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Lewis v Immigration Guru Limited (Auckland) [2016] NZERA 512; [2016] NZERA Auckland 349 (13 October 2016)

Last Updated: 2 December 2016

IN THE EMPLOYMENT RELATIONS AUTHORITY AUCKLAND

[2016] NZERA Auckland 349
5617013

BETWEEN MARILOU LEWIS Applicant

AND IMMIGRATION GURU LIMITED

Respondent

Member of Authority: Eleanor Robinson

Representatives: James Lewis, Advocate for Applicant

Jasmine Bath, Representative for Respondent

Investigation Meeting: 3 October 2016 at Auckland

Submissions received: 23 September, 3 & 4 October 2016 from Applicant

23 September, 3 & 5 October 2016 from Respondent

Determination: 13 October 2016

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Applicant, Ms Marilou Lewis, claims that the Respondent, Immigration Guru Limited (Immigration Guru), indirectly or directly discriminated against her using a prohibitive ground of discrimination, specifically discrimination based on her Filipino ethnicity.

[2] Ms Lewis further claims that Immigration Guru disadvantaged her by making irregular wage payments, and when making a decision to terminate her employment used an unfair procedure to realign her core duties to focus exclusively on marketing which was disadvantageous to her.

[3] Ms Lewis claims that Immigration Guru unjustifiably dismissed her from employment on 3 February 2016.

[4] Immigration Guru denies that it directly or indirectly discriminated against Ms Lewis on ethnicity or any other grounds and that the termination of her employment was a justifiable

dismissal which occurred during a valid trial period.

The issues

[5] The issues for determination are:

(a) Was Ms Lewis' employment subject to a valid trial period provision?

(b) Did Immigration Guru directly or indirectly discriminate against Ms Lewis on the basis of her ethnicity such that the trial period provision does not apply?

(c) Did Immigration Guru unjustifiably disadvantage Ms Lewis by making irregular wage payments to her?

(d) Did Immigration Guru unjustifiably disadvantage Ms Lewis by having her focus exclusively on marketing?

(e) Did Immigration Guru unjustifiably disadvantage Ms Lewis in respect of the reimbursement of expenses?

(f) If the trial period is not valid, was Ms Lewis unjustifiably dismissed by

Immigration Guru Limited?

Background facts

[6] Immigration Guru is a registered New Zealand company which provides information and advice to potential migrants, prepares and lodges visa applications, and acts as an intermediary to legally represent clients during visa processing and before review bodies. It is owned by Ms Jasmine Bath and her husband, Mr Jay Bath, who are co-directors and licensed Immigration Advisers. Immigration Guru's clients are migrants from various countries and nationalities.

[7] Immigration Guru is a small business; apart from Mr and Mrs Bath it employed two other staff members during the period of Ms Lewis' employment.

[8] During September 2015 Ms Lewis applied for a position with Immigration Guru. The position advertised was for an Immigration Adviser. Although Ms Lewis was not licenced to act as an Immigration Adviser, Immigration Guru decided to consider her for a position as an Administrator.

[9] Mr Bath initially interviewed Ms Lewis who was shortlisted and attended a second

interview with Mr Bath and Mrs Bath. At the first interview, Mr Bath had explained the nature of Immigration Guru's business and the details of the position on offer to Ms Lewis. He introduced her to the other employees and she sat next to him during client consultations in order that she could understand the work carried out by Immigration Guru.

[10] Ms Lewis said that Mr Bath had asked her what she would do if she had no lodgement work to undertake and she had responded that she could market Immigration Guru to other members of the Philippine community.

[11] As Ms Lewis was keen to pursue her application, she was shortlisted and a second interview followed with Mr and Mrs Bath. During the second interview, Mrs Bath said that the role, and the duties and responsibilities, were fully explained to Ms Lewis, including the trial period provision. An offer was made for her to attend an unpaid work trial to which she agreed. The trial took place on 21 October 2015.

[12] Following the work trial, Mrs Bath emailed Ms Lewis advising her that Immigration Guru would be inviting another candidate for a work trial, and then making a decision by the first week in November 2015.

