

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE**

[2022] NZERA 444
3117212

BETWEEN MAGDY MISHRIKI
 Applicant

AND THE FONO TRUST
 Respondent

Member of Authority: Geoff O’Sullivan

Representatives: Anthony Drake and Rosemary Judd, counsel for the
 Applicant
 John Kahukiwa, counsel for the Respondent

Investigation Meeting: 30 March 2022 at Auckland

Submissions Received: 11 April 2022 and 9 May 2022 from the Applicant
 4 May 2022 from the Respondent

Date of Determination: 07 September 2022

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Dr Magdy Mishriki is a medical doctor who worked as a general practitioner (GP) for the Fono Trust (the Trust) at its Manurewa clinic. He commenced working for the clinic on 3 October 2016.

[2] On 23 March 2020 New Zealand entered into alert level 3 lockdown in response to the Covid-19 pandemic with a move to alert level four pending. Dr Mishriki was classified as a vulnerable person because of his age. Accordingly as the pandemic escalated he took approved leave. Dr Mishriki was off work from 19 March 2020 during Covid-19 alert levels four, three and two. He remained in regular communication with the Clinic Manager, Ankit Anand.

[3] When the alert levels dropped to level one, Dr Mishriki contacted Mr Anand and was asked to attend a meeting scheduled for 27 May 2020. He says that the meeting was attended by himself, Anthony Dentice, an HR consultant, and Mr Anand. He says he was advised that the Trust needed to restructure the clinic and needed a Pacific/Samoan doctor. He says they said this came about because of the impact of Covid-19.

[4] He says he was given an option of leaving the clinic or working three days at four hours a day in West Auckland. He declined this option and on 4 June 2020 was advised in writing that going forward, the clinic could not provide the roster Dr Mishriki wanted at Manurewa. He was advised that he could be offered locum cover from time to time but the alternative was for the contract between the parties to be cancelled. The letter stated that Dr Mishriki was not an employee but an independent contractor. Dr Mishriki viewed the 4th of June letter as ending his employment.

[5] Dr Mishriki says that at all times he was an employee of the clinic and not an independent contractor. He says therefore the termination of his employment this way constituted an unjustified dismissal. Further, he says he was discriminated against because of his race and because of his age.

[6] The Trust rejects the claims, stating that at no time was Dr Mishriki an employee. It denies ever unlawfully discriminating against Dr Mishriki. It said that Dr Mishriki signed an independent contract which was common in the industry. It said that its preference was that Dr Mishriki be an employee however because the hourly rate was higher, and because he wished more freedom, Dr Mishriki preferred to take the option of being an independent contractor. It says he did this knowingly and deliberately.

The Authority's Investigation

[7] The Authority heard from Dr Mishriki, his wife, Dr Therese Khella, and from Fadi Mishriki, Dr Mishriki's son. The Trust gave evidence through Mr Anand, the Manager of the Manurewa clinic, Mr Dentice, Sally Dalhousie the Trust's Chief Operating Officer, Tuvita Funaki the Trust's CEO and Dr Allan Moffitt who is contracted to the Trust where he is also Associate Clinical Director as well as a general practitioner.

The Issues

[8] The issues the Authority needs to determine are as follows:

- (a) Was Dr Mishriki engaged as an independent contractor or as an employee?
- (b) If Dr Mishriki was initially engaged as an independent contractor, did the nature of the relationship change during its course?
- (c) If Dr Mishriki was an employee, was he discriminated against on the basis of race/age?
- (d) If Dr Mishriki was an employee was he unjustifiably dismissed and if so what remedies should flow?

[9] At the beginning of the investigation meeting, before giving evidence, each witness swore an oath or gave an affirmation confirming the evidence that they have filed and confirming that any further oral evidence in answer to question from the Authority or the parties' representatives was also to be given on oath or affirmation.

[10] Following the investigation meeting, I received and assessed written submissions and further information from the parties' representatives up to and including 9 May 2022.

[11] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received.

