

**Attention is drawn to the order prohibiting publication of certain information in this Determination.**

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2018] NZERA Auckland 193  
3024897

BETWEEN                      HSU-YIN WEI  
Applicant

A N D                              ANZ SKY TOURS LIMITED t/a  
ANZ SKY TOURS  
Respondent

Member of Authority:        Anna Fitzgibbon

Representatives:              May Moncur, Advocate for Applicant  
Catherine Stewart/Carla Pallant-Drake Counsel for  
Respondent

Investigation Meeting:        22 and 29 May 2018 at Auckland

Submissions Received:        18 May 2018 and 1 June 2018 from Applicant  
18 May 2018 and 8 June 2018 from Respondent

Date of Determination:        21 June 2018

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**DETERMINATION OF THE  
EMPLOYMENT RELATIONS AUTHORITY**

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- A. The Respondent, ANZ Sky Tours Limited t/a ANZ Sky Tours (ANZ Sky Tours) owes the Applicant, Ms Hsu-yin Wei, unpaid remuneration amounting to \$18,146.47 gross. ANZ Sky Tours is to pay Ms Wei the sum of \$18,146.47 gross within 21 days of the date of this determination together with interest at the rate of 5% per annum calculated from 13 July 2017 until payment in full.**
- B. The Applicant was unjustifiably constructively dismissed by the Respondent, ANZ Sky Tours. To settle Ms Wei's personal grievance claim, ANZ Sky Tours is to pay her the following sums within 21 days of the date of this determination:**

(a) **\$20,000 compensation pursuant to s.123(1)(c)(i) of the Employment Relations Act 2000 (the Act) for humiliation, loss of dignity and injury to feelings in respect of her unjustifiable constructive dismissal.**

(b) **\$2806.85 gross in lost remuneration under s128 of the Act together with interest at the rate of 5% per annum calculated from 13 July 2017 until payment in full.**

**C. Costs are reserved.**

## **Employment Relationship Problem**

### **ANZ Sky Tours**

[1] ANZ Sky tours is a travel and tourism operator based in New Zealand and Australia. ANZ Sky Tours sells and organises tours for “people residing in New Zealand and overseas. We are responsible for organising every aspect of the tour including transport, accommodation and activities”.<sup>1</sup> Ms Sherry He is sole director and joint shareholder of ANZ Sky Tours. Ms He is the managing director.

### **Ms Wei’s employment**

[2] Ms Hsu–Yin Wei commenced employment with ANZ Sky Tours in the position of Accounts Payable and Marketing Coordinator in April 2016. ANZ Sky Tours sponsored Ms Wei’s work visa.

[3] On 6 May 2016, Ms Wei signed her employment agreement. Under clause 7.1 of the employment agreement, Ms Wei’s base salary was stated to be \$40,000 per annum. Clause 7.2 provided for a bonus in addition to base salary for recognition of “efforts and achievements ... Bonus verification will also take into account of work attitude, individual role as Team Player, fulfilment of each business transaction as required”.

[4] Ms Wei says that in about September/October 2016 her job description changed, and she began working as a tourist guide in addition to the accounts payable

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<sup>1</sup> Witness statement of Sherry He

role. Ms Wei says Ms He proposed a change in her remuneration from an annual salary to remuneration based on commission only from sales made by her.

### **Change in remuneration structure**

[5] Ms Wei says she agreed to the commission structure but when she provided her sales record to Ms He along with a calculation of commission owing, Ms He refused to pay it. Ms Wei says she was asked to recalculate commissions based on 5% of sales. Ms Wei did not agree to the change but provided Ms He with a recalculation. Ms Wei says she was paid commissions accordingly but for 2 months only. A further reduction in Ms Wei's level of commission was subsequently made by Ms He. Ms Wei says in February 2017, Ms He decided to pay her a base salary plus a commission of 2% on sales achieved by her.

### **Ms Wei's claims**

[6] Ms Wei says she repeatedly asked Ms He to pay her commissions as she was in desperate need for money. Ms Wei says when she asked for payment, Ms He would reference her work visa which made her anxious. Ms Wei resigned on 28 June 2017. Her last day of employment was on 12 July 2017. Ms Wei claims she was unjustifiably constructively dismissed. Ms Wei seeks remedies including arrears of wages of \$51,237.78 gross, compensation for unjustified constructive dismissal and loss of remuneration for the period of time she was unemployed.