[13] Following the work trial, Ms Lewis was emailed by Mrs Bath on 25 October 2015, informed that she was the successful candidate, and advised to collect a written offer of employment, job description and the proposed individual employment agreement (the Employment Agreement) from the Immigration Guru offices. Ms Lewis collected the Employment Agreement on 30 October 2015 together with the proposed job description.

[14] The Employment Agreement stated that the position was that of Administrator and that Ms Lewis was expected to perform the duties set out in the job description which was attached to the Employment Agreement. The clauses of the Employment Agreement included:

*3.0 ... The employment shall commence on **Monday the 16th***

November 2015 ...

3.3 Trial periods

*A trial period shall apply for a period of **90 days** employment to assess and confirm suitability for the position. The parties may only agree to a trial period if the employee has not previously been employed by the employer.*

During the trial period the employer may terminate the employment relationship, and the employee may not pursue a personal grievance on the grounds of unjustified dismissal. The employee may pursue a personal grievance on grounds as

specified in sections 103(1)(b) to (g) of the Employment Relations Act (such as unjustifiable disadvantage, discrimination, sexual

harassment, racial harassment, duress with respect to union membership, and the employer not complying with Part 6A of the Employment Relations Act

2000).

Any notice, as specified in the employment agreement, must be given within the trial period, even if the actual dismissal does not become effective until after the trial period ends. This trial period does not limit the legal rights and obligations of the employer or the employee (including access to mediation services), except as specified in [section 67A\(5\) of the Employment Relations Act 2000](#).

6.0 Hours of work

6.1 Full time hours with an obligation to perform overtime as necessary but without extra payment.

The employee's normal hours of work shall be **35 hours per week during trial period** and subject to increase after trial period has ended. The employee shall work between the hours of 9am and 4pm on Monday to Friday. The employee may also be required to work such overtime as may be reasonably required by the employer in order for the employee to properly perform their duties. The employee's salary fully compensates him for all hours worked.

7.0 Wages/salary/allowances

7.1 Hourly rates

The employee shall be paid according to an hourly rate which shall be **\$16.00 per hour**. The employee's pay shall be paid weekly on Friday into a bank account nominated by the employee.

13.0 Termination of employment

13.1 Termination of trial period

The employer may terminate the trial period by providing **2 weeks'** notice to the employee within the trial period.

13.2 General termination

The employer may terminate this agreement for cause, by providing four weeks' notice in writing to the employee. Likewise the employee is required to give four weeks' notice of resignation. The employer may at its discretion pay remuneration in lieu of some or all of this notice period.

15.0 Acknowledgment of the agreement

...

15.5 Employee acknowledgment

The employee acknowledges that:

(i) They have been advised of their right to take independent advice on the terms of this agreement.

(ii) They have been provided with a reasonable opportunity to take that advice.

(iii) They have read these terms of employment and understand these terms and their implications, and

(iv) They agree to be bound by these terms of employment and the

employer's policies and procedures as implemented by the employer

from time to time.

16.0 Declaration

16.1 Declaration

I, Jasmine Bath or Jay Bath (director) offer this employment agreement to Marilou Lewis.

[15] Ms Lewis had signed and dated the agreement 4 November 2015. Above her

signature was clause 16.0 'Declaration' that read:

I Marilou Lewis, declare that I have read and understand the conditions of employment detailed above and accept them fully. I have been advised of the right to seek independent advice in relation to this agreement, and have been allowed reasonable time to do so.

[16] Also attached to the Employment Agreement was a job description entitled

"Administrator". The duties and responsibilities stated 12 duties. The duties and responsibilities which were as follows:

- *Liaising with other staff to arrange meetings, prepare reports, briefing notes and correspondence, improved reading work.*
- *Liaise with Immigration NZ and other agencies on behalf of the managers/advisers and directors.*
- *Maintaining appointment diaries and making travel arrangements for managers, directors and licensed immigration advisers.*
- *Answering telephone calls, and responding to inquiries and redirecting callers in a timely and professional manner.*
- *Taking and transcribing dictation of letters and other documents.*
- *Greeting visitors and clients, ascertaining nature of business and director visitors and clients to appropriate manager, director or licensed immigration adviser.*
- *Implement business management decisions.*
- *Set up appointments for parties to meet for mediation for resolving client complaints.*
- *Work with relevant organisations to resolve disputes if required.*
- *Attend meetings and presentations with managers and directors.*
- *Assist with legal aspects of operating the company.*
- *Assist in marketing and promoting the company's service to potential clients.*

Pay issues

[17] Ms Lewis said that after her first week of employment she received her first pay. However, she had received payment in two tranches, half on one day and half on the next.