[12] This determination has been issued outside the timeframe at s 174C(3)(b) of the Act in circumstances the Chief of the Authority has decided, as he is permitted by s 174C(4) to do, are exceptional.

Background

[13] Dr Mishriki first qualified as a medical doctor in Egypt. He is a graduate of the University of Alexandria (TANTA) Medical School from which he graduated in 1969. The doctor and his family emigrated to New Zealand in July 1999 and completed further exams at the University of Auckland Medical School, graduating in 2005. Dr Mishriki had multiple decades of medical experience and had worked at the International Hospital of Bahrain, King Fahad Military Hospital in Saudi Arabia and at various public hospitals and military hospitals and private clinics in Egypt. He passed his New Zealand medical examinations in 2003. This was followed by training and working for a year in Middlemore Hospital and Auckland City

Hospital, following which he was awarded provisional scope in 2004 and general scope in 2005.

[14] In 2005 he commenced work at the Manukau Urgent Care, where he worked for about 12 years. Dr Mishriki worked there as an independent contractor and not as an employee. Whilst he worked at the Manukau Urgent Care, he also worked on several locum stints at the Manurewa Family Doctors. Again, his work as a locum was as a self-employed independent contractor.

[15] In mid-2016, the Trust acquired this clinic.

[16] In June 2016, the Trust advertised for a GP. On 27 August 2016, Dr Mishriki emailed Mr Dentice to apply for the role.

[17] Dr Mishriki attended an interview on 31 August 2016 and made it clear, although he wanted a permanent position, he needed to have a degree of flexibility in his work. He also wanted the higher hourly rate that an independent contractor received.

[18] On 2 September 2016, Mr Dentice emailed Dr Mishriki two draft unsigned agreements, an independent contractor agreement and an employment agreement. This was sent alongside a spreadsheet which compared the rates of pay between what an independent contractor would receive and what an employee would receive over a 32-hour or a 40-hour week.

[19] On 6 September 2016 Dr Mishriki met with Mr Dentice. There is a difference in the parties' recollections with Dr Mishriki saying whilst the differences as to how the pay arrangement worked may have been discussed, there was no discussion regarding the difference between he becoming an independent contractor as opposed to an employee. He does recall being told that an independent contractor (Exhibit C06) arrangement would give greater flexibility as to his hours and days of work. He asked Mr Dentice to send him the documentation for both arrangements so he could make a final decision.

[20] On 8 September 2016, Dr Mishriki emailed Mr Dentice advising he would accept the permanent contract as an independent contractor. He pointed out that it had been agreed he would work only at the Manurewa clinic and not on nights or weekends, and he wished that the relevant document be amended to reflect this.

[21] Dr Mishriki says he selected the independent contractor agreement (Exhibit C06) because of the flexibility it would have. He says however this flexibility never transpired and that he worked exclusively for the Trust from 3 November 2016 until his dismissal, and reiterated he only selected the independent contractor arrangement because it stated in Appendix A “this is a permanent contract”.

[22] Dr Mishriki worked at the clinic without incident until the Covid-19 pandemic took hold. He remained away from the clinic until 27 May 2020 when he attended a meeting which he says at this time he was told that the clinic needed to restructure and required a Samoan/Pacific doctor. There were discussions about where Dr Mishriki could work. He was offered the potential of a locum appointment or working in South Auckland. He declined both of these and 4 June 2020 Dr Mishriki received the letter he said effectively terminated the arrangement and accordingly resulted in an unjustified dismissal.

[23] Dr Mishriki eventually found further work on 21 October 2020 where he commenced as a GP at Cavendish Doctors in Manukau for three days a week. He signed a locum contract which was again, a self-employed role as an independent contractor.

Analysis and discussion

[24] In Dr Mishriki’s case, analysis and discussion must start by addressing the status issue, in other words was he an employee or independent contractor? The Court in *Leota v Parcel Express Limited* said:¹

An employee works for the employer, in the employer’s business, to enable the employer’s interests to be met. An independent contractor is an entrepreneur, providing their labour to others in pursuit of gains for their own entrepreneurial enterprise.

