IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON

WA 84/09
5134523

	BETWEEN	DR DAVID SMITH Applicant
	AND	WAIRARAPA MEDICAL LIMITED Respondent

Member of Authority:	P R Stapp
Representatives:	Adam Parker for Applicant Tanya Kennedy for Respondent
Investigation Meeting:	17 February 2009 at Wellington
Further Information, Affidavit, Submissions	19 & 20 March and 25 and 29 May 2009
Determination:	15 June 2009

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Dr David Smith arrived in New Zealand from the UK to work at Wairarapa Medical Limited ("WML") as a GP at the Doctors in Masterton. WML is a general medical practice owned by Dr Nixon, who did not appear at the Authority's investigation. The respondent's evidence was provided by its accountant, Mr David Sorenson.

[2] Dr Smith was initially employed under the terms of an employment agreement and a written offer of employment. During his first period employment there were some differences between Dr Smith and Dr Nixon that resulted in Dr Smith's employment ending. After discussions between Dr Smith and Dr Nixon, they signed off an agreement for Dr Smith to re-engage as a contractor ("the contractor

agreement") with WML. When that arrangement came to an end, a dispute arose about the underpayment of wages in the first period that Dr Smith was an employee. Further, there is a dispute now about whether Dr Smith was a contractor or employee during that second period that he worked at WML. The outcome of this will determine whether Dr Smith can proceed with a personal grievance claim.

The parties' claims

[3] Dr Smith has claimed $2,417.50 wages for 483.5 hours from 5 December 2004 until 3 April 2005 that he says was underpaid by WML in the first period of employment. The detail of the claim was not challenged. The statement of problem was filed in the Authority on 3 September 2008, and I am satisfied that the recovery of wages claim is within the time permitted by s 142 of the Employment Relations Act: *Limitation period for actions other than personal grievances.*

[4] Dr Smith accepted that he had 3 consults per hour until February 2005. WML accepted that he had four patients an hour from February 2005. Dr Smith says he agreed to be paid $60 per hour, but was only paid $55 per hour until April 2005. WML accepted that he was paid $55 per hour, but says this was on the basis that there was an agreement for Dr Smith to have 3 consults per hour. WML denied that Dr Smith's terms included him being paid $60 per hour for the time he has claimed.

[5] Dr Smith raised a personal grievance claim for unjustified dismissal on 30 July 2008. WML denied the claim because it says he was a contractor.

The issues

[6] Is Dr Smith owed $2,417.50 wages for the first period of his employment with WML?

[7] Was Dr Smith a contractor or an employee in the second period with WML?

[8] Dr Smith's claim that he has a personal grievance is reserved, depending on the outcome of [7] above.

The law

[9] The principle I am required to apply is to determine the real nature of the relationship under s 6 (2) of the Employment Relations Act 2000. The law makes provision that a statement by the parties about the nature of their relationship is not determinative: see s 6 (3) (b) of the Act. I must consider all relevant matters to establish the intention of the parties and apply the control and integration tests as well as the fundamental test of whether the person performing the services required was doing so on their own account: *Bryson v Three Foot Six Ltd (No 2)* [2005] ERNZ 372 (SCNZ). In addition I have considered that many cases often cited depend on their own individual facts and most of them reiterate the relevant principles. It is often the case that the facts will involve some statement of what the parties say the relationship is: in this case there is a contracting agreement. Thus, the intention was made clear at the outset of the relationship, except that Dr Smith now challenges what purported to be the relationship when that agreement was signed off, because he says he had to go along with it and it was never his intention to be a contractor.

[10] The parties' representatives were provided with an opportunity by me to make any written submissions on a recent case from the Employment Court: *Tse v Cieffe (NZ) Limited* (unreported) Judge Shaw 6 April 2009 WC 4/09. The respondent's representative considered that the judgment reinforced its argument that Dr Smith was a contractor. The applicant's representative submitted that the judgment was distinguishable on the facts.

[11] That judgment leaves it open to consider, pursuant to the usual legal principles, whether the elements in the conduct of the relationship, would if viewed in the round, make the relationship one of a contractor or an employee.

The first period of Dr Smith's employment

[12] The parties' signed off employment agreement (August 2004) and letter of offer (October 2004) made provision for Dr Smith to be paid $125,000 per annum or $60 per hour.

[13] WML accepted that there was no written variation to expressly provide for $55 per hour to pay him for three consultations an hour instead of the usual four expected for $60 per hour. WML has relied upon the practice of paying Dr Smith $55 per hour and produced an appointment form signed off by the manager at the time. Dr Smith told me the manager at the time informed him he had made a mistake and was limited to make a back payment of two weeks wages. Dr Smith did not take the matter up further and did not put his complaint over the underpayment in express terms in writing. His failure to challenge that has been relied upon by WML to say that Dr Smith accepted the situation. Also, Dr Smith arranged for the manager to provide an affidavit to support his claim. However the affidavit does not go so far to confirm the arrangement or that there has been any mistake made.