[18] As a result, she had contacted Mr and Mrs Bath and asked if she could receive her wages in full on one day as did the other employees.

[19] Mr Bath said he had investigated and made contact with Immigration Guru's bank which confirmed that the full weekly wage was transferred from the Immigration Guru account in full to Ms Lewis' bank account on the due day.

[20] Ms Lewis said that she experienced a similar problem the following week and on 27

November 2015, she emailed Mrs Bath informing her that she had trouble with her pay again and that the amount available for disposal from her pay was only half that expected on the due date of payment. She had visited her local bank branch and been informed by a customer service representative that the problem lay with Immigration Guru's bank.

[21] The issue of payment in two sections was not raised by Ms Lewis after the second date of payment, and Mr and Mrs Bath believed it had been resolved.

[22] At the Investigation Meeting Ms Lewis provided statements from her own bank which confirmed that the full amount of her wages had been paid into her bank account on one day in one amount.

[23] Ms Lewis said that she had not received payslips in relation to her employment. She had asked another employee about receiving payslips who had informed her that if she required payslips she should request them from Mr Bath, however, she had not done so and she did not raise this as an issue with Immigration Guru.

[24] Mr Bath said that one week before the Christmas break he had informed each employee about how the Christmas holiday pay would be paid. On receiving her holiday pay Ms Lewis asked for an explanation of the make-up of the pay and Mr Bath sent her a text message of explanation. Subsequently Ms Lewis complained about her pay in January 2016 and Mr Bath had again explained to her how payment had been made.

[25] During the Investigation Meeting it was explained that an overpayment had been made to Ms Lewis over one week of the Christmas period which had been adjusted the following week. This had been discussed at the time with Ms Lewis. Ms Lewis confirmed that she had received the full amount of wages due to her over that period.

[26] Ms Lewis said that when Christmas had come she received the same 'perks' as the other employees to which she had not initially thought she was entitled as she was new in the job.

[27] Mrs Bath said that all employees and their partners were given gifts of equal value

regardless of their position or the duration of their employment with Immigration Guru, each employee and their partner received approximately \$300 worth of gifts plus a fully paid dinner at a restaurant on 18 December 2015.

Issues re: new applicant

[28] During December 2015, Ms Lewis said she had become aware that there was another applicant applying for a position within the company. She had noted this from emails to which she had access.

[29] As a result of the information that she had found via the emails, she considered that her employment was being terminated and that Immigration Guru was seeking to replace her. She did not raise this concern with either Mr or Mrs Bath.

[30] Mrs Bath said that in December 2015 the directors had decided to recruit an additional staff member for a different role. They had not been looking to replace Ms Lewis.

[31] During the second week of January 2016, Ms Lewis said that she noted a change in the behaviour of Mr and Mrs Bath towards her as if they were finding fault in her work.

[32] Mr Bath explained that Immigration Guru had streamlined its systems for the client and Immigration New Zealand interface and provided templates to be used in those interfaces. Both he and Mrs Bath had had occasion to speak to Ms Lewis about her failure to follow the instructions given to her, and when they had provided feedback to her on those issues, she would argue with them.

[33] Ms Waina Toia, who was also employed as an Administrator, said she was aware that Ms Lewis questioned instructions given by Mr and Mrs Bath, as she had access to email exchanges between Mr and Mrs Bath and Ms Lewis.

Marketing and work issues

[34] Mr and Mrs Bath explained that it was expected of all the employees that they would assist to market Immigration Guru. Whilst the main responsibility for marketing fell upon her and Mr Bath, the other three employees assisted in the process by carrying out basic marketing functions consisting of visiting international colleges in Auckland to introduce the company, distributing leaflets and business cards on an ad hoc basis, and attending cultural events.

