IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

AA 245/09
5125417

	BETWEEN	RAHUL INDURU Applicant
	AND	MEDFORD HOUSE DENTAL CARE LIMITED Respondent

Member of Authority:	G J Wood
Representatives:	Joanne Watson for the Applicant Simon Menzies for the Respondent
Investigation Meeting:	14 May 2009 at Hamilton
Submissions Received:	12 June 2009
Determination:	23 July 2009

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The applicant, Rahul Induru, worked for a period at Medford House Dental Care Limited (Medford House) under the control of its principal, Murray Robertson. While Mr Induru was employed as an independent contractor dentist and he was responsible for his own GST, it was agreed between the parties that the real nature of the relationship, due to their common intention, was that of employer and employee.

[2] Mr Induru's employment lasted only for a few months. After his employment ended he has claimed unpaid wages, which he considered to be unlawfully withheld from his final pay, together with holiday pay. It is accepted that holiday pay has not been paid yet. After Mr Induru filed with the Authority, Medford House counterclaimed for damages to cover the cost of re-treatments, Mr Induru not having

worked the full number of days agreed per week and him giving insufficient notice. By agreement between the parties it was decided to determine the terms of the employment between the parties by way of a preliminary investigation meeting, but not any issues of quantum, including over the quality of Mr Induru's workmanship.

[3] Accordingly, the issues for determination are

- whether Mr Induru was required to work three days a week or four;
- whether sufficient notice was given; and
- whether or not there is a binding contractual provision permitting the withholding of salary at the end of the employment.

Findings of Fact

[4] The key factual issue between the parties is whether or not Mr Induru was provided with a copy of an agreed employment agreement by Mr Robertson before he started work. Mr Induru was working at a Cambridge dentist's effectively part time and therefore was interested in obtaining work with Medford House. Mr Induru was offered and accepted a four day a week position at Medford House, on the basis that both parties expected that there would be sufficient work within a short period of time to keep Mr Induru fully engaged. It was agreed that he be paid monthly on the 10th of the following month by way of 40% of the fees charged to the patient, less the costs of laboratory work. I note that the parties expected his monthly income to be about $10,000 or more.

[5] Mr Robertson gave evidence that in the three or four meetings he had with Mr Induru prior to him starting work a number of points were discussed and agreed on. In particular, it was his evidence that he obtained a copy of Medford House's standard individual employment agreement, discussed the whole of the agreement with Mr Induru and that they agreed to it, together with a number of alterations.

[6] The standard agreement provides for a signature from both parties on the fourth page and has two schedules attached. On the unsigned copy provided by

Mr Robertson there are a number of handwritten annotations. One of them is on a separate page, and provides for termination. It states, verbatim:

> *A sum of $10,000 will be retained at the termination of contract for failed treatment which requires re-treatment by a succeeding dentist. 50% i.e. $5,000, will be reimbursed at the end of 3 months should no re-treatment have been carried out.*
> *The balance should be reimbursed after 6 months less re-treatment cost according to the attached fee schedule.*

[7] Other changes to the standard agreement related to the fee schedule, the number of hours per week, what day of the month payment would be made and GST arrangements. The contract prepared by Mr Robertson specifically dealt also with hours of work (34 per week), remuneration (40% of gross fees less laboratory and product fees paid monthly), and a notice period of two months.

[8] Christine Quirke, Medford House's practice manager, then typed up the amended agreement and gave it to Mr Robertson. Mr Robertson's evidence was that he then gave the contract to Mr Induru. Mr Robertson's wife, Jane Robertson, witnessed her husband giving Mr Induru a copy of the contract, although she did not know if it was the draft agreement or the later version.

[9] Mr Induru's evidence was that he was never given a copy of the contract and nor was a written contract even referred to until a dispute arose many weeks after he started work, over him reverting to working four days per week. At that meeting, he says Mr Robertson told him that he already had a contract and that was what they were working to.

[10] Mr Robertson's and Mr Induru's evidence can not both be correct. If Mr Induru's evidence is correct, then the only conclusion to draw is that Mr Robertson has indulged in a deceit to try and bolster his case, with the connivance of his wife and practice manager. These are very serious allegations and there is no proof of them to the degree required. The alternative is that Mr Induru was provided with the employment agreement but he has forgotten that he received it. Having heard all the witnesses I conclude that the latter interpretation is the more likely.

