

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

AA 138/09  
5139399

BETWEEN                      YUNYUN FEI  
   Applicant

AND                              PAC-AL (NZ) LTD  
   (FORMERLY  
   MONEYWORLD ASIA (NZ)  
   LTD)  
   Respondent

Member of Authority:      Yvonne Oldfield

Representatives:           Applicant in person  
   Mr Daniel Lee for Respondent

Investigation Meeting:    10 March 2009

Determination:              1 May 2009

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1]     Mrs Fei was employed by the Respondent (Moneyworld) as a Marketing Executive for almost four years (and for a related company for another three prior to that.) On 24 July 2008 she received a letter from Daniel Lee (then a Director of Moneyworld) advising that her position had been made redundant. Her employment ended immediately.

[2]     Mrs Fei disputes the genuineness of this redundancy. She wrote to Mr Lee on 6 August 2008 telling him that she believed the real reason for the dismissal was the fact that she is the mother of two small children. She subsequently told the Authority that she suspected there was a further reason. In May 2007, the respondent and two staff (including Mr Lee) were charged with money laundering, and police took from Mrs Fei a statement which was in part unfavourable to the defence of the charges. She believes that Mr Lee continued to hold this against her.

[3] Mr Lee resigned as director of the respondent on 1 December 2008, but was authorised by director Lim Jit Ooh to give evidence. He told me the respondent had ceased trading on 31 December 2008 and was technically insolvent at the time of the Authority investigation meeting. Another company from the same group as the respondent was operating what was formerly the respondent's business.

[4] Mr Lee told me that the decision to make Mrs Fei redundant in July 2008 was made for two reasons. The first was the closure of the respondent's office in China, which shifted the respondent's focus away from the area in which Mrs Fei had worked. The second was the need to deal with the expense of defending the money laundering charges and paying the fines to which the respondent was sentenced.

[5] He noted however that towards the end of August 2008, an opportunity for part-time work became available and was offered to Mrs Fei. The offer remained open until 10 September 2008 however Mrs Fei decided not to take it. Mr Lee told me he felt that the fact that the offer was made showed that the original redundancy was genuine and that the respondent had acted towards Mrs Fei in good faith.

[6] Mrs Fei continues in the view that the termination of her employment was unjustified.

[7] In a letter dated 12 January 2009 the parties were advised of the timetable for the investigation of this employment relationship problem. It provided that the applicant should lodge a statement by 20 February 2009 and the respondent, by 4 March. The applicant's witness statement was not received on the due date. When the Authority support officer followed up on this Mrs Fei advised that as a result of English being her second language she had not understood what was required of her. The respondent then requested that the matter be dismissed as a result of the breach of the timetable.

[8] In the circumstances I did not accept that this would be justified. The matter has been determined on the basis of oral evidence presented at the investigation meeting by Mrs Fei and Mr Lee, as well as on the basis of copies of correspondence exchanged between the parties around the time of termination. A Mandarin interpreter was also present to assist at the Investigation Meeting.

## Issues

[9] The issues for determination are whether the termination of Mrs Fei's employment was genuinely for redundancy, and whether the process by which it was done was procedurally fair. These issues are intertwined and for that reason I address them together as set out below.

[10] Mrs Fei was on maternity leave from December 2007. This was her second period of maternity leave since being employed by the respondent; her first child was born in 2006. She originally gave notice that she would be on leave until June 2008 but in June General Manager William Ang suggested to her that September 2008 would be a suitable time for her to return and she agreed. By July Mrs Fei had organised childcare and on 22 July she arranged to meet with Daniel Lee to finalise her return date. (Mr Ang having left the company by then.) Instead of settling arrangements for her return, Mr Lee advised Mrs Fei that he was making her redundant. This was confirmed by the letter of 24 July 2008. No notice was provided.

[11] Clause 14 of Mrs Fei's employment agreement (executed 7 February 2005) provides for two weeks notice of termination. Clause 15 provides:

*"15.1 Redundancy is defined as where the company has staff surplus to requirements because of the closing down of the whole or any part of the company's operations due to a change in methods, materials, re-organisation, and sale of the business or like cause requiring a permanent reduction in the number of employees.*

*15.2 If the company terminates the employee's employment for redundancy, no compensation shall be payable."*

[12] Mrs Fei was the only staff member made redundant in July 2008. Because of the proximity of the announcement to her proposed return from maternity leave, she inferred at first that the reason she was being dismissed was because she had two young children. Later, when Mr Lee made reference to the consequences of the court case, she concluded that that was an additional reason.

[13] Mr Lee rejects the allegation that Mrs Fei's family circumstances were part of the reason that she was selected for redundancy. He told me that after her first period of maternity leave she had been welcomed back and later sent on an overseas trip to meet colleagues in Asia.