[35] Mr Bath said he primarily engaged with the Indian community given his ethnicity, but all staff employees engaged with communities of all nationalities, the members of which

might be in need of assistance with immigration procedures.

[36] Ms Sophie Skye and Ms Waina Toia worked in similar positions to that of Ms Lewis, they both had the job title of Administrator, and all three would assist on the reception, although Ms Toia had main responsibility for that area.

[37] Ms Skye and Ms Toia confirmed that they had carried out marketing duties on occasion. In their evidence they described it as not onerous, and as providing a pleasant change to being in an office environment.

[38] Mrs Bath said that Ms Lewis had been requested on two occasions to carry out some marketing tasks prior to 19 January

2016, consisting of contacting a Philippine newspaper and finding details relating to advertising. She was first told to inquire from the Philippine newspaper about advertising in November 2015. However, she failed to do so. She was again told in December 2015 to make contact with the Philippine newspaper and again she failed to do so.

[39] Contacting newspapers in relation to advertising was something that all three Administrators were expected to do, and both Ms Skye and Ms Toia had carried out this task on occasion.

[40] Ms Lewis said she had contacted the Philippine newspaper and passed the details of the advertising cost for the publication to Mrs Bath, however Mrs Bath advised her that she had abandoned the idea of advertising in that medium.

[41] Other than the instruction to contact a Philippine newspaper, Ms Lewis was not instructed to carry out any marketing related tasks during November or December 2015. However Mr Bath said that he had had occasion to speak to Ms Lewis about approaching members of the public and distributing business cards, advising her that it would be more appropriate for a marketing plan to be discussed between her and Mrs Bath to be implemented during working hours.

[42] On 19 January 2016 Mrs Bath decided that as the marketing task was not being performed by Ms Lewis, it would be best to approach her more formally. As a result she and Mr Bath met with Ms Lewis on 19 January 2016.

[43] Mr Bath thought that an excessive amount of immigration lodgement work might be preventing Ms Lewis from being able to carry out some marketing tasks, so it was decided to reallocate her lodgement work for a short period. As a result Mrs Bath emailed Ms Lewis on

19 January 2016 stating:

When you are free today from lodgements can we please talk about marketing? I have told Jay not to give you any more lodgement this week so we can focus and act on marketing.

[44] During the meeting held on 19 January 2016, marketing strategy was discussed and Mrs Bath made some rough notes with the aim of helping Ms Lewis understand what was required.

[45] Mr Bath advised Ms Lewis to schedule some marketing in colleges and universities where there were international students. Mrs Bath told her she should email and inquire of newspapers in the Philippines which Ms Lewis said she had done in December.

[46] Ms Lewis said she was instructed to obtain a copy of a local Philippine newspaper circulating in Auckland but as she could not obtain one locally, her husband had driven her to another area of Auckland where she was able to obtain a copy.

[47] Mr and Mrs Bath said Ms Lewis had offered to pick up a newspaper on her usual shopping trip, and she had not informed them that she had made a special journey to obtain one. They stated that they did not request her to do so.

[48] Ms Lewis said that in her opinion the marketing plan was discriminatory in nature because it made several references to "Philippino" under the suggestions which included handing out flyers at areas frequented by Philippine community members, a note of flyers in the Philippine language, a Facebook note on pages aimed at the Philippine community, contacting Philippine Marketing Managers at the Auckland colleges, and local events.

[49] Mrs Bath said that the marketing was to be aimed at all immigrant groups, however given Ms Lewis' apparent reluctance to carry out marketing duties, she and Mr Bath believed that Ms Lewis might find it easier to concentrate on her own culture and language.

[50] Ms Lewis said that she planned a day for marketing in central Auckland on

29 January 2016, during which time she had made an arrangement to meet with an acquaintance, a fellow Filipino who was an instructor at the New Zealand International Academy.

[51] Prior to her trip Ms Lewis sent an email about her planned visit:

Tomorrow, I am slated to do marketing stuff at International Academy where an acquaintance teaches. I will be away from 9 – 12 and might get the Office at around 12.30. May I please know what is the Marketing procedures in place like log book, etc, and for claiming

travel expenses?