[11] I therefore determine that Mr Robertson did give Mr Induru a copy of the intended employment agreement in writing and that Mr Induru worked to it, subject to the later oral amendments described below.

[12] Mr Induru began work on 12 June 2007, despite the agreement referring to a start date of 5 June 2007, but this was by agreement. Mr Induru was concerned there was insufficient work to keep him engaged for four days a week. He was able to change his days at the Cambridge practice where he worked part time to be able to implement a reduction in hours at Medford House.

[13] Therefore he obtained agreement from Mr Robertson, given only reluctantly, that he would reduce his hours to three days a week. It was also agreed that he be paid a minimum retainer of $10,000 gross per month, less 40% of the laboratory fees. I accept the evidence of Mr Robertson and Ms Quirke over that of Mr Induru that this was only to be a temporary arrangement, as this is consistent with Mr Induru's evidence that Mr Robertson had told him that at their later meeting of around 17 August. Similarly, it was always both parties' intention that the work would build up sufficiently so as to make it profitable for Mr Induru to work for four days a week, not three.

[14] On 10 August, Mr Induru was not paid, as required, for his July work. When he was paid, there were mistakes in the payment and this led to a heated discussion between Mr Robertson and Mr Induru. The next day, Mr Induru told Mr Robertson that he was going to leave. A number of discussions were held over the next few weeks. I accept that Mr Robertson told Mr Induru during this period that unless he was prepared to work four days he would have to leave and Mr Induru's notice of intended resignation followed that.

[15] Mr Robertson stated that he wanted Mr Induru to work until the end of October and that as he was not prepared to work four days he would revert to the original payment of 40% of fees, less 40% of laboratory costs. Mr Robertson later suggested that Mr Induru stay until the end of November. Mr Induru declined.

[16] I conclude that Mr Robertson provided another copy of the agreement to Mr Induru, who subsequently provided a written letter of resignation dated 20 September. In that letter he states the following:

> *…I formally announced my resignation verbally on 17 August. In the meeting we had on 30 August the practice accepted my resignation and agreed to let me work on the following terms.*
>
> *I hereby would like to document the set of conditions put forward by the practice:*

> *I, Rahul Induru would be working three days a week until end of October 2007, would be paid 40% of income generated on the work done by me after deducting 40% of the lab fee. Payment would be done on a monthly basis and credited on the 10th of the following month. My earnings for the month of October 2007 would be retained for three months which could be used for the repeat work on the treatment done by me. If I further elaborate, the amount paid to me by the practice for that particular job could be held back to cover the cost of repeat treatment. At the end of the three month period, that is, in the first week of January 2008 my earnings would be returned to me with copies of invoices in print of clinical notes.*

[17] Mr Robertson did not agree to three days a week work as an ongoing measure and this was a factor in Mt Induru's resignation. Mr Robertson did, however, acquiesce to this arrangement for the balance of Mr Induru's employment.

[18] Mr Induru also stated that the amounts withheld would be repaid after three months. Given the written employment agreement, I do not accept that Mr Robertson would have agreed to all the conditions set out above and hence I find as a matter of fact that he did not.

[19] Mr Induru did resign. He stopped work at Medford House at the end of October. On 29 January 2008 Mr Robertson wrote to Mr Induru stating that there had been a number of re-treatments necessary and *now you are owed somewhere around $5,000. We have already had to redo $4,500 of treatments so I will be withholding this money back for six months. Not only that when I consult the Dental Association they may find you have some further liability on this and I will let you know.*

The Law

[20] The Wages Protection Act 1983 provides that an employer shall, when any wages become payable to a worker, pay the entire amount of those wages to that worker without deduction. The only exceptions to this are that deductions may be payable for any lawful purpose with the written consent of a worker, or on the written request of a worker. It is also provided that a worker may vary or withdraw a consent given or request made by that worker for the making of a deduction from that worker's wages by giving the employer written notice to that effect. In that case, that employer shall, within two weeks of receiving that notice, if practicable, and as soon as practicable in every other case, cease making or vary as the case requires, the deductions concerned.