[25] Section 6 of the Employment Relations Act 2000 (the Act) is a starting point. It provides that under these circumstances (the Authority’s task is to determine the real nature of the relationship. As noted in *Leota* at [6]²:

As s 6(3) makes clear, the mutual intention of the parties (if it can be ascertained) will be relevant to undertaking that task, as will the way in which the parties have labelled their relationship. But what is equally clear from the express wording of s 6(3)(a) and (b), is that neither intention nor labelling are determinative: both are pieces of a larger s 6(2) real-nature-of-the-relationship

¹ *Leota v Parcel Express Limited* [2020] NZEmpC 61

² *Leota v Parcel Express Limited* [2020] NZEmpC 61

puzzle. If it were otherwise, the underlying purpose of s 6 in particular, and the objectives of the legislation more generally, would be undermined.

[26] And further in paragraph [7] of its decision, the Court noted:

The underlying policy intent of what was to become s 6 was to “stop some employers labelling individuals as “contractors” to avoid responsibility for employee rights such as holiday pay and minimum wages.

Did the agreement describe Dr Mishriki as an independent contractor?

[27] The agreement does describe Dr Mishriki as an independent contractor and not as an employee. Prior to applying for a position in the Centre, Dr Mishriki had answered an advertisement for a position as a GP. Mr Dentice, the human resources consultant engaged by the Centre says that Dr Mishriki indicated that he knew the practice because he had worked there previously as a locum, i.e. as a self-employed independent contractor. Tab 3 of the Trusts index shows that on 7 September 2016, Dr Mishriki was sent what was termed an “offer of employment”. However, the letter offered engagement as either an employee or contractor. Draft agreements styled “Permanent employment agreement” and “Independent contractor agreement” were both attached. Dr Mishriki signed the independent contractor agreement and it is noted initialled a change to the starting date under the heading “Term” on page 1. He initialled each page.

[28] There are differences in the evidence of Mr Dentice and Dr Mishriki regarding why he chose the independent contractor agreement. Mr Dentice says that there were in-depth discussions with Dr Mishriki regarding both forms of agreement and on 6 September 2016 he went through the document clause by clause with Dr Mishriki. He says he went through both documents and made special reference to the differences between them.

[29] Dr Mishriki gave evidence that he did not really understand the difference between independent contracting and employment. However, he also gave evidence that he had spent the 12 years prior to joining the Centre as a self-employed GP and during that time had also undertaken locum services as a self-employed GP. When asked why he signed an independent agreement, Dr Mishriki stated he didn’t properly read it and all he saw was the word “permanent”. The agreement contained the suggestion that Dr Mishriki seek legal advice. Dr Mishriki confirmed that he did not have paid leave and that he was aware of this from the beginning.

[30] Dr Khella said that her husband wanted the flexibility that acting as a contractor gave him. She noted that as an employee he would not have been able to take more than four weeks leave and he wanted to take more.

[31] Dr Mishriki confirmed that he paid ACC levies on a self employed basis. He also confirmed he owned rental properties and had his own accountant. He confirmed he filed tax returns, paid GST, and claimed deductions when he could.

[32] The evidence I heard indicates that Dr Mishriki deliberately entered into an independent contract as a self-employed GP. This was a role he had undertaken for some 12 years prior to taking up his position with the clinic. He had been self-employed the entire time he had worked as a GP in New Zealand.

[33] The tax information seen by the Authority showed that Dr Mishriki had a relatively sophisticated knowledge of GST and deductions. He also signed his tax returns as self employed.

[34] Mr Dentice' evidence shows that this was not a case where the Clinic imposed contractual terms on Dr Mishriki. He was given the option of working either as an employee or as a self-employed GP on an independent contract. He deliberately chose the latter because he felt it had advantages.

[35] It is difficult to escape the conclusion that Dr Mishriki believes that the terms of his contract were not honoured. This belief is firmly rooted in Dr Mishriki's view that he signed a permanent agreement. In other words, putting aside for the moment whether or not Dr Mishriki viewed himself as an employee or independent contractor, he did not believe the Clinic was honouring the terms of his agreement.