[52] Mr Bath replied stating:

Good to know you are on to the marketing side, please keep a diary of your visit to the colleges. Please keep your bus ticket and bills as proof of any other expenses that you may incur in relation to the business marketing. Bring these in and we will reimburse these to you.

[53] Ms Lewis said she had a *Hop card* so did not obtain bus tickets and no refund was made to her. Mr Bath said that had Ms Lewis provided a copy of her *Hop card* information, a reimbursement could have been made, but she did not raise the issue with Immigration Guru.

[54] Ms Lewis said that at or about 10.30am she visited her acquaintance and afterwards proceeded to visit other colleges within the city centre. At midday she decided to have lunch and messaged Mr Bath asking him that if he could allow her to extend her marketing on the basis that she thought there might not be any work for her to do if she returned to the office. Mr Bath responded by asking:

Hi Marilou, since you had not planned further marketing out of the office what else can you do between now and 4pm?

[55] Ms Lewis said she had responded that she had business cards to give out. However, if Mr Bath did not agree to her request, he could just pay her to midday.

[56] Mr Bath had raised no objection to her remaining in Auckland, and Immigration Guru paid her for the full day.

[57] The following day Ms Lewis said she reported on the accomplishments that she had made during her marketing day, which she explained as being marketing to prospective clients.

[58] Ms Lewis said that after 19 January 2016 she was only able to work on marketing work to the exclusion of any of the other duties on her job description, which was not the case with either Ms Skye or Ms Toia. During that period she had just 'surfed' the internet.

[59] Mrs Bath disagreed and said that Ms Lewis had carried out immigration client work during that period.

[60] Ms Lewis believed at that stage that the relationship between her and Mr and

Mrs Bath deteriorated and said that the usual fault finding she had noted earlier had returned.

[61] Mrs Bath said that there had been difficulties in the relationship with Ms Lewis resulting from her reluctance to adhere to the Immigration Guru instructions.

[62] On 2 February 2016 Mr and Mrs Bath met with Ms Lewis and informed her that her employment would be terminated. Mrs Bath confirmed the decision in a letter dated

3 February 2016 which stated:

As per our discussion yesterday, this is a written confirmation that we have decided to terminate your employment while you are still in a trial period. Please see clauses 3.3 and 13.1 of your individual employment agreement. As explained yesterday, your two weeks' notice begins as of 2 February 2016 and I confirm that we do not require you to work throughout your notice period and accordingly you will be paid in lieu of notice.

As discussed yesterday, your last day of employment was Tuesday 2nd February and your two weeks' notice period starts on Wednesday 3rd February and ends on Tuesday 16th February 2016.

Determination

[63] Ms Lewis commenced employment with Immigration Guru on 16 November 2015. Her employment was subject to a trial period provision which was set out at clause 3.3 of the Employment Agreement.

Was Ms Lewis' employment subject to a valid trial period provision?

[64] Trial periods are set out in s.67A and s.67B of the Act which state:

s.67A. When employment agreement may contain provision for trial period for 90 days or less

(1) An employment agreement containing a trial provision, as defined in subsection (2), may be entered into by an employee, as defined in subsection (3) and an employer.

*(2) **Trial provision** means a written provision in an employment agreement that states, or is to the effect, that –*

(a) For a specified period (not exceeding 90 days), starting at the beginning of the employee's employment, the employee is to serve a trial period; and

(b) During that period the employer may dismiss the employee; and

(c) If the employer does so, the employee is not entitled to bring a personal grievance or other legal proceedings in respect of the

dismissal.

(3) **Employee** means an employee who has not been previously employed by the employer.

S 67B Effect of trial provision under section 67A

(1) ...

(2) An employee whose employment agreement is terminated in accordance with subsection (1) may not bring a personal grievance or legal proceedings in respect of the dismissal.

(3) Neither this section, or a trial provision prevents an employee from bringing a personal grievance or legal proceedings on any of the grounds specified in section 103(1)(b) to (g).

