IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

[2011] NZERA Christchurch 79
5327127

	BETWEEN	PETER ALEXANDER BARRON Applicant
	AND	MACKENZIE GROUP LIMITED Respondent

Member of Authority:	Philip Cheyne
Representatives:	Jonny Mirkin, Counsel for Applicant Sam Guest, Counsel for Respondent
Investigation Meeting:	20 May 2011 at Dunedin
Submissions received:	27 May 2011 from Applicant 3 June 2011 from Respondent
Determination:	8 June 2011

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Mackenzie Group Limited is involved in a number of pharmacy businesses in several locations around New Zealand. Peter Barron established the company by bringing a number of pharmacists who operated their own pharmacies into an arrangement where they transferred shares in their businesses in exchange for shares in MGL. As well as the company founder, Mr Barron was a shareholder, managing director, chairman of the board of directors and chief executive officer of Mackenzie Group Limited from 1 April 2001 until he resigned in July 2009.

[2] In November 2010 Mr Barron lodged a statement of problem with the Authority claiming arrears of holiday pay. The scheduled investigation meeting had to be adjourned as a result of the February earthquake in Christchurch and the

Authority's inability to access its file. Helpfully the parties provided copies of file materials shortly before the rescheduled investigation meeting. I note that Mr Barron's refilled statement of problem includes some amendments and additional documents to bring it up to date.

[3] Mr Barron's resignation resulted from the company's need to restructure. Mr Barron resigned as a director in July 2009 at the same time that he resigned as CEO. There were attempts to resolve commercial issues between the parties but ultimately there was no agreement.

[4] Mr Barron's claims before the Authority rest on the assertion that he never took any annual holidays for the entire duration of his employment with Mackenzie Group Limited. MGL says that Mr Barron did have or must have taken holidays, that he was responsible for the management of his holidays and reporting the company's financial position and that he never alerted the other directors to any untaken leave. MGL's position is that Mr Barron is owed nothing further.

[5] To resolve this problem I must set out the background in a little more detail before considering the application of the Holidays Act 2003 to the facts as found.

Background

[6] It is fair to say that Mr Barron is entrepreneurial with a great capacity for business and professional endeavour. While founding MGL and during his time as CEO he solely or with partners operated other business ventures, some of which were aligned with MGL's business and others that were not. Mr Barron was also a member of the Otago District Health Board from 2001 until 2007. Even while attending to his non-aligned business and professional interests Mr Barron says that he fulfilled his obligations as CEO for MGL.

[7] Mackenzie Group Limited operates as a head office for the group pharmacies. It also provides services to some other pharmacy businesses. Mr Barron's evidence is that MGL employed him. Later Mr Barron employed a personal assistant part-time who was also paid by the company. Generally those who worked in the group's pharmacies were employed by the particular pharmacies in which they worked.

[8] There were three other directors apart from Mr Barron. They generally met monthly. All decisions had to be by consensus. That was a deliberate policy reflecting the ethos of the business.

[9] There was no written employment agreement between Mr Barron and MGL in respect of his employment as CEO. Mr Barron's evidence is *Given my role as founder of MGL, Managing Director and CEO I did not deem it appropriate to draw up an employment agreement with the company. …There is a huge amount of sweat equity involved in start-up companies and I was happy to work long hours. …Equally I saw it as my obligation that when I was away from my home in Dunedin I took my work with me. I was always in …contact …I always took personal responsibility for authorising daily banking, payment of creditors and wages etc.* Mr Barron also told me that he did not believe it was appropriate for him to have a written employment agreement, that it had been discussed several times and that he made decisions as the CEO. All that leads to the conclusion that there was no written employment agreement at Mr Barron's initiative but with the concurrence of the other directors.

[10] By *sweat equity* Mr Barron means a share of the increased worth of MGL's business resulting from his work. A good example is that Mr Barron and another director personally worked on the fitout for a new pharmacy.

[11] The lack of any employment agreement means that there were no fixed days or hours of work. Mr Barron received a monthly salary payment less PAYE but the amount varied initially reflecting his assessment of the time expended by him in the relevant month. Mr Barron's evidence is that he never took a full salary until later in the employment.