### **ANZ Sky Tours response**

[7] Following a serious car accident, Ms He says Ms Wei's work performance suffered and she made a number of mistakes. In September 2016, Ms He says she spoke to Ms Wei about her work and her mistakes. As a result of the discussion, Ms He says she asked Ms Wei to stop verifying accounts and to instead focus on the sales part of her role.

[8] Ms He says there was discussion about a change in remuneration and a proposal was put to Ms Wei. However, Ms Wei did not respond to the proposal and it was not implemented. Therefore, Ms Wei's salary remained at \$40,000 gross until she received a pay rise to \$45,000 gross per annum when her work performance improved.

[9] Ms He denies that Ms Wei was unjustifiably constructively dismissed. Ms He says she was shocked by Ms Wei's resignation and says Ms Wei resigned when she found another position in Taupo. ANZ Sky Tours disputes the claims made by Ms Wei for remedies.

### **Investigation meeting**

[10] As permitted under s.174E of the Act, this Determination has not set out all the evidence required. The Determination states findings, relevant facts, legal issues and makes conclusions in order to efficiently dispose of the matter.

[11] The investigation in the Authority took place over two days. The first day was scheduled for 22 May 2018. The matter had to be adjourned on that date because Ms Moncur, acting for Ms Wei, informed the Authority that Ms Wei had a recording of a telephone conversation with Ms He about her employment situation and wages. As a result of this disclosure, the investigation meeting was adjourned so that the recording could be translated from the Mandarin language in to the English language. The investigation meeting proceeded for the full day on 29 May 2018.

[12] Ms Wei filed a witness statement. For ANZ Sky Tours, Ms He filed a witness statement. Both Ms Wei and Ms He either swore on oath or affirmed their evidence was true and correct.

[13] The Authority was assisted by an interpreter of the Mandarin language.

### **Non publication order**

[14] A non-publication order applies to ANZ Sky Tours' financial reports. The information contained in those reports produced to the Authority in a common bundle of documents is prohibited from publication.

### **The issues**

[15] The issues for the Authority to determine are as follows:

- (a) Does ANZ Sky Tours owe Ms Wei wage arrears?
- (b) Was Ms Wei unjustifiably constructively dismissed by ANZ Sky Tours?

- (c) If Ms Wei was unjustifiably constructively dismissed, what remedies is she entitled to?

### **First Issue**

#### **Does ANZ Sky Tours owe Ms Wei wage arrears?**

[16] Ms Wei says she was paid a salary by ANZ Sky Tours until October 2016, when her remuneration changed to a commission only structure.

[17] Ms He disputes this and says a proposal for “commission only” remuneration was put to Ms Wei, but she did not accept it. Therefore, Ms He says, Ms Wei remained on an annual salary.

#### **Proposed commission structure – 19 September 2016**

[18] Ms He set out her proposal in an email to Ms Wei on 19 September 2016. The email states:

To Dora

Hello, Dora (sales representative) commission base

1. 10% of NZ LOCAL TOUR invoice amount; OZ TOUR SALES
2. 40% of AIR FARE profit, cruise sales profit, insurance sales profit (or say any sales that profit can be worked out at the time of sale)
3. When you work away from the office as a Tour Director (guide), you will be paid \$100/day or \$150/day plus tips.

We are expecting that you achieve a total annual salary \$40,000 plus and if you are okay with this?

This is the best option for you at this stage and the advantage of this is that you can work on your pace and at relax.

I am looking forward to your kind consideration and confirm to me asap.

Cheers  
Sherry

[19] Despite the wording of the final sentence, Ms Wei says that the proposal was put to her in a way which was not open for negotiation. Ms Wei agreed verbally to the commission only sales role. She says she did not have an option. ANZ Sky tours was supporting her work visa and she did not want it to be jeopardised.