[65] The effect of a valid trial period provision is that if the employee is given notice of dismissal during the trial period, he or she cannot raise a personal grievance for unjustified dismissal. On that basis, as stated by the Chief Judge in *Smith v Stokes Valley Pharmacy*: “Sections 67A and 67B remove longstanding employee protections and access to dispute resolution and to justice. As such, they should be interpreted strictly and not liberally”.¹

[66] The Employment Agreement signed by Ms Lewis states at clause 3.3 that: “the employee shall commence on Monday 16 November 2015” and at clause 3.3: “A trial period shall apply for a period of 90 Days”. I find that the period of the trial period is specified as applying for the period of 90 days from the date of commencement of Ms Lewis’ employment.

[67] Ms Lewis was provided with the Employment Agreement which she signed on 4 November 2015 prior to her commencing employment with Immigration Guru on 16 November 2015.

Unpaid Work Trial

[68] Ms Lewis completed a work trial on 21 October 2015. This took place prior to her receiving an offer of employment from Immigration Guru which she did not sign in acceptance until 4 November 2015.

[69] Ms Lewis was not paid in respect of the work trial, nor is there any evidence to

1 [\[2010\] NZEMPC 111at](#) [48]

[70] As indicated by the email from Mrs Bath dated 22 October 2015 Ms Lewis was not the only applicant to be offered a trial period.

[71] Significantly, at the period Ms Lewis undertook the work trial I find she was an applicant for a position which had not been offered to her, and not an employee in the sense of: “a person intending to work”.²

[72] I find that the trial period provision in the Employment Agreement is valid.

Unjustifiable Discrimination: Racial harassment

[73] A valid trial period provision pursuant to s 67A of the Act does not prevent Ms Lewis from bringing a personal grievance on any of the grounds specified in section 103 (1)(b) to (g) of the Act.

[74] Ms Lewis claims that she was unjustifiably disadvantaged and discriminated against on the basis of her ethnicity in her employment in her employment pursuant to s 103 (b) and (c) of the Act.

[75] Section 103 (1)(b) of the Act is applicable to the disadvantage grievances and states:

That the employee’s employment (including any condition that survives termination of the employment), is or are or was (during employment that has since been terminated) affected to the employee’s disadvantage by some unjustifiable action by the employer;

[76] The elements of s 103(1)(b) are:

a. An action

b. The action was unjustifiable

c. The action affected the employee’s terms and conditions of employment, and this was to the employee’s disadvantage.

[77] Discrimination is set out in s 104 of the Act which states that an employee is

2 s 6(1)(b)(ii) of the Act, cf *The Salad Bowl Limited v Amberleigh Howe-Thornley* [2013] NZEmpC

152 at para [51]

discriminated against in his or her employment if the employer:

(a) *Refuses or omits to offer or afford to that employee the same terms of employment, conditions of work, fringe benefits, or opportunities for training, promotion and transfer ...*

(b) *Dismisses that employee or subjects that employee to any detriment, in circumstances in which other employees employed by that employer on work of that description are not or would not be dismissed or subjected to such detriment; ...*

Did Immigration Guru directly or indirectly discriminate against Ms Lewis on the basis of her ethnicity?

Pay issues

[78] The evidence provided by Immigration Guru's bank, as supported by the evidence from Ms Lewis' bank, confirms that Ms Lewis was paid wages in accordance with 7.1 of the Employment Agreement, that is weekly into a bank account nominated by her.

[79] Ms Lewis claimed that she was unable to access her full wages payment on the day it appeared in her bank account and raised this issue with Immigration Guru. I find that Immigration Guru took appropriate and timely action to address her concerns on the two occasions they were raised.

[80] The evidence supports the conclusion that the inability to access the full wages amount was not as a result of Immigration Guru failing to make the contractual payment in accordance with the terms of the Employment Agreement, but that this resulted from a matter beyond its control, namely with the arrangements between Ms Lewis and her bank.

[81] In respect of payments over the Christmas period, I find there was an over-payment which was rectified as soon as Ms Lewis brought it to the attention of Mr Bath, and she suffered no financial loss thereby.

[82] I find no evidence to support Ms Lewis' contention that Immigration Guru did not act appropriately once she raised her concerns, and there are no grounds for concluding that it would have treated any other employee differently in the same situation.

[83] I find no evidence that Ms Lewis' terms and conditions of employment were affected to her disadvantage in that she was paid her due wages on the due date for payment as set out in the Employment Agreement.

