

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

[2014] NZERA Christchurch 10  
5393033

BETWEEN            NEIL ALFRED NOTTLE  
                                 Applicant  
  
AND                    TE ANAU PHARMACY (2008)  
                                 LIMITED  
                                 Respondent

Member of Authority:    M B Loftus  
  
Representatives:        Neil Nottle on his own behalf  
                                 Gregory and Shelly Roberts on behalf of the Respondent  
  
Investigation Meeting:    21 January 2014 at Wellington  
  
Submissions Received:    At the investigation  
  
Determination:            23 January 2014

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1]     The applicant, Mr Neil Nottle, claims he was unjustifiably dismissed by the respondent Te Anau Pharmacy (2008) Limited (the pharmacy). He also seeks unpaid wages and holiday pay.

[2]     The pharmacy's response is that Mr Nottle is precluded from pursuing his claims in the Authority as he was a contractor and not an employee.

[3]     During a teleconference held to progress the claim it was agreed the question of whether or not Mr Nottle was an employee be determined as a separate preliminary issue.

**Citation of the respondent**

[4] The application, as filed, named Gregory David Roberts as the respondent. Irrespective of whether or not Mr Nottle was an employee, this appeared at odds with documents appended by the parties to their respective statements. The respondent's identity was therefore discussed and the parties concluded that the arrangement, whatever it was, was between Mr Nottle and Te Anau Pharmacy (2008) Limited.

[5] The identity of the respondent was altered by consent.

**Background**

[6] Mr Nottle is a qualified pharmacist. Having divested himself of a business he owned and operated for many years, he sought work as a locum. To that end he placed an advertised in a professional medium on 25 November 2011. It read:

*I am available for locum work nation wide for the next 12 months,. I would prefer country work either North or South Island. I am prepared to travel where ever required, longer periods preferred but not absolutely essential. Here is your chance to book next years holiday, conference, world trip, golf tournament, or fishing trip! I have been doing locum work for the last 6 months in Northland region, after selling my business of 32 years. All inquiries welcome. Regards, Neil*

[7] Contact phone numbers followed.

[8] The advertisement was seen by the pharmacy's principals (Mr and Mrs Roberts) who were, at the time, seeking cover for their pharmacist who was absent due to illness. Mrs Roberts telephoned Mr Nottle.

[9] Given the passage of time neither she nor Mr Nottle have a detailed recollection of what they discussed. They agree the conversation was followed by email exchanges and further telephone discussions.

[10] Beyond agreeing they briefly discussed an hourly rate, neither can recollect any detail or context. Nor can they recollect any discussion over other key points such as hours or the nature of the relationship. They agree I should rely on the emails for details of what was agreed.

[11] The e-mail exchange which followed the first telephone conversation sheds no light on the nature of the relationship. That which followed the second conversation was initiated by Mr Nottle on 28 November 2011. He says:

*Thanks for the chat tonight.*

*Further to this, I would like to confirm points of discussion:*

1. *My locum rate is \$40 per hour. I would prefer PAYE at 21% plus KiwiSaver at 2%. This is not critical, but is a request. If \$40 an hour + GST is required for Business EBIT to look better, then I am happy to go along with this.*
2. *I would like a contract to reflect a maximum of four days per week, being 11.5 hours a day, bearing in mind that if the need would arise, and under exceptional circumstances, and I would be required to work above this, this hourly rate would be time and a half.*
3. *...*
4. *We would confirm our period of employment being from 1 January 2012 to 31 March 2012 as long as the contract terms of employment are adhered to.*
5. *Consequently, employment after April 1 2012 could be renegotiated.*
- ...*

[12] Mrs Roberts responded on 30 November. She writes:

*Hi Neil,  
Thanks for putting everything in writing.*

*Locum rate of \$40/hour is confirmed. We would prefer GST rather than PAYE.*

*...*

[13] Further emails followed and a commencement date of 1 January 2012 was agreed and accommodation was provided by the pharmacy. As events transpired, the weekly hours fluctuated with an agreed increase, followed by subsequent reductions as reduced winter hours were adopted. Furthermore the arrangement was extended by agreement and ultimately came to an end on short notice when the Roberts sold the business. A dispute arose over outstanding payments but it escalated with a challenge to the termination and the manner thereof.

[14] In the interim there were issues over a written agreement, its form and content. Mrs Roberts says she prepared an *Independent Contractor Agreement* and emailed it

to Mr Roberts at the pharmacy for passing to Mr Nottle. The document clearly reads as a contract for services as opposed to an employment agreement and Mr Roberts is sure he passed it to Mr Nottle.