[14] Mr Lee told me that in 2008, between the loss of business which resulted from the closure of the office in China, and the significant costs and fines associated with the court case, the company needed to downsize significantly. By July one staff member had left and another had cut down to part time. No-one had been employed to do Mrs Fei's work while she was on leave, although one other "casual" had been engaged to work part time in June. In the three months to July total staffing levels had dropped from six full time equivalents to five (excluding Mrs Fei's position.) He said there was no work for Mrs Fei to come back to as her job had been primarily to look after "RMB" (Chinese yuan) exchange business. With the closure of the office in China the New Zealand branch had no counterpart in that country with which to do business. Although a small amount of Chinese exchange work could be put through Singapore, most of Mrs Fei's job had gone. He said it was for this reason that she (rather than one of her co-workers) was made redundant.

[15] Mrs Fei told me that the China office had in fact closed in July 2007 and that there had been no suggestion of redundancy then. She agreed that prior to this most of her work was RMB work however she said she did (and was qualified to do) a wider range of work.

[16] After giving Mrs Fei notice of redundancy, Mr Lee met with her and her husband again to discuss the situation and then, in August, made the offer of re-employment. This was possible because of the resignation, in August, of the "casual" staff member who had been taken on in June.

[17] Mrs Fei declined the offer because she felt it was only made under threat of ERA proceedings. She said she would have considered it if it had come sooner and had not seemed like "a sort of deception." She also feared that her employment would still be vulnerable. Finally she noted that this alternative could have been considered before she was made redundant, as the casual was taken on in June. She said that if she had

been offered part time work in June (when she had originally planned to come back to work) or even in July, she would have accepted it.

[18] Mr Lee said that he was not at the time aware of what Mr Ang and Mrs Fei had arranged before Mr Ang left. Confusion over what was happening was compounded by the fact that Mr Lee's father in law passed away about the time Mr Ang left and Mr Lee returned to Singapore for some time then.

[19] Mrs Fei remained unemployed at the time of the investigation meeting and told me that she had decided to work on improving her English before seeking work again. She told me that she and her husband have had financial problems as a result of her losing her job and that she has had trouble sleeping.

### **Determination**

[20] I accept that this redundancy was not simply an attempt to get rid of an employee who was not wanted. The respondent needed to reduce staff numbers and the resignations of the first half of 2008 had not fully addressed this. I accept that the respondent's primary reason for dismissing Mrs Fei was a genuine need to cut staffing levels.

[21] However, even in such circumstances an employer must show that it has adopted a fair procedure in selecting for redundancy. It must then show that it has consulted with the affected employee about alternatives.

[22] In this case, the reason given for choosing Mrs Fei was the fact that the closure of the China office affected her job specifically. This however did not stand up to scrutiny: the China office closed over a year prior to her redundancy and six months before her maternity leave commenced. I am not satisfied that the respondent has shown why she should have been made redundant in preference to other full and part time colleagues.

[23] In addition, as Ms Fei has rightly pointed out, a new staff member was taken on just one month prior to her being made redundant (and well after the China office

closed.) With adequate and timely consultation she could indeed have been offered this position as an alternative to redundancy.

[24] **Because of these factors, I conclude that the termination of Mrs Fei's employment was unjustified.**

### **Remedies**

[25] I accept that the August offer of part-time employment was made genuinely and in good faith. Mrs Fei was deeply suspicious of it but I do not find her suspicions to be well grounded. I note also that the action taken by Mr Lee after Mrs Fei raised her grievance is precisely what should be done in the early stages of an employment relationship problem. He met with her and her husband and made a reasonable attempt to rectify the mistake that he had made. Such offers are to be encouraged. In failing to take up that offer Mrs Fei failed to mitigate her loss. This will affect the remedies to which she is entitled.

[26] Mrs Fei was on an annual salary of \$31,200 (\$600.00 per week.) In her statement of problem she sought remedies of "compensation" (which was not quantified) and "one year's payment." In all the circumstances, including the fact that she turned down an offer of part time work that would have helped to mitigate her loss, I consider it appropriate to limit the award of lost earnings to a three month period.

[27] In addition I consider a modest sum to be appropriate in relation to hurt and humiliation. Although I accept that Mrs Fei has been very distressed by her dismissal, I also consider that she contributed to her financial predicament by failing to take up the offer of part time work.

[28] Finally I accept that Mrs Fei should be able to recover her filing fee.

[29] In summary, I make the following orders:

- i. the respondent is ordered to pay to the applicant lost earnings in the sum of \$7,800.00 gross;

- ii. the respondent is ordered to pay to the applicant the sum of \$5,000.00 compensation for hurt and humiliation, and
  
- iii. the respondent is ordered to pay to the applicant the sum of \$70.00 in reimbursement of the filing fee.

Yvonne Oldfield

Member of the Employment Relations Authority