Is Dr Smith owed $2,417.50 wages for the first period of his employment with WML?

[14] Dr Smith is entitled to wages from the time his consults increased to 4 per hour in February 2005. He says he was not paid the increased rate before April. He is supported by the invoices and wages summary.

[15] There was no written variation to the employment agreement for the arrangement that WML relied upon. Dr Smith's claim that there had been a mistake was said to be verified by his manager in an affidavit produced after the Authority's investigation meeting. The affidavit was less than clear about what happened. Thus I conclude that despite there being nothing in writing Dr Smith's failure to take the matter up further and not make any further complaint to recover any money owing before the employment relationship ended means that it is more than likely he accepted the situation as applied by WML. The situation was more consistent with the arrangements for Dr Smith's integration in the practice and New Zealand health environment than with WML's application of its arrangement where it has not provided any examples of any other circumstances applying. However, not withstanding that he did not take the matter any further does not mean he agreed to any variation of the employment arrangement. Indeed, there does not appear to be any variation agreement, except the way in which WML has applied the arrangement. Thus, the employment agreement must prevail. I find that Dr Smith is owed $2,417.50 as claimed. Given that Dr Smith is entitled to wages from the time his

consults increased to 4 per hour in February 2005 the above sum may require some adjustment. If that is the case leave is granted for the parties to return to the Authority and I will make a determination on any details provided.

Was Dr Smith a contractor or employee?

[16] At the heart of the parties' positions on Dr Smith's claims is whether he was an employee or a contractor.

[17] The test applied is what is the real nature of the position? It has more to do with the work Dr Smith did and other relevant considerations than the description of the nature of the employment. The intention of the parties is not determinative. In this case there was a clear contract arrangement that applied. The contract was signed off and I presume Dr Smith understood what he signed at the time given Mr Sorenson's input. That contract made provision for:

> *"2.1. The parties acknowledge that this agreement is a contract for services, and that no employment relationship of any sort, and no partnership or joint venture arises from it."*

[18] Under the contract there were references to *"the contractor"*. Remuneration was provided at an hourly rate *"plus Goods and Services Tax, if any"*. The rate of remuneration was a total hourly rate incorporating holiday pay, statutory days, sick days and allowance for seniority and on call. The clear and unambiguous terms of the contract are entirely at odds with what Dr Smith told me; i.e that it was *"not [his] intention to become an independent contractor and…did not become an independent contractor"*. I am required to consider all relevant matters. This includes any matters that indicate the intention of the parties, but my analysis calls for an assessment of the actual conduct of the relationship in practice.

[19] Therefore, I must consider the amount of control and integration and whether Dr Smith was in business independently on his own.

[20] Dr Smith worked in a medical practice. His work description was general practitioner. There was no other job description. He was required to provide competent patient-centred care that addressed the health needs of the patients of the

practice and promoted wellness. His care was required to be based on *"the latest evidence and guidelines and to meet all statutory obligations"*. His staff responsibility was to support other doctors and centre staff. As such the requirement for the services he was required to provide focussed on his skill and profession. There was no direct report line prescribed as an employee. Consulting rooms were provided on a walk in walk out basis. There was a roster arrangement. This was subject to Dr Smith's availability and for set hours. Dr Smith's hours were set subject to his availability on roster for at least 20 hours per week and WML's public hours. He was not required full time. There was no stipulation on him to work defined hours for the service he was requested to provide. The organisation of this was that Dr Smith would be advised of the availability of roster time and he would be asked for his availability to cover the roster. He accepted there was a degree of negotiation involved over the hours required from time to time. The clients were provided by WML and the remuneration regime was subject to numbers per hour. These factors are not inconsistent with contracting, but leaves it open to the consideration that the level of control over Dr Smith had more to do with control over him as much as an employee, I hold.

[21] WML relied on Dr Smith's skills and profession rather than needing supervision in the same way that an employee would require. The contract provided no prescriptive supervision requirements. Any relationships and responsibility would involve the usual establishment of professional relationships. The business provided rooms and facilities and equipment. WML made provision for both employee and contracting arrangements. Indeed Dr Smith had previously been an employee and was required to report to Dr Nixon.

[22] Consistent with the parties' arrangements Dr Smith had rooms provided by WML for his own use, and he was provided by WML with clients from the practice's client list. This was no different than the arrangement applying during Dr Smith's first period of employment as an employee. So there was no difference in the arrangements, except the label being put on the nature of the relationship. Also he had access to administration services run by WML. Indeed it was a requirement that he use the administrative services provided. These factors are consistent with the operation of a business which involved the control essentially being maintained by Dr

Nixon. Indeed Dr Nixon maintained a direct control over much of what happened in the practice including over Dr Smith's relationships and work.