[21] In *Portia Developments Ltd v. Taylor* (unreported, Travis J, AC100/97, 9 September 1997), it was held that the parties had orally agreed that the worker was to give 21 days notice of the termination of her employment or forfeit wages for that period. It upheld the Employment Tribunal's conclusion that the Wages Protection Act … *prevents the deduction of money from wages earned from an employer unless that employee has given written consent. A contract which contained a forfeiture clause agreed to by an employee would entitle such deduction*. The Court went on to find, however, that in the absence of an agreed written contract including the 21 day notice and forfeiture clause, there was no written consent on the part of the employee for deductions from wages payable to her. It was implicit in that judgment that the agreement did not have to be signed, although it did have to be in writing to meet the requirements of the Wages Protection Act.

[22] In *Yeates v. Jetstick Ltd* (unreported, Alastair Dumbleton, Employment Relations Authority, AA320/08, 10 September 2008), Mr Dumbleton held, in relation to whether or not a fixed term agreement applied, that:

> *[12] I do not consider that an agreement in writing, as there is required to be for every employment relationship under the Employment Relations Act 2000, must also be signed by the parties to it before it becomes binding on them. An employee who deliberately evades signing the agreement or who, for whatever reason, omits to do so, cannot later take advantage of his or her failure to execute the document if, as a matter of evidence, the parties had intended to be bound by its terms including a fixed term.*

[23] Mr Dumbleton also stated that the question was whether Mr Yeates and Jetstick had nevertheless agreed that the employment would end at the conclusion of the work specified in Schedule 1 of the agreement, even though Mr Yeates had not signed anything.

Determination

[24] As the written agreement here was consistent with the intention of the parties, then (following *Taylor* and *Yeates*), it does not have to be signed. Both Medford House and Mr Induru ordered their affairs relying on the written contract given to him as recording the employment agreement. Thus both parties intended that they be bound by the contract and therefore it is binding.

[25] Mr Induru was provided with a written contract. When he wished to change the agreed days of work he did so with the agreement of Mr Robertson on behalf of Medford House. While Mr Robertson was not happy with the move to three days a week, he agreed to it as a temporary measure. The contract was varied accordingly.

[26] The agreement was, however, only for a temporary period. When Mr Robertson sought to enforce the underlying contractual provision, Mr Induru resigned. I do not accept Medford House's claim that a set period of one month was agreed for the three days, but prefer Mr Induru's evidence that it would change when business picked up. Unfortunately, the parties could not agree on when business would pick up. While Mr Robertson may have thought that would be in a month, Mr Induru's earnings do not so indicate. It therefore follows that there are no grounds for Medford House to claim losses against Mr Induru for any failure by him to revert to working four days per week. In any event, damages would be difficult to prove or calculate.

[27] The notice period in the written agreement must apply, which is two months. On 17 August Mr Induru did not give notice of resignation but rather notice of his intention to resign. As the Court of Appeal held in *Coca-Cola Amatil (NZ) Ltd v. Kaczorowski* [1998] 1 ERNZ 264 at 280 in similar circumstances, a notice of resignation *is an intimation by one of the parties to an agreement that it is to terminate at a specified time*. Mr Induru's oral notice on 17 August did not specify a time because he did not have another job to go to. Instead, the notice period provided was six weeks, not the two months required in his employment agreement.

[28] Finally, it is clear that Mr Induru agreed to be bound by the terms of the written employment agreement. It was therefore in writing and for the reasons given above it was not necessary that it be signed. It follows that it was a binding exception to the Wages Protection Act, which could be enforced against Mr Induru. Mr Induru's letter of 20 September, however, constituted written notice of his withdrawal of consent to the provisions for deductions in the employment agreement. In the absence of a collective employment agreement (s.16 Wages Protection Act) the employment agreement's provisions can not override the provisions in the Act and thus after consent had been withdrawn the clause could no longer be enforced (see for example *Davies v Dulux (NZ) Ltd* (1987) 1 NZELC 95,371). What Medford House can rely on, however, is the withholding of the costs of repeat treatments done before

the end of January 2008, as per the letter of 20 September. Furthermore, the withdrawal of consent does not limit its counterclaim for the costs of all re-treatments.

[29] A conference call will take place between the parties in approximately four weeks' time in order to progress the issues of quantum and the employer's counterclaim.

G J Wood
Member of the Employment Relations Authority