[36] Despite the above, s 6 of the Act is as the Court noted in *Ross Barry v C I Builders Limited*:³

Ultimately s 6 is a protective provision, enabling the Court to reach its own view on whether an employment relationship exists.

³ *Ross Barry v C I Builders Limited* [2021] NZEmpC 82 (para [22]).

[37] Just because Dr Mishriki deliberately signed an independent agreement as a self-employed GP, is not the end of the matter. It is a factor pointing away from the conclusion an employment relationship existed, but is not conclusive.

What control did the Clinic exert over the way Dr Mishriki carried out his tasks?

[38] Dr Mishriki's evidence was that he organised and paid for his own practising certificate. Whilst it is clear the Clinic organised Dr Mishriki's work from an administrative perspective, he gave evidence he worked unsupervised and absolutely made his own clinical assessments and decisions. He saw patients who had been organised for him. He worked on his own and in his own way. Whilst it could be said so too could many experienced employees, Dr Mishriki could postpone patient appointments if he needed to and exercise the autonomy one would expect to see in a self-employed GP.

[39] Dr Mishriki gave evidence that there was control and that he was expected to attend certain meetings at the direction of the Clinic. The Clinic's evidence was that this was not the case. Collegiality and meetings were encouraged but the Clinic gave evidence this was not compulsory for Dr Mishriki because he was not an employee. In cross-examination Dr Mishriki conceded that he was never ordered to attend a meeting and was always requested to. He also gave evidence that there were times when he didn't attend.

To what degree was Dr Mishriki integrated into the Centre's organisation?

[40] The evidence suggests that Dr Mishriki was integrated into the Clinic's organisation to the extent he saw patients organised by the Centre. Whilst the agreement Dr Mishriki signed, and the evidence of the Clinic, was that Dr Mishriki could work outside the Clinic especially on the days he didn't work there, it was accepted he did not. As noted in *Head v Commissioner of Inland Revenue*:⁴

The integration is not just concerned with the nature of work being undertaken. The Court needs to consider matters such as the duration of the work, training and reporting requirements and the practical operation of the business relationship the parties have agreed to.

[41] Dr Mishriki and his wife, both gave evidence that Dr Mishriki signed the independent agreement because he wanted more flexibility and the ability to take more leave whenever he wanted to. His complaint, other than the factors which led to the termination of the agreement,

⁴ *Head v Commissioner of Inland Revenue* [2021] NZEmpC 69 at [260]

was that in practice the agreement did not operate that way. Evidence from the Clinic, however, was that the agreement was clear. If Dr Mishriki felt the agreement was being breached, then the Clinic felt he should have raised that with it. The witnesses agreed nothing changed operationally during the time Dr Mishriki worked at the clinic.

[42] However, the practical operation of a medical centre/clinic on the evidence clearly allowed for a GP to operate as an employee or as self-employed. Indeed, Dr Mishriki had only operated as a doctor in New Zealand as a self-employed GP. As noted earlier, although Dr Mishriki saw patients arranged for him by the Clinic, he was responsible for them. His evidence was that because of his background he was the doctor for a significant percentage of patients who spoke Arabic and/or had poor English. Whilst patients may have been assigned to Dr Mishriki, he acted autonomously in treating them. In this particular case, on balance, the extent to which Dr Mishriki was integrated into the Clinic's operations seems to be consistent with the agreement he signed and does not lead me to conclude the relationship was one of employment.

Was Dr Mishriki free to work elsewhere during his time at the Clinic?

[43] The evidence from the Clinic was that Dr Mishriki could have worked as a GP for other clinics at times he was not contracted to be at the Trust's clinic. However, whilst I accept there was no prohibition on working for others in the agreement, it never became an issue because Dr Mishriki worked only for the Clinic. Although he was not working for the Clinic full time, nonetheless I accept Dr Mishriki's motive for entering into the agreement he did, was to give himself more free time. There would have been little point in entering into that arrangement if he was to lose that free time by working elsewhere. I also note that Dr Mishriki could hardly subcontract or delegate his work out. I accept, however, in the context of a medical clinic, that point is not particularly helpful in determining the relationship.