[15] Mr Nottle says he never received it and, if he had, he would have raised numerous inaccuracies and inconsistencies therein. The errors to which he refers are, I must say, obvious.

[16] Instead Mr Nottle says he Mr Roberts asked for a written agreement on four separate occasions. He says none of his approaches gleaned an acknowledgment, let alone a response. Mr Nottle has a diary record of each, though the requested document is variously referred to as an *employment agreement* (one occasion) and, on the others, a *contract*. Mr Roberts denies the approaches were made.

### **Determination**

[17] As already said, this determination relates to the preliminary question of whether or not Mr Nottle was an employee or a contractor.

[18] For two reasons I take the issue of whether Mr Nottle received the *Contractor Agreement* no further. First the agreement was never signed. Second, and more importantly, answers given in the investigation (and particularly Mr Nottle's various concessions) allow me to answer the issue without recourse to credibility. The same applies to Mr Nottle's subsequent requests the arrangement be reduced to writing.

[19] Mr Nottle's claim is founded on a premise the respondent *has to disprove that the worker is an employee* (refer document 2 attached to the statement of problem). That is incorrect. It is for the applicant to establish the existence of an employment relationship.

[20] That said, Mr Nottle raised various issues in support of his argument he was an employee. These he based on personal research on the issue.

[21] He emphasises the issue of control and claims the Roberts had absolute control over the hours of work and his days of absence. That said he also made various concessions when these issues were discussed, which effectively nullify the claims.

[22] Both Mr Nottle and Mr Roberts agree the hours of work are dictated by client need which affects opening hours and regulatory requirements concerning the

presence of a pharmacist when the business is open. It should be noted neither Mr nor Mrs Roberts are pharmacists.

[23] Mr Nottle initially claimed it was the Roberts who determined when he took leave. Again discussion during the meeting made it clear he had an ability to identify when he sought to be absent and arrangements would then be made by either himself or Mrs Roberts to find locum cover.

[24] Mr Nottle also said Mr Roberts did not allow him to take any initiative and told him what to do and when. Again, the claim was undermined by Mr Nottle's evidence of occasions on which he exercised judgement and acted contrary to Mr Roberts' instructions when he (Mr Nottle) considered his actions were justified by both regulatory requirements and professional standards.

[25] There was also a discussion about the fact the pharmacy provided all equipment, although Mr Nottle conceded this was the norm in the industry. Statutory regulations require a pharmacy to have all equipment and he has never provided more than a pen in any of his locum arrangements.

[26] Finally, and most importantly, there was a discussion about the remuneration arrangements and the manner in which Mr Nottle was paid. The pharmacy put to Mr Nottle a desire to enter into a *GST* arrangement (email of 30 November – paragraph 12 above). It is clear they saw Ms Nottle as a contractor and this would be confirmed by that manner of payment.

[27] While not his preference Mr Nottle then accepted and acted accordingly. He provided *GST* invoices for all hours worked. He used the *GST* number of his previous business, which remains a registered company. The invoices were then paid and Mr Nottle had his accountant deal with the revenue in a manner appropriate with the payment having been received by the company. *GST* was paid in a correct manner and Mr Nottle received his remuneration via drawings upon which schedular payments were made.

[28] These are the actions of a businessman and not an employee and, as already said, Mr Nottle concedes that while it was not his preference he agreed to this arrangement.

[29] When I consider the above factors and the tests pertaining to the question of whether a person is an employee or contractor, I conclude Mr Nottle was, and behaved as, a contractor in business on his own account.

[30] The references to *employment* in Mr Nottle's email of 28 November and his diary notes about the requests for an agreement do not alter the outcome for two reasons. First, the email predated Mr Nottles acceptance of the pharmacy's advice it sought a contractor/ GST arrangement. Second, and as Mr Nottle conceded when discussing his diary notes, he had no knowledge of the relevance of the terminology and did not think about the word he was using.

[31] For the above reasons Mr Nottle's claim must fail as the real nature of the relationship was that of contractor and not employee.

### **Costs**

[32] The pharmacy has successfully defended the claim and in the normal course of events would be entitled to a contribution toward the costs of doing so. However, it was represented by officers of the company and there are no legal costs I am aware of. Recoverable costs, if any at all, are therefore limited to travelling to the investigation meeting. This I discount as it was occasioned by a decision of the Roberts to move after they sold the business and, in any event, the alternate venue (Wellington) was:

- (a) Agreed by the parties; and
- (b) Cheaper than the cost that would have been incurred had the Roberts been required to return to the place of employment as normally occurs.

[33] Given a cost determination can be revisited and in order to avoid putting the parties to further effort and cost I therefore advise that costs should lie where they fall.