

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2012] NZERA Auckland 309
5352987

BETWEEN

ANAM GHAZALI
Applicant

A N D

MIDDLEMORE RETAIL
PHARMACY LIMITED
Respondent

Member of Authority: Alastair Dumbleton

Representatives: Applicant in person
Runganathan Naidu, advocate for Respondent

Investigation meeting: 30 August 2012

Date of Determination: 10 September 2012

DETERMINATION OF THE AUTHORITY

- A. Anam Ghazali remained an employee of Middlemore Retail Pharmacy Ltd after completing an internship, from December 2010 until April 2011.**
- B. In that period she did not receive pay for annual holidays and public holidays and is therefore entitled to recover \$3,129.72 from Middlemore Retail Pharmacy Ltd.**
- C. She is also entitled to be paid \$580 for sick leave taken without pay during her employment.**
- D. She is not entitled to recover an additional half hour of wages each day during a lunch break or recover wages for professional training days.**
- E. Middlemore Retail Pharmacy Ltd is to pay interest from the date of this determination at 5% per annum on the annual and public holiday pay and sick pay totalling \$3,709.72. The company is also to pay \$71.56 to**

Ms Ghazali in reimbursement of the cost of bringing her application to the Authority.

Employment relationship problem

[1] The applicant, Ms Anam Ghazali, has brought to the Authority for investigation and determination claims arising from periods during which she was engaged to work for the respondent, Middlemore Retail Pharmacy Ltd.

[2] Ms Ghazali worked in the business from July 2007 until April 2011. In the first few years of work she was studying to become a pharmacist. In 2010 for most of that year she worked as an Intern while obtaining professional registration. From early December 2010 until she finished in April 2011, Ms Ghazali worked as a fully qualified and registered pharmacist.

[3] She claims that during the last phase of her engagement from December 2010 to April 2011, she was not paid for annual holidays or public holidays. Ms Ghazali also claims that during an earlier period she was unable to take a lunch break of half an hour and is therefore entitled to be paid for that time as well as for the recognised hours of work each day. Further, Ms Ghazali claims that she was not paid her entitlement to five days of sick leave taken and was not paid for six days during which she was away from the Pharmacy while attending professional training to become a pharmacist.

[4] Middlemore Retail Pharmacy Ltd, through its director, Mr Runganathan Naidu, has opposed all of Ms Ghazali's claims. In respect of pay for annual and public holidays, Mr Naidu denies that Ms Ghazali was employed under an employment relationship in the period from December 2010 after Ms Ghazali qualified and gained registration as a pharmacist. Mr Naidu claims that Ms Ghazali worked as a "locum" then and was therefore engaged as an independent contractor rather than an employee.

[5] In respect of the period of claim for pay in lieu of a half hour lunch break, Mr Naidu accepts that Ms Ghazali was then an employee but claims that she had an opportunity to take the break each day and in that time did have lunch on most, if not all, days.

[6] Mr Naidu claims that nothing is owed to Ms Ghazali for sick leave and that the employment agreement under which she worked until December 2010 made no provision for her to be paid while away from the pharmacy at training courses.

Engagement as a locum

[7] Unless Ms Ghazali is found to have been an employee working for Middlemore Retail Pharmacy Ltd under an employment relationship, the Authority has no jurisdiction to consider her claims made in respect of the period of her engagement from December 2010 until April 2011.

[8] Initially Ms Ghazali sought assistance from a Labour Inspector to investigate her issues about annual and public holiday pay but the Inspector declined to pursue a claim on her behalf. In a letter to Ms Ghazali he noted that Mr Naidu had alleged she was a locum, and said “I believe the term refers to a work arrangement similar to that of a contractor in the private sector.” The Inspector concluded that Ms Ghazali’s claim fell outside the jurisdiction of the Labour Inspectorate and advised that only the Authority was able to determine the real nature of her work relationship with Middlemore Retail Pharmacy Ltd. No indication was given by the Inspector that he had attempted to establish “the real nature” of the work relationship, the test to be applied under the Employment Relations Act 2000 in determining whether a person has been engaged in an employment relationship.

[9] The use of the description “locum” by Mr Naidu with regard to Ms Ghazali cannot in principle be determinative of the real nature of the work relationship his company had with her. That question must be determined under s 6 of the Act, which provides that for the purposes of deciding whether a person is employed by another under a contract of service the Authority must determine the real nature of the relationship between the parties. In doing so the Authority;

- (a) *must consider all relevant matters including any matters that indicate the intention of the persons; and*
- (b) *is not to treat as a determining matter any statement by the persons that describes the nature of their relationship.*

[10] The leading case on s 6 of the Act is *Bryson v. Three Foot Six Ltd* [2005] 3 NZLR 721. From the judgment of the Supreme Court in that case and earlier

judicial decisions approved of by the Court, the principles to be applied are as follows:

- (1) The Authority must determine the real nature of the relationship;
- (2) The intention of the parties is still relevant but no longer decisive;
- (3) Statements by the parties, including contractual statements, are not decisive of the nature of the relationship;
- (4) The real nature of the relationship can be ascertained by analysing the tests that have been historically applied such as control, integration, and the fundamental test;
- (5) The fundamental test examines whether a person performing the services is doing so on their own account;
- (6) Another matter which may assist in the determination of the issue is industry practice, although this is far from determinative of the primary question.