[23] Dr Smith was required to fit in with WML's arrangements in all respects including:

- Using materials and equipment provided by WML for his professional use and in his consulting room.
- He was not permitted to keep his own files on clients.
- There was a business card with his name, qualifications, the name of the business, address and telephone number and a email address belonging to WML.
- There was a personalised pigeon hole for incoming mail.
- Dr Smith had a personalised logon and personal folder on WML's server.
- The name and address of WML was used as Dr Smith's sole contact for pharmaceutical mail and official health related mail (Ministry of Health, District Health Board, Primary Health Organisation), ACC provider registration and maternity services.
- Dr Smith's name was the primary source of any contact and he was not referred to as a locum.
- He had an off site computer network connection to continue practice work for the firm while he was at home in the evenings and weekends.
- He featured as one of the doctors on the practice web site
- All fees were paid to the practice account.

[24] Dr Smith was not prevented from pursuing other work, but subject to a contractual provision. He worked at least 20 hours per week. The contract made provision for:

> *5.2 During the term of this contract the Contractor shall not, without the prior written consent of Wairarapa Medical, continue or undertake any work or activity which is, or which is likely, to be in conflict with or adversely affect Wairarapa Medical's interests. Consent will not be unreasonably withheld".*

[25] This provision was never tested by Dr Smith. Therefore, he cannot rely on saying that he was prevented from working elsewhere. However, the provision does

suggest some restriction could have applied and if Dr Smith had wanted to work elsewhere he had to rely on what Dr Nixon considered was, or likely to be, a conflict. Thus, he was not free to work elsewhere independently.

[26] Dr Smith was not in business operating independently on his own. However, arrangements were agreed that Dr Smith was:

> *"…responsible for meeting all obligations to the IRD and ACC for payments received pursuant to this contract" (Clause 3.3 of the contract).*

[27] Dr Smith asserts he made no profit or loss. No accounts have been produced of any business operation. He was not working elsewhere. He was reliant upon his wife, Gail Smith, preparing invoices of his hours of work and tax returns. She was guided by Mr Sorenson to set up the arrangement for payment; involving obtaining an invoice book that had to have GST, and how to prepare the invoices. I have no doubt in my mind that the arrangements for payment, invoicing and rendering the invoices with hours for payment were as a consequence of the apparent independent contractor arrangement entered into by the parties.

[28] Invoices were made for a range of hours for providing "*professional services*". There were no payments made for sick leave and annual leave. Dr Smith and Mrs Smith complied with the arrangements for payment and participated in WML's input to set it up with the help of Mr Sorenson. There is no direct evidence available that Dr Smith claimed deductable related expenditure from his income. It remained Dr Smith's responsibility to pay his own tax, GST and ACC. He became GST registered. As such he has accepted, and in practice entered into a contracting arrangement, based solely on his hourly rate of pay agreed under the label of the contract. For this reason I have some real difficulty in accepting Dr Smith's assertion that he never was a contractor.

[29] In all other respects there was no evidence that Dr Smith operated any business or commercial operation in his own name, independently or in partnership, or through any corporate structure.

[30] There was no profit motive and his income was restricted to the maximum amount of the hourly rate dependent on the number of patients provided by WML from its client base.

[31] The real nature of the relationship was that Dr Smith was an employee based on the degree of control and integration that was required by WML. This is consistent with the "employee" arrangements that existed in Dr Smith's first period of employment. Dr Smith's arrangements for payment as a contractor in the way his work operated and his payment had more to do with the consequences of the contract being set up rather than Dr Smith being in business on his own account, or in partnership or under some corporate arrangement that did not exist. It was almost as though Dr Smith had to accept what was offered to continue to work, and thus he surrendered to Mr Sorenson's advice.

[32] I accept that there are some elements of the relationship that would support a finding that Dr Smith was a contractor, but considering the whole situation, including that he had been previously employed to work at WML, there was no other professional medical contracting arrangements, and that the catalyst of the new arrangement was to manage the relationship, I find the real nature of the relationship was that Dr Smith was an employee.

Conclusion

[33] The real nature of the arrangement was that Dr Smith was an employee.

[34] WML is required to pay to Dr Smith the sum of $2,417.50 on the wage claim, and WML is to pay this sum to Dr Smith. Leave is granted for the parties to return to the Authority only if it is necessary, and I will make a determination on any details provided, if an adjustment on the above sum is required.

[35] Costs are reserved.

[36] Dr Smith's claim of a personal grievance is also reserved. I would suggest that the parties now try to settle the matter, and in doing so give serious consideration to further mediation provided by the Department of Labour.

P R Stapp
Member of the Authority