

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Angela Martins de Aquino (Applicant)

AND David Zimmerman (First Respondent)

AND TF Dental Limited (Second Respondent)

REPRESENTATIVES Applicant In Person and Dr Ian King
Miles Edwards and Melissa Russell, Counsel for Respondent

MEMBER OF AUTHORITY Leon Robinson

DATE OF DETERMINATION 4 April 2005

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] This is an investigation of a contended employment relationship problem concerning an alleged unjustifiable dismissal.

[2] The applicant Ms Angela de Aquino (“Ms de Aquino”) says she was employed as a dental hygienist by the respondent dentist Dr David Zimmerman (“Dr Zimmerman”). Dr Zimmerman says Ms de Aquino was an independent contractor engaged by a limited liability company TF dental Limited.

The evidence

[3] Ms de Aquino and Dr Zimmerman had signed a contract executed by Ms de Aquino on 16 September 2003 and Dr Zimmerman on 6 November 2003 (the “contract”). That contract is otherwise undated. It nominates Ms de Aquino as a “Commissioned Agent”. It provides for a probationary period of three months and declares that as a commissioned agent there is no annual leave or public holidays. The probation period was completed satisfactorily. Ms de Aquino resigned from another clinic where she worked part time to be available for extra days with Dr Zimmerman.

[4] The hours of work clause specified hours of work from 9.00 am to 4.00 pm each working day with a one hour lunch break. Unfortunately the days of “work” are not specified. The remuneration clause of the agreement is unintelligible but the Authority accepts that Ms de Aquino was remunerated by commission of 45% for each patient she saw. The fee from each hourly appointment ranged between \$120 and \$160.

[5] By letter dated 3 February 2004 Ms de Aquino was advised that her services were no longer required and she was given one months notice of termination. Ms de Aquino's final day was 3 March 2004.

[6] By letters of 9 and 15 February 2004 Ms de Aquino communicated her displeasure about the decision to dispense with her services. She demanded an explanation. Dr Zimmerman's solicitors wrote to Ms de Aquino by letter dated 23 February 2004 advising they acted for "TF Dental Limited" and that Ms de Aquino was not an employee but rather an independent contractor. Ms de Aquino was further advised she was not entitled to an explanation for the termination.

Employee or contractor?

[7] The essential issue in this problem is whether Ms de Aquino was an employee.

[8] It is convenient to first dispose of a preliminary matter. I find that Ms de Aquino entered into a contractual relationship with Dr Zimmerman personally. The contract was executed by Ms de Aquino and Dr Zimmerman personally. It does not indicate that Dr Zimmerman executes it for and on behalf of or as agent of another entity. There is no reference to his acting as agent for T F Dental Limited and so it must follow that he executed that contract in his personal capacity. I am satisfied too, that there is no evidence indicating Dr Zimmerman put Ms de Aquino on notice or disclosed that he was acting as agent for a principal. Having made that finding, the question then becomes whether he had an employment relationship with Ms de Aquino.

[9] Section 6 of the Employment Relations Act 2000 ("the Act") provides that in deciding whether a person is an employee or not, the Authority must have regard to the real nature of the relationship between the parties. That means the Authority has regard to the reality of the situation and the substance of the relationship.

[10] I am satisfied that Ms de Aquino and Dr Zimmerman engaged in full discussions and negotiations between them before they executed the contract. Their intention that Ms de Aquino was to be a contractor is plain from the references throughout of her status as a "contractor" or "commissioned agent" and the deletion of entitlements to statutory holidays and annual leave. Ms de Aquino concluded the contract being fully aware of that status.

[11] Ms de Aquino also supplied some of her own instruments. These included desensitising paste and her own surgical uniform. She took possession of these instruments when her engagement was terminated.

[12] Ms de Aquino invoiced T F Dental Limited "for hygiene services" and she was registered for GST.

[13] I find that Ms de Aquino exerted her own control over the appointments that were made for her. She entered into an arrangement where she had T F Dental Limited's receptionist telephone her with the following day's appointments. I find that Ms de Aquino decided when she would attend at the clinic. I find too that while initially she elected to see patients on Tuesdays and Wednesdays, from 29 September 2003 she attended the clinic on Wednesdays and Thursdays. From October she also saw patients on Saturdays.

[14] I also find that Ms de Aquino was simultaneously variously engaged at two other dental surgeries as a hygienist.

[15] I conclude that Ms de Aquino entered into a contract after meaningful consultation and negotiation which designated her as an independent contractor. I am satisfied that because of the degree of autonomy she had in making appointments and her invoicing to D F Dental Limited that she was a person in business on her own account. She was not therefore an employee and she was engaged by Dr Zimmerman as an independent contractor.

Wage claim

[16] Ms de Aquino says she is owed total arrears in the sum of \$8,655.75 because she was not provided with hourly appointments from 9.00 am to 4.00 pm each day. She says there was a verbal agreement that she would be working two days per week plus one Saturday per month.

[17] The Authority rejects this claim because Ms de Aquino was not entitled to the same by the terms of the contract.

[18] Firstly, I have determined that she was not an employee. Most decisively however, the contract expressly provides that it constitutes the full and entire agreement between the parties. There is no provision in that contract which entitles her to sum she now claims whether as wages or as a debt due. The hours of work clause sets out hours of work but it does not prescribe minimum entitlements for patient fees.

Determination

[19] I determine that Ms de Aquino was not an employee but rather, she was an independent contractor. As a consequence of that finding, **the Authority is unable to assist Ms de Aquino to resolve her contended employment relationship problem.**

Costs

[20] The parties are encouraged to resolve the question of costs between them, but failing such agreement, either party may approach the Authority to have the matter determined.

Leon Robinson
Member of Employment Relations Authority