[11] The above summary of applicable principles was given by the Employment Court in *Poulter v. Antipodean Growers Ltd* [2010] NZEmpC 77, 17 June 2010, at para.[20]. The Court concluded that ultimately the approach necessarily to be taken under s 6(2) of the Act is for the Authority to gain an overall impression of the underlying and true nature of the relationship between the parties.

The real nature of the locum work

[12] I accept that Mr Naidu's purpose in engaging Ms Ghazali as a registered pharmacist from December 2010 was to conduct a trial for a period to see whether the pharmacy could be opened for longer hours.

[13] Mr Naidu instructed his payroll provider to treat Ms Ghazali as a locum and she was paid \$30 per hour for a few weeks and then \$33 per hour until she finished in April 2011. The tax deducted from weekly payments made to Ms Ghazali remained PAYE, as it had been since the start of her engagement in 2007. Mr Naidu accepts that consistently with his view that Ms Ghazali was a contractor, no provision was made for her to receive pay for annual or public holidays.

[14] The application of the traditional tests of control, integration, the fundamental test and the mixed test, make it quite clear to the Authority that Ms Ghazali was an employee and not a contractor. She carried out her duties according to Mr Naidu's requirements, as well as those of her profession, and she was fully integrated into the pharmacy business in which she worked. She was rewarded solely for her time and not for results or with regard to profit made by the business, and had no investment of her own in it. She was not in business on her own account.

[15] The two page document produced by Mr Naidu headed "Locum and New Pharmacist – Important Information" indicates that a significant degree of control, not only in the work that Ms Ghazali was to do but in the way she was to do it, was exercised by Mr Naidu over the running of the business. In his second submission Mr Naidu expressly rejected the idea that he would have let her even "manage" his practice.

[16] Too much emphasis has been placed by Mr Naidu (and the Labour Inspector as well it seems) on the term "locum." It is normally used to describe someone who substitutes temporarily for another member of the same profession. In this case Ms Ghazali was not filling in for anyone else but was taking part in a trial to see whether the pharmacy opening hours could be extended. Calling Ms Ghazali a locum does not answer the question as to whether she was a contractor or an employee.

[17] Insofar as industry practice is relevant, the view expressed by the Pharmacy Guild of New Zealand is that a locum may be either an independent contractor or an employee, depending on the agreement of the parties. Explanatory notes to the Independent Contractor Agreement for Locum Pharmacists state with reference to that type of agreement:

*It has been designed as an Independent Contractor Agreement to use for Locum pharmacists where they are **engaged as independent contractors**, and **not as employees**. If the Pharmacy wants to engage a Locum as an employee, the General Fixed Term Employment Agreement should be used for those purposes.*

Employer-employee relationship

[18] From the evidence before the Authority the overall impression readily gained of the underlying and true nature of the relationship between the parties is that it was one of employer-employee. I conclude from the evidence of Ms Ghazali and Mr

Naidu that there was an employment relationship from December 2010 until April 2011, the period following Ms Ghazali's registration as a pharmacist. The label "locum" at best described the limited period of her engagement but not the nature of her work relationship.

[19] There is no dispute by Middlemore Retail Pharmacy Ltd that Ms Ghazali was not paid for annual and public holidays while employed as a locum and I accept her calculations as to the amounts owed for annual holiday pay - \$1,941.72 - and public holiday pay - \$1,188.00. Those sums are to be paid to Ms Ghazali by Middlemore Retail Pharmacy Ltd.

[20] With regard to the claim for one half-hour's pay each day, there is no basis for it as Ms Ghazali was able, I accept, to have lunch although she may not have found it convenient to leave the premises for half an hour, given its location and the need for someone to be present on the premises.

[21] I also consider the claim for six days when Ms Ghazali was away from the pharmacy in Wellington training for her qualification, cannot be upheld. This claim relates to a period when she was under the terms of an individual written employment agreement (which she had drafted) but which made no provision for payment during absence for training purposes. Under it the parties agreed that Ms Ghazali was to perform her duties at Middlemore Retail Pharmacy and was to be paid for her hours of work there. The agreement provided only for a contribution by her employer towards course fees, paid time off to attend *examinations* and reasonable assistance with childcare. Middlemore Retail Pharmacy Ltd was not ungenerous with assistance while Ms Ghazali was attaining her qualifications.

[22] In relation to the claim for five days sick leave in the period from January to December 2010, I consider Ms Ghazali has an entitlement which was not met. Because of her service she had qualified for paid sick leave and was, I am satisfied, absent for the days claimed. I accept her calculation of \$580 (which does not include the additional half hour lunch break claimed). Middlemore Retail Pharmacy Ltd is ordered to pay that sum.

[23] I order that interest at 5% per annum is to be paid from the date of this determination on the total of the amounts awarded to Ms Ghazali, \$3,709.72.

[24] There is no issue as to costs because the parties did not engage professional representation, but Ms Ghazali is entitled to be reimbursed \$71.56, the fee for lodging her application, which is also to be paid by Middlemore Retail Pharmacy Ltd.

A Dumbleton
Member of the Employment Relations Authority