[12] Principally Mr Barron worked from his Dunedin home with costs reimbursed or directly paid for by MGL. The part-time personal assistant (Katrina Palenski) who started in March 2006 also worked from his home. Between January 2005 and July 2009 Mark Lee was contracted (through his company) in the capacity of operations manager reporting to Mr Barron. The evidence of Mrs Palenski and Mr Lee is that Mr Barron often sent them work emails late at night or in the early hours of the

morning throughout the week; and they received phone calls from Mr Barron outside ordinary business hours as well. When Mr Barron was away elsewhere in New Zealand or overseas he remained in cellphone or email contact attending to work requirements.

[13] From 2007 Mr Barron and his partner have maintained a home in Thailand and when Mr Barron was in Thailand thereafter his evidence is that he attended to his CEO responsibilities and worked from his home in Thailand just as he did when he was in Dunedin.

[14] Pearl Matahiki is Mr Barron's ex-wife. They separated in February 2007. Her evidence is that nearly every year they travelled either to Tokomaru Bay to her whänau or to Winton to his and stayed from before Christmas until into the New Year. Ms Matahiki says that they were definitely on holiday on these occasions. She also gives evidence about travelling overseas with Mr Barron from time to time. Some of these trips were business trips but they would spend additional days on holiday. Ms Matahiki says that although Mr Barron made the odd phone call or sent the occasional email about his business activities (including for MGL) during these times he was definitely on holiday. When it was put to Ms Matahiki that Mr Barron was never on holiday at any of these times she said *I presumed we were on holiday together – obviously we weren't!* In making that comment, I did not understand Ms Matahiki to be departing from her evidence that Mr Barron was on occasion on annual leave when she accompanied him on their travels. Ms Matahiki also said that Mr Barron told her that he was on holiday and enjoyed it on the occasion when he drove across America. She had not accompanied him on that trip.

[15] Mr Barron went on a RadioWorks promotional trip to Singapore and Vietnam between 2-10 September 2006. He then went on privately to Thailand for a week. His evidence is that the RadioWorks trip was not a trip on behalf of MGL. I infer that he received the trip as a result of advertising placed by him (or his interests) with RadioWorks for businesses other than MGL. However, Mr Barron says that he attended to all his responsibilities as CEO throughout this period and that none of the time away was annual leave from that position.

[16] Mr Barron had responsibility for providing regular financial reports to the board and generally attending to MGL's record keeping responsibilities. None of these financial reports recorded MGL's liability to Mr Barron for untaken holidays. No records were kept by Mr Barron of holidays taken or accrued.

[17] Overall, as Chairman, Managing Director and founder, Mr Barron throughout his employment as CEO had complete autonomy over his hours and days of work and substantial autonomy over what work he did.

[18] By July 2009 it had been agreed with Mr Barron that he would cease in the CEO and director roles. There is an email dated 6 July 2009 where Mr Barron for the first time raises an employment issue saying:

> *Although I have never had a formal employment agreement I have worked and been paid as an employee of Mackenzie Group and there normal entitlements that have accrued including holiday pay …*

[19] It is common ground that Mr Barron ceased working for MGL by 24 July 2009 and that he resigned as a director on that date. However, Mr Barron continued to receive monthly salary payments at the rate of $1,500.00 net per month with the last payment being made on 30 November 2009.

[20] During that time and subsequently, the parties endeavoured to reach agreement about resolving their commercial and employment issues. However, no settlement was concluded and eventually Mr Barron initiated the present proceedings claiming holiday pay on the basis that he had never had any holidays during his employment.

The Law

[21] The Holidays Act 2003 provides employees with minimum entitlements to annual holidays to provide opportunities for rest and recreation. *Employee* has the same meaning as in s.6 of the Employment Relations Act 2000 (subject to an exclusion not presently relevant). S.16 provides that after each completed 12 months of continuous service an employee is entitled to not less than 4 weeks' paid annual holidays. That entitlement remains in force until the employee had taken all of the

entitlement as paid holidays. Under s.18 an employer must allow an employee to take annual holidays within 12 months after the date on which the entitlement arose. When holidays are to be taken is to be agreed between the employer and the employee. Failing agreement, under s.19 an employer may require an employee to take annual holidays. Under s.24 where the employee has become entitled to annual holidays but the employment ends before the employee has taken those holidays, the employer must pay the employee for the untaken portion of the annual holidays entitlement. S.25 covers the situation where the employment ends before a further entitlement has arisen.