[20] The next email that Ms Wei received was on 6 October 2016, as follows:

Hi, Dora

Regarding your Commission Calculation, the Format is:

1. 10% of NZ Tour sales LAND ONLY but if you can mark up the airfare and generate profit, you also can claim commission on the profit at 50%.
2. 10% of OZ Six Days tour package with airfare at \$630
3. Half share of profit generated from airfare, insurance, USA, Europe, OZ Fit LAND ONLY tour sales that can work out the profit at the time of sales
4. 1% of agency booking PROCESS OR BOOKING DIRECT TO YOU
5. As a summary, you get half percent share of the profit generated from any sales that you can work out the profit at the time of sales.

### **Payments by ANZ Sky Tours to Ms Wei**

[21] Ms Wei was paid wages weekly from the commencement of her employment in April 2016 until October 2016. The weekly payments were made on the basis of an annual salary.

[22] On 1 November 2016, Ms Wei was paid the sum of \$3,018.75 by ANZ Sky Tours. Ms Wei then received further monthly payments until January 2017. These payments Ms Wei says were made by ANZ Sky Tours in accordance with the change in her remuneration structure from salary to commission only.

[23] Ms Wei says that when she was paid monthly by ANZ Sky Tours, she was paid a fixed amount so that ANZ Sky Tours could comply with its tax and employment obligations. The commissions on sales generated by Ms Wei were not calculated until the end of each month. Ms Wei was to be paid the balance owing once the monthly commission had been calculated and verified by ANZ Sky Tours.

[24] Ms He says the monthly payments made to Ms Wei were based on an annual salary and not a commission because Ms Wei had not responded to the proposal put to her in September 2016.

### **Annual salary or commission?**

[25] I do not accept Ms He's version of events. The change from being paid weekly to monthly is consistent with Ms Wei's evidence that her remuneration structure was altered, in accordance with the September 2016 email. Ms Wei says that

on the basis of her sales for the month of October 2016 she should have received \$13,810.58, being 10% commission. Ms He refused to pay the commission, as calculated by Ms Wei, and asked Ms Wei to send her another sales report calculating a commission based on 5% of sales generated. Ms Wei accordingly provided a sales report and on the basis of a 5% commission, she was entitled to \$8,847.21 for that month.

[26] Ms He agreed during the course of the Authority's investigation meeting, that she had not paid Ms Wei a commission of 10% because she said Ms Wei had not accepted the commission structure.

[27] In my view, it is clear from the evidence Ms Wei understood that she was going to be paid based on a commission of 10% of sales generated from October 2016. Ms Wei produced sales records to Ms He accordingly. Ms He understood this to be the arrangement also.

[28] Ms He refused to pay Ms Wei commission based on 10% of sales made by her and asked Ms Wei to recalculate her commission based on 5% of sales.

[29] Ms Wei did so and provided Ms He with monthly sales reports with a calculation of commission she understood was owing, based on 5% of sales.

[30] During the course of the Authority's investigation, when asked about the emails proposing a 10% commission, Ms He said that she had made a mistake. One of the emails from Ms He to Ms Wei dated 19 September 2016 is as follows:

Subject: The changes regarding your position and wage

Hello, Dora.

Due to the change of your position, I can offer you a position of "sales representative". It is a commission-based salary (no basic salary). The details as below.

[31] After Ms He refused to pay Ms Wei commission based on 10%, Ms Wei wrote an email to her on 7 November 2016:

Dear Sherry:

After talking with you, I have added one column which is 5% based in the new claim form. I am a little bit upset. I would like to make a request to you. Would you please increase my commission ratio to 7% on the grounds of motivation and encouragement? I feel that it is inferior to our competitors. I am doing my best serving clients no matter that they are current clients or future clients. I devote my heart

and soul to the company. I have a hard time currently due to the law suit. I am desperate for money to pay the compensation. Please be magnanimous to me.

Thanks.  
Dora

### **Transcript of telephone conversation between Ms Wei and Ms He**

[32] During the course of the investigation meeting, the Authority was provided with a transcript of a conversation held between Ms He and Ms Wei which was recorded by Ms Wei. The transcript is clear in my view that the proposal by Ms He was that the commission was based on 10%, and Ms He claims this was a mistake. In the transcript, she says:

You have no reason to be higher than others. If it is based on \$45,000, the monthly pre-tax salary is \$3,700, right? If you're \$9,000 or \$10,000 a month, this is almost taxed. I think this is unreasonable. It should stop immediately.

