

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Susan Marie Burton (Applicant)
AND Alpine Fresh Filters Limited (Respondent)
REPRESENTATIVES Susan Marie Burton In person
Michael Tait and Paula Evans, Advocates for Respondent
MEMBER OF AUTHORITY Leon Robinson
INVESTIGATION MEETING 19 February 2004
DATE OF DETERMINATION 27 September 2004

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

- [1] This is an investigation of an employment relationship problem involving claims for arrears of wages, reimbursement of expenses and unjustifiable dismissal.
- [2] The applicant Susan Burton (“Ms Burton”) claims she is owed wages and reimbursement for her cell phone. She also claims she was unjustifiably dismissed from her employment with Alpine Fresh Filters Limited trading as Springfresh (“Alpine”).
- [3] Ms Burton asks the Authority to investigate her employment relationship problem and resolve it by granting her orders for payment of wages and in respect of her claim that she was unjustifiably dismissed, and compensation.
- [4] Alpine says Ms Burton was not an employee, but rather, she was an Independent Contractor.
- [5] The Authority has completed its Investigation of Ms Burton’s employment relationship problem and renders this Determination pursuant to section 174 of the Employment Relationship Act 2000 (“the Act”).

The evidence

- [6] Ms Burton responded to an advertisement in the weekend *Herald* on 28 June 2003 by Alpine. That advertisement was as follows:-

SALES REP

Due to expansion Spring Fresh Water Filters is looking for bright enthusiastic sales reps. No experience necessary. Full training given. Generous base salary plus commission. Travel opportunities. Immediate start.
Ph Paula, 307-2299 or email:
paulaevans@global.net.nz

- [7] Alpine Fresh says the advertisement was generic and intended to solicit applicants for a range of positions, including both independent contractors and employees.
- [8] Ms Burton telephoned Ms Paula Evans (“Ms Evans”) on either Tuesday 1 July or Wednesday 2 July 2003. They arranged an interview for Friday 4 July 2003 at 10.00 am.
- [9] Ms Evans says she made a distinction between sales persons who came into the office and those who did not. The latter were apparently intended to be commission only. When Ms Burton said she would rather work from home and come into the office for training and meetings when required, Ms Evans says that she took from that statement that Ms Burton was interested in the commission only position. She conceded to the Authority that this conclusion was an assumption on her part. Nor did Ms Burton specifically ask for a commission only position.
- [10] According to Ms Evans, one team was “advance commission” and the other “commission only”. The Authority regards that distinction with much scepticism. There would be no difference after three months when the retainer dropped off, and the entire sales team would then be “commission only”.
- [11] The Authority prefers Ms Burton’s evidence that Ms Evans told her that there would be a base salary of \$500.00 per week for three months and then the position was commission only. Ms Burton says that Ms Evans further said she was working on the commission structure. Ms Burton asked whether the Rep would have to come into the office and Ms Evans told her “*not after training.*” Ms Evans told Ms Burton, she would be employing commission only Reps later. Ms Burton was advised Ms Evans would call her back so that she could meet Mr Mike Tait the managing director (“Mr Tait”).
- [12] Ms Burton met with Mr Tait and Ms Evans on Monday 7 July 2003. Mr Tait discussed the company’s vision. At the end of the meeting Mr Tait advised Ms Burton that Ms Evans would call her.
- [13] Later that afternoon, Ms Evans phoned Ms Burton. She told Ms Burton “*we have decided to employ you, you’ll be working from home, you can go straight to your appointments from home, come in for meetings and anything else required of you and the initial training.*” Ms Burton was keen and said “that sounds good.” As Ms Burton had to give two weeks notice at her position at SIS Insurance, they agreed that she would commence on Monday 28 July 2003 at 10.00 am.
- [14] The Authority accepts Ms Burton’s evidence that in this conversation Ms Evans did not make any mention of the remuneration. It seems logical and the Authority accepts that Ms Burton would have regarded the offer made to her was in relation to the position that Ms Evans had outlined to her when they met on 4 July 2003, i.e. base salary of \$500.00 per week for three

months and then commission only. That was the position she reasonably believed was offered and was consistent with the position advertised.

