commission. Ms Zhuang was paid commission in error because she had no entitlement to it.

[23] The arrangement brokered by Mr Palleson on Ms Zhuang's behalf with Mr Hannan constituted an accord and satisfaction in respect of the commission that Ms Zhuang had been paid but was not entitled to. Ms Zhuang instigated discussions

directed towards compromising the demand made of her for overpayments and entered into an arrangement for the same.

[24] The Authority finds that Ms Zhuang did not at any time subsequently pursue or maintain any entitlement to commission after an agreement was reached not to pursue the overpaid commission from her. That fact the Authority regards is corroborative of and acknowledgement by Ms Zhuang that she had no entitlement to commission. Accordingly, the Authority finds Ms Zhuang is not entitled to commission.

The claim for unjustifiable dismissal

[25] The decision to terminate Ms Zhuang's employment must be carried out fairly and sensitively. That is because the *Employment Relations Act 2000* (“the Act”) obliges parties to act towards each other in good faith and additionally, the law implies in all contracts of employment a duty of fair and reasonable treatment. These are duties which both parties owe to each other. Section 4 of the Act required First Mobile to provide to Ms Zhuang access to information relevant to the continuation of her employment as well as an opportunity to comment on the information before the decision was made.

[26] The test of whether a dismissal is justifiable falls to be determined according to the statutory prescribed test of justification at section 103A of Act. That test applies to dismissals for redundancy. I must consider whether on an objective basis, the decisions made by First Mobile and how they were made were what a fair and reasonable employer would have done in all the circumstances at the relevant time.

[27] In scrutinising First Mobile's decision to terminate Ms Zhuang's employment for redundancy, I look to see whether that business decision was made genuinely and not for ulterior motives, and secondly, whether First Mobile acted in a fair and open way in carrying out that decision, and in particular, whether it consulted properly about the proposal to make Ms Zhuang redundant and in good faith.

A genuine redundancy?

[28] The Court of Appeal in *GN Hale & Son Ltd v Wellington Caretakers IUOW* [1991] 1 NZLR 151 affirmed an employer's right to make its business more efficient:-

...make his business more efficient, as for example by automation, abandonment of unprofitable activities, re-organisation or other cost-saving steps, no matter whether or not the business would otherwise go to the wall. A worker does not have the right to continued employment if the business could be run more efficiently without him

[29] The Authority accepts that the restructuring that resulted in Ms Zhuang's redundancy was motivated by genuine commercial reasons. The previous roster provided more cover than was required to efficiently staff the Onehunga operation, there was no ability for extra cover from existing staff and the manager was only present three days per week. First Mobile resolved that change was required to address these problems and to address the losses the operation was suffering. The Authority is satisfied that the proposed restructuring and amended roster pattern was a proposal directed at addressing a genuine commercial situation. The Authority finds that the restructure was a business decision made genuinely and was not made for ulterior purposes.

Procedurally fair and in good faith?

[30] Section 4 of the Act requires First Mobile to deal with its employees in good faith. That duty is to be exercised not only generally but in specific situations including redundancy.

[31] The duty of good faith set out in the Act requires an employer who is proposing to make a decision that will have an adverse effect on the continuation of employment of an employee to provide to that employee, access to information relevant to the continuation of the employee's employment, about the decision, and an opportunity to comment on the information before the decision is made.

[32] The IEA does not contain any provision about redundancy. It does however contain a provision about employment protection which applies to restructures for sale, transfer or contracting out of all or part of the business. That is not the situation here however.

[33] The Authority accepts that Ms Zhuang was provided with all relevant information. She was provided with the Onehunga operation financial results for the months of May 2008 to January 2009. She was also provided with the current and proposed wage cost figures. Ms Zhuang was advised of the reasons for and the details

of the proposed restructuring and how it might affect her. She was provided with all the information she requested and was given the notes taken at the meetings held with her.

[34] Ms Zhuang was encouraged to apply for vacancies including the Store Manager role at Onehunga. She was offered one of the new part time sales assistant roles at Onehunga as well as a full time sales assistant role at another branch.

[35] The Authority finds that Ms Zhuang was fully consulted about the proposed restructure. It further finds she actively participated in that process and made comments and offered feedback and suggestions. She made plain her views on various matters. The Authority finds that Ms Zhuang's input was received and considered by First Mobile.

[36] Ms Zhuang was invited to take advantage of EAP counselling. First Mobile explained to Ms Zhuang the final decision it reached once that decision was made.

[37] Taking all these factors into account, the Authority finds that First Mobile did act in a fair, open and sensitive way and in good faith in carrying out its decision to terminate the position held by Ms Zhuang for redundancy.

[38] The Authority finds that First Mobile's actions, and how it acted were what a fair and reasonable employer would have done in all the circumstances at the time the dismissal occurred. **Ms Zhuang does not have a personal grievance for unjustifiable dismissal and there will be no formal orders by the Authority.**

The claim for unjustifiable disadvantage

[39] Ms Zhuang says she was unjustifiably disadvantaged in her employment. She says her requests for new business cards and a new work phone were ignored. She says she was constantly left alone at the Onehunga store without any support and her phone messages to her superiors about the matter were ignored. Ms Zhuang says that she sensed the manager took away support for her because of the commission issue.

[40] The statement of problem was amended and pleads that Ms Zhuang seeks compensation for disadvantage "namely work place stress from failure to provide a sound rostering system and being treated less favourably than other workers".

[41] In relation to the complaints about business cards and the mobile phone, no particulars or details are given to the Authority and the claim is not established to the Authority's satisfaction.

[42] The principal claim appears to relate to Ms Zhuang being left alone at the kiosk. This claim is pleaded in the statement of problem as failure by First Mobile to provide a sound rostering system. When she was asked to verify her claim by giving particular dates, Ms Zhuang listed about twenty days in January, February and March this year. But in terms of whether Ms Zhuang raised the issue with the employer as a matter she wished it to address, I find she did not raise a personal grievance in relation to it. Ms Zhuang admitted that she had not raised the matter with her employer and only did so during the restructuring consultation.

[43] In any case I accept that one of the principal reasons for the restructuring was to address rostering issues and better staff coverage at the Onehunga operation. I conclude then at the time Ms Zhuang raised the matter with her employer, it was in fact acting to address the very situation she was complaining about.

[44] As for the allegations made in the statement of problem that Ms Zhuang's health deteriorated considerably, Ms Zhuang tendered no evidence of the same to the Authority.

[45] I conclude that Ms Zhuang does not have a personal grievance for unjustifiable disadvantage.

The determination

[46] The Authority determines Ms Zhuang is not entitled to payment of commission for the period from May 2008 to April 2009.

[47] The Authority determines that Ms Zhuang does not have a personal grievance for unjustifiable dismissal.

[48] The Authority determines that Ms Zhuang does not have a personal grievance for unjustifiable disadvantage.

The costs

[49] In the event that costs are sought, I invite the parties to resolve the matter between them, but failing agreement, Ms Robins is to lodge and serve a memorandum as to costs within 28 days of the date of this Determination. Ms Reed is to lodge and serve a memorandum in reply thereafter but within 14 days of the date of this Determination. I will not consider any application or submission lodged outside that timeframe without leave.

Leon Robinson
Member of Employment Relations Authority