[33] In the transcript, Ms He also makes a comment which, in my view, supports Ms Wei's contention that her employment conditions were constantly changed by her. Ms He stated:

I made the conditions. It's not because I'm constantly changing. It is because your performance has forced me to make such adjustments. In fact you're the most troublesome. Yes, I might say that one, that is, okay, you may, even from the point of view of immigration law, I first meet the local staff. ... In a travel agency, wages higher than \$40-5,000 are not readily available. ...

[34] On 6 May 2017, Ms Wei received an email from Ms He attaching a new employment agreement. The new employment agreement included a new commission rate of 2%. Ms Wei says that she was deeply disappointed and hurt by Ms He's actions, and felt that she was at Ms He's mercy if she remained in the position.

[35] I find that the arrangement between Ms Wei and Ms He from October 2016, was that Ms Wei was to be remunerated by ANZ Sky Tours by commission on sales at the rate of 10%. Reluctantly, Ms Wei agreed to a commission rate of 5% when Ms He refused to pay her 10% commission.

[36] On Ms Wei's calculations, commissions owed to her on the basis of 5% of sales generated by her from October 2016 amounted to \$51,716.47 gross. ANZ SKY Tours did not provide the Authority with complete employment records for Ms Wei

and so calculating payments made to Ms Wei became very difficult. On the basis of IRD records provided to the Authority Ms Wei received gross income from ANZ Sky Tours of \$33,570 from October 2016 until her employment terminated on 12 July 2017.

[37] Ms Wei calculated her income from the date of the commission only arrangement in October 2016 at the rate of 5%, to amount to \$51,716.47 gross. After deducting income received by her, according to the IRD records for the year, Ms Wei is owed the sum of \$18,146.47 gross.

[38] ANZ Sky Tours is to pay Ms Wei the sum of \$18,146.47 within 21 days of the date of this determination together with interest at the rate of 5% per annum calculated from 13 July 2017 until payment in full.

## **Second Issue**

### **Was Ms Wei unjustifiably constructively dismissed?**

[39] The Authority was provided with text messages between Ms He and Ms Wei in December 2016 in which Ms Wei sought payment of commission as she was in financial difficulties. Ms He's response to one such email on 22 September 2016 asked some questions about deductions to be made from her remuneration and stated:

In addition, I would like to confirm with you if there is anything needed to be updated in regards of your visa.

[40] In an email from Ms He to Ms Wei on 30 December 2016 concerning Ms Wei's remuneration Ms He stated:

According to your performance for this period, I would like to inform you that I am considering not to support your further work visa, also the matter of Permanent residency. In general, from my point of view, you have no extra point regarding of your engagement and contribution to the company. I must support those who are the assets for the company growing. We would be lost without them. You have been here long time. I do not have a such feeling to you. I suggest that you need to think carefully and make a plan for your future.

Regards  
Sherry

[41] Ms Wei's email in response provided Ms He with the information requested and stated:

I am shameful that you are not satisfied with my performance. I will think carefully about what I am going to do next. Before any further action I will keep doing my best to serve clients.

Thanks  
Dora

[42] Ms Wei had never received any written or verbal warnings about her performance. It is my view that in response to Ms Wei's requests for payment of income she believed was owing to her, Ms He made veiled threats to her about her work performance and her work visa.

[43] In early January 2017, Ms Wei had to travel urgently to Taiwan as her grandmother was dying. Ms Wei contacted Ms He while she was away, urgently seeking payment of her wages which had still not been processed.

[44] On 22 January 2017, Ms He responded to Ms Wei's request. Ms He informed Ms Wei that she had evaluated her work performance, and had gone through her contract again.

[45] Ms He criticised Ms Wei's performance and concluded:

If you believe that you are ready to come back to work I will arrange your usual work. You are still doing the part of your job described in your contract. You are supposed with \$40,000 yearly salary. You can do the booking job while you have done the fixed part.