- [15] On 11 July 2003, Ms Evans sent flowers to Ms Burton welcoming her to the Spring Fresh team.
- [16] On 28 July 2003, Ms Burton says there was a commission spreadsheet left on her desk the day she commenced work. That schedule shows base salary of \$18,000.00 p.a. Ms Evans disputed this schedule was intended to apply to Ms Burton.
- [17] Ms Burton also says she was told Ms Evans was organising contracts but she was never provided with one.
- [18] On 31 July 2003 Ms Burton attended a first sales meeting.
- [19] On 7 August 2003 Ms Burton attended a second sales meeting. She noticed she had not been paid. Her sister Ms Julie Fincham suggested she provide her bank account details and IRD number to Ms Evans. Ms Burton could not have expected to have been paid if she had not provided that information earlier.
- [20] On 14 August 2003 Ms Burton attended a third sales meeting.
- [21] On Sunday 17 August 2003 Ms Burton travelled to Masterton for work with her sister Ms Julie Fincham and another employee Rod.
- [22] On 29 August 2003 Ms Burton phoned Ms Evans and asked when her retainer and refund for the mobile were going to be paid into her account. Ms Evans said she told Ms Burton *“that’s not the deal you were on”* and that she would talk to Mr Tait and get back to her.
- [23] Ms Evans says that Ms Burton telephoned that morning and asked when she would be paid her \$500.00 per week “advance”. Ms Evans says she told Ms Burton that *“her deal was commission only as she had been working from home and that that was we had agreed at the beginning.”* She told Ms Burton everyone else was paid on a weekly basis and reported into the office at 8.30 am. She said Ms Burton was rude to her and hung up on her.
- [24] When Mr Tait spoke to Ms Burton he told her she had never been offered a wage and that had not been discussed with Ms Evans. Ms Burton told him that he was not there when the matter was discussed. He said that he knew from Ms Evans what had been discussed. Ms Burton says Mr Tait began shouting at her. She said he said *“We’ve told you this, we never discussed any wages with you, we don’t owe you, you never sold anything.”* She said he would not let her say anything, was swearing at her and was intimidating. She said that she persisted that she was owed salary. She said that Mr Tait eventually said *“its best we call it quits.”* She told the Authority she agreed with that statement. Ms Evans says Mr Tait said *“Since we cannot come to some arrangement, let’s just call it a day.”*

Discussion

- [25] It is extremely unfortunate that Ms Evans did not record the agreement reached between the parties.
- [26] The advertisement refers to a *“generous base salary plus commission”*. It is obvious that salary implies an employment. It is reasonable therefore that Ms Burton desired employment

and that that is what she considered she was applying for when she made her application for the position.

[27] It is relevant to note section 12 of the *Fair Trading Act 1986* which provides:-

“12. Misleading conduct in relation to employment

No person shall, in relation to employment that is, or is to be, or may be offered by that person or any other person, engage in conduct that is misleading or deceptive, or is likely to mislead or deceive, as to the availability, nature, terms or conditions, or any other matter relating to that employment.”

[28] While the Authority does not have any jurisdiction in relation to that provision, it must be taken to be a statement of the law and principles which apply in pre-employment situations and in this present matter.

[29] The Authority concludes that the advertisement related to an employment. It would be misleading if it actually related to an independent contractor arrangement. Ms Evans and Alpine ought to have accepted that any applicant that answered the advertisement would be doing so on the basis that they were seeking employment. That is, employment with “*a generous base salary and commission.*”

[30] That being so, the Authority finds Ms Burton attended interviews and she eventually accepted employment. That is consistent with what the advertisement invited. The offer made to her and which she accepted, must have been one of employment.

[31] The Authority is also persuaded that Ms Burton is unlikely to have left her employment at SIS Insurance to take a position that did not provide a regular income.

[32] On balance, the Authority concludes Ms Burton was offered employment and she accepted that employment on a weekly retainer of \$500.00 for three months plus commission and then commission only.

Determination

[33] Ms Burton abandoned her claim for reimbursement in respect of her mobile phone.

[34] As Ms Burton was an employee, she is entitled to the retainer of \$500.00 that was agreed. **Alpine Fresh Filters Limited is ordered to pay to Ms Burton \$2,500.00 gross being the retainer due to her in respect of the duration of her employment from 28 July 2003 until 29 August 2003.**

[35] As for the claim for compensation arising out of an alleged unjustifiable dismissal, the Authority is not persuaded that Ms Burton was dismissed. It is the Authority’s view that Ms Burton agreed with Mr Tait to end the employment. She was not dismissed. **The Authority is unable to assist Ms Burton further in respect of her claim for compensation.**

Costs

[36] As neither party was represented by professional advocates, there will be no order for costs.

Leon Robinson
Member of Employment Relations Authority

Summary of orders

- (i) Alpine Fresh Filters Limited is ordered to pay to Ms Burton the gross sum of \$2,500.00 as arrears of wages pursuant to section 131 of the Act.**

- (iii) Alpine Fresh Limited is ordered to pay to Ms Burton the sum of \$70.00 in respect of the filing fee disbursed by her.**