[84] I determine that Ms Lewis was not racially discriminated against and not unjustifiably

Marketing and Work Issues

[85] Ms Lewis' job description listed assisting with marketing and promoting Immigration Guru's services to potential clients.

[86] The marketing work expected of the three administrative employees was basic in nature, consisting of leaflet distribution, visiting colleges to introduce the company and attending cultural events such as Diwali which new immigrants to New Zealand, who formed the potential client base of Immigration Guru, might attend.

[87] Ms Lewis had failed to carry out the marketing task she had been asked to do in

November and December 2015 which resulted in the marketing meeting held on 19 January

2016.

[88] I find the decision to reallocate immigration lodgement work for that week to ease pressure and give Ms Lewis time to perform some marketing work to have been reasonable and was not the result of racial discrimination.

[89] Whilst Ms Lewis claimed the marketing plan was racially discriminatory based on the references to targeting the Philippine community, I consider it was not unreasonable or discriminatory for Immigration Guru to consider that Ms Lewis might be more comfortable focusing her marketing on the Philippine community given her cultural background and language skills. Moreover I observe that Ms Lewis had not objected to the possibility of her marketing to the Philippine community at the two job interviews held before her employment commenced.

[90] In addition I accept that the marketing was not to be focused entirely on the

Philippine community and note there is also a reference to “*chine*” on the marketing plan.

[91] There was no evidence that during the afternoon of 29 January 2016 that Ms Lewis was instructed to focus her marketing solely on Philippine community members, or that her college visits were to be limited to solely making contact there with someone from the Philippines.

[92] I determine that Ms Lewis was not racially discriminated against and/or was not unjustifiably disadvantaged in terms of the marketing duties that formed part of her role description duties.

Did Immigration Guru unjustifiably disadvantage Ms Lewis by having her focus exclusively on marketing?

[93] Ms Lewis claimed that as from 19 January 2016 she had been limited to performing marketing jobs.

[94] I accept that she carried out marketing on 29 January 2016, but otherwise find no evidence to substantiate such a claim. Although Ms Lewis claims that she ‘surfed’ the internet during that period, I find it more credible that Ms Lewis did in fact perform other duties during that period as claimed by Mr and Mrs Bath and Ms Toia in their evidence given at the Investigation Meeting.

[95] I determine that Ms Lewis was not racially discriminated against and/or was not unjustifiably disadvantaged in respect of being asked to focus on marketing duties during the latter part of her employment with Immigration Guru.

Expenses

[96] Ms Lewis claims that she was racially discriminated against in terms of her expenses not being refunded as a result of her marketing day on 29 January 2016 as she alleges would have been the case for the other administrative employees.

[97] Ms Lewis was informed by Mr Bath that Immigration Guru would refund her expenses upon production of receipts to confirm expenditure. This is a normal business requirement.

[98] Ms Lewis chose not to claim reimbursement. I do not find that the non-payment of expenses in these circumstances resulted from racial discrimination.

[99] The advisability of the purchase of a copy of a Philippine newspaper was discussed with Ms Lewis. Whilst she undertook a special journey to obtain it, this was a fact unknown to Mr and Mrs Bath who understood she could obtain it on her normal shopping trip.

[100] There is in addition no evidence that Immigration Guru would not have refunded any expenses incurred in the journey had it been brought to its notice by Ms Lewis.

[101] I do not find the purchase of the Philippine newspaper in the circumstances to be racial discrimination.

If the trial period is not valid, was Ms Lewis was unjustifiably dismissed by Immigration

Guru Limited?

[102] I determine that Ms Lewis was not subjected to racial discrimination or unjustifiably disadvantaged during the course of her employment with Immigration Guru and that her employment was terminated in accordance with a valid trial period provision pursuant to s.67A of the Act.

Costs

[103] While costs are reserved, I note here that, subject to its submissions, Immigration Guru was not legally represented and, unless it incurred legal costs, it is therefore unlikely it has grounds to claim a contribution to any fair and reasonable costs.

[104] If costs are claimed, all submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

Eleanor Robinson

Member of the Employment Relations Authority