[22] S.73 requires both employers and employees when dealing with one another under the Holidays Act 2003 to do so in good faith. When they enter into an employment agreement the employer must inform the employee about their entitlements under the Act and where the employee can get further information about their rights. The Act may be enforced by an employee. There are penalties for non-compliance with specified sections but only in proceedings brought by a Labour Inspector. Under s.81 an employer must keep a holiday and leave record that records the details specified in the Act. If there is evidence that an employer has failed to comply with s.81 and the failure prevented the claimant from bringing an accurate claim, the Authority may accept as proved, in the absence of evidence to the contrary, the employees statements about leave or payments. Finally, the Act protects existing entitlements as at its coming into force.

Employment

[23] The fundamental point that Mr Barron must establish employment as an employee under a contract of service in order to succeed with this claim has been assumed by the parties but the Authority must nonetheless be satisfied that there is jurisdiction. In deciding whether Mr Barron was employed by MGL under a contract of service the Authority must determine the real nature of the relationship. I must consider all relevant matters, including those that indicate the intention of Mr Barron and MGL and I must not treat as determinative any statement by them that describes the nature of their relationship. All that is contained in s.6 of the Employment Relations Act 2000.

[24] A principal element indicating an employment relationship is the payment of the monthly salary along with the associated PAYE deductions. In addition, Mr Barron's role as CEO was fully integrated into the company. Pointing the other way, MGL in practice exercised no control over Mr Barron although in theory it could have done so. To some extent Mr Barron was in business on his own account because his endeavours generated income and profits (or losses) that accrued to MGL in which he was a substantial shareholder. However, Mr Barron was just one of a number of shareholders in MGL. Balancing these factors I find that there was an employment relationship between Mr Barron and MGL.

[25] Although employed by MGL as CEO, Mr Barron often conducted the affairs of the company without distinguishing whether he was acting as an employee, managing director or chairperson of the company; and without regard to the different interests and responsibilities that therefore arise. A good example is the point about not having a written employment agreement. So when Mr Barron says that he travelled overseas for MGL (for example) it is difficult to know if he was attending to his responsibilities as CEO or as managing director.

Applying the Holidays Act 2003

[26] I should start with the statutory obligation on the company and Mr Barron to deal with one in good faith. Good faith is not defined for the purposes of the Holidays Act 2003 but the extensive range of circumstances in which the Employment Relations Act 2000 duty of good faith applies captures the present circumstances in any event: see s.4(4) and (5) of the Employment Relations Act 2000. It follows that parties must not, whether directly or indirectly, do anything to mislead or deceive one another or that is likely to mislead or deceive one another.

[27] A point for MGL is that Mr Barron's failure to record the accrual of his holidays as part of his financial reporting to the board misled other members of the board into thinking that Mr Barron was taking his annual leave as it fell due. They thought that Mr Barron's frequent trips overseas included him taking annual leave. For Mr Barron it is submitted that the directors jointly failed to discharge their responsibilities about record keeping, that the Authority is not the correct forum to

resolve issues about directors' duties and that the Authority should simply focus on whether Mr Barron as an employee is entitled to unpaid holiday pay.

[28] The submission for Mr Barron is too narrow. The Authority's role is established by s.157 of the Employment Relations Act 2000. It is to resolve employment relationship problems by establishing the facts and making a determination according to the substantial merits of the case, without regard to technicalities. The Authority must (inter alia) support good faith behaviour. It must act as it thinks fit in equity and good conscience but may not do anything that is inconsistent with the Act, regulations made under the Act or the relevant employment agreement. I note also that, under s.143 an object of Part 10 of the Act is to establish procedures and institutions that support successful employment relationships and the good faith obligations that underpin them.