Regards  
Sherry

[46] Upon returning to New Zealand, Ms Wei spoke with Ms He about wages she felt were owing. Ms Wei says that Ms He told her that she was not going to pay commission to her based on the sales report and the payment arrangement was to be changed back to salary. Ms Wei says that during the course of the conversation, Ms He said to her that she thought she would have resigned after the change to remuneration structure in October 2016, and reminded Ms Wei that she could dismiss her at any time.

### **Resignation – 28 June 2017**

[47] Ms Wei decided to resign on 28 June 2017. Ms Wei says it was a very difficult decision to make. However, Ms Wei says Ms He constantly changed her conditions of remuneration, Ms Wei had begged Ms He for payment of her wages for a significant period of time and Ms He's response was to raise her work visa. Ms Wei

felt at Ms He's mercy and the longer it went on the more income she was going to lose.

[48] On 28 June 2017, Ms Wei resigned, stating that her last day would be 12 July 2017. Ms Wei stated in the letter:

Thank you so much for the opportunity to work in this position for the past 14 months. I've greatly enjoyed and appreciated the opportunities and I've learned a lot since I've worked here, all of which I will take with me throughout my career.

During my last two weeks, I will do everything possible to wrap up my duties and train other team members. Please let me know if there's anything else I can do to aid during the transition.

I wish the company continued success, and I hope to stay in touch in the future.

Sincerely,  
Dora Wei

[49] This letter is a rather unconventional letter in that Ms Wei claims that she was forced to resign. However, I accept Ms Wei's explanation that she found a template on the internet for a resignation letter and used it to draft her resignation. Ms Wei also stated that her cultural background and upbringing prohibited her from being impolite and disrespectful towards her employer, Ms He.

[50] Ms He claimed to have been shocked by the resignation, but this is not borne out in the evidence. Ms He had repeatedly reminded Ms Wei that she was considering removing her support for her work visa, complained about her work performance when Ms Wei sought payment of wages she felt she was due, did not pay Ms Wei wages that she had promised to pay and indicated to Ms Wei that she thought she may have resigned when the new commission structure was implemented.

[51] I consider Ms He's actions amounted to a course of conduct with the deliberate and dominant purpose of coercing Ms Wei to resign<sup>2</sup>.

[52] It was foreseeable, in my view that Ms Wei would resign and in the circumstances, I consider the resignation amounted to a constructive dismissal which was unjustified<sup>3</sup>.

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<sup>2</sup> *Auckland Shop Employees Union v Woolworths (NZ) Ltd* [1985] 2 NZLR 372 (CA)

<sup>3</sup> *Auckland Electric Power Board v Auckland Provincial District Local Authorities Officers IUOW Inc* [1994] 1ERNZ 124(CA)

**Third Issue****If Ms Wei was unjustifiably constructively dismissed, is she entitled to remedies?**

[53] Ms Wei was a credible witness and her account of Ms He's treatment of her satisfies me that she is entitled to compensation in respect of her unjustified dismissal. Ms Wei had little option with regard to her employment conditions at ANZ Sky Tours. This was because her work visa in New Zealand was being supported by ANZ Sky Tours. This was made explicit in the correspondence that was provided to the Authority.

[54] Ms Wei suffered for a considerable period of time before resigning. She told the Authority how she begged Ms He to pay her when she was in financial difficulty and wanting to travel to Taiwan to see her dying grandmother. Ms He was not sympathetic towards her.

[55] I consider compensation of \$20,000 pursuant to s123(1)(c)(i) of the Act appropriate in the circumstances.

[56] Ms Wei did find another job relatively quickly. Ms Wei is entitled to lost wages calculated on the basis of an annual salary of \$40,000 gross for 2 months (\$3,333 gross per month) and commission on sales of 5% for 10 months which amounts to \$51,716.47. An annual remuneration totalling \$58,382.47. Lost remuneration of 2.5 weeks on that basis amounts to \$2806.85 gross.

[57] I do not consider Ms Wei contributed to her dismissal. Accordingly, I am not prepared to reduce remedies.

**Costs**

[58] Ms Wei has 14 days in which to file submissions on costs. ANZ Sky Tours has 14 days from receipt in which to respond.

**Anna Fitzgibbon**  
**Member of the Employment Relations Authority**