[29] In *Bell v Broadly Downs Ltd* 1987 ERNZ Sel Cas 172 the Court of Appeal determined that an arguably much more restrictive predecessor provision to the current s.157(3) was applicable to cases where there are deficiencies or imprecision in the evidence. The equity and good conscience jurisdiction must also apply in considering the effect of s.83 of the Holidays Act 2003. In the present case, the reason why there are no records is principally because of Mr Barron's failure to keep any such records. While it is correct that the board could have kept its own records, the other board members reasonably relied on Mr Barron to ensure that MGL met its recording obligations. As a result it would be inconsistent with s.157(3) to simply accept as proved Mr Barron's statement that he never had any annual leave. There is also evidence to the contrary that he did have annual leave, and I refer in particular to Mr Barron's former wife, Pearl Matahiki, whose evidence I accept as accurate.

[30] Another submission for Mr Barron is based on *Wilson v ABC Developmental Learning Centre (NZ) Ltd* [2010] NZEmpC 159. Applying the Holidays Act 2003, in that case the Employment Court found that because there was neither an agreement under s.18 nor a requirement under s.19 for the employee to take holidays at a particular time, she could not be regarded as on holiday. In the present case, there is no suggestion that MGL ever exercised its rights under s.19 of the 2003 Act by requiring Mr Barron to take annual leave. For Mr Barron then the argument is that

there was never any agreement pursuant to s.18 that he take annual leave either so that he must now be paid for accrued annual leave.

[31] The circumstances that amount to an agreement for the purposes of s.18 of the Holidays Act 2003 must also be assessed in light of s.157(3) of the Employment Relations Act 2000. As noted by counsel, Mr Barron had complete autonomy over when he worked. Similarly he had complete autonomy over when he was not working including overseas travel or attendance to his own business and other professional interests. In the many circumstances when Mr Barron was attending to his own business and other professional interests sometimes for days at a time it is proper to infer an agreement between him and MGL that he would be on annual leave. On those occasions, when Mr Barron chose to deal with some calls or emails for MGL, he should not in equity and good conscience be regarded as not on holiday.

[32] As noted above, the substantial part of Mr Barron's claim for arrears is based on s.24 of the Holidays Act 2003 which covers the situation where the employment comes to an end before the employee has taken all the annual holidays to which they are entitled. It follows from the findings above that Mr Barron must be regarded as having taken all the annual leave to which he had become entitled during his employment and in the period up to the end of November 2009.

[33] S.25 covers the situation where the employment ends before the employee has worked the whole of the second or subsequent period of 12 months since they last became entitled to holidays. In that circumstance, the employee is entitled to 8% of their gross earnings since they last became entitled to holidays less any amount paid for holidays taken in advance. There is no suggestion that Mr Barron took any holidays in advance during the year starting 1 April 2009. He will be entitled to 8% of his gross earnings from that date. Calculations made by a Labour Inspector show gross earnings of $74,567.06 since 1 April 2009 which generates an entitlement of $5,965.36 (gross) in holiday pay pursuant to s.25 of the Holidays Act 2003. That sum is to be paid to Mr Barron forthwith.

Summary

[34] Mackenzie Group Limited is to pay Mr Barron arrears of holiday pay of $5,965.36 (gross).

[35] I am asked to order the payment of interest. Mr Barron has been denied the use of this money. I accept he should be compensated for that by receiving interest payable on the gross commencing on 1 December 2009. The rate of interest is set by the Judicature (Prescribed Rate of Interest) Order 2008 at 8.4% although I note that rate will reduce to 5% on 1 July 2011. I will limit the period for which interest is payable to the earlier of the date of payment or 30 June 2011. By that I do not mean to encourage any delay in payment of the arrears and note that any application to enforce this determination could result in a further award of interest from 1 July 2011.

[36] Costs are reserved. Mr Barron has lost his main point but succeeded in part. The opposite could be said for MGL. If either party seeks costs against the other they should lodge and serve a memorandum within 28 days and the other party may lodge and serve a reply within a further 14 days.

Philip Cheyne
Member of the Employment Relations Authority