Taxation treatment

[44] Dr Mishriki was treated as a self-employed independent contractor for taxation purposes. He says he was initially given a template invoice which he then used throughout the term of his engagement. He was paid GST. He had an accountant. He also had rental properties, deducted expenses and claimed GST where applicable. Accordingly, the evidence clearly shows that Dr Mishriki behaved and acted like a self-employed person for tax purposes. Further, he signed tax returns clearly identifying his status as self-employed. These tax returns

were prepared by Dr Mishriki's own accountant. This strongly points to the real nature of the relationship not being one of employment.

Supplying of tools and equipment

[45] Dr Mishriki was not required to supply his own tools and equipment. He gave evidence that whilst he had medical equipment, including a stethoscope, everything he needed was provided by the Clinic. This was not disputed. Again, however, in the context of this particular case, I do not find the fact that the Clinic provided a stethoscope etc is determinative of the relationship.

How was Dr Mishriki paid?

[46] Dr Mishriki forwarded invoices based on patients he had seen and the hours he had worked. He gave evidence that if he was not working then he was not paid. He submitted invoices for the hours he worked and these were plus GST. In terms of what he was paid, comparison of the two agreements and the evidence of both sides show that there was a different hourly rate depending on whether a doctor worked for the Clinic as an employee or as a self-employed contractor. Dr Mishriki was paid the higher rate as an independent contractor.

Did Dr Mishriki bear any risk of loss or conversely have the chance of making a profit?

[47] The answer to this is murky. If Dr Mishriki did not see patients, then he would be paid less. However, if others in the practice suffered loss or indeed the Clinic suffered a loss, that would not have impacted on Dr Mishriki. Likewise, if the Clinic increased its profitability, that had no impact on Dr Mishriki. The patients he saw were the Clinic's patients. He wasn't building up a business to sell.

[48] However, Dr Mishriki also could not really accrue a transferrable element of goodwill. Whilst I could accept Dr Mishriki could enhance his reputation amongst patients he saw, those patients belonged to the Clinic. This is a factor pointing towards the real nature of the relationship being one of employment, although again not conclusively.

Conclusions and summary

[49] Each case needs to be seen in its own factual context. Self-employed GPs are not uncommon in the medical industry. Indeed, Dr Mishriki's evidence was that prior to starting

at the Clinic he was self-employed and following his work at the Clinic he again was self-employed. I accept in this case there are one or two factors which could be seen as pointing towards an employment relationship.

[50] However, overall, I conclude that the totality of the evidence, along with the deliberateness of Dr Mishriki's election to be self-employed, points firmly towards the real nature of the relationship being not one of independent contractor and principal. As indicated earlier, I see Dr Mishriki's concerns about the termination of the arrangement as being based on his belief that the agreement was breached rather than being based on the status of his relationship with the clinic. Dr Mishriki's evidence was that he thought that the agreement he signed would see him through until he retired. He thought it was a permanent engagement which could only be terminated if he was guilty of some misconduct.

[51] As I have found, Dr Mishriki was not an employee of the Clinic. It follows the Authority has no jurisdiction to reach any conclusions to whether or not there has been a breach of Dr Mishriki's independent contract.

[52] Dr Mishriki's claim for unjustified dismissal therefore fails. Further, and for the sake of completeness, I note I cannot make a finding that Dr Mishriki was discriminated against because of age/race. However, in the course of the investigation meeting I heard the evidence presented by Dr Mishriki in support of his claim, and the Clinic's response. If I had been in a position to rule on that matter, I would have ruled there was insufficient evidence to make out this claim. I would have accepted the Clinic's evidence that it had a need to put resources into Māori/Pasifika health. It was not discriminating against Dr Mishriki either because of race or age. It offered him alternative engagements, albeit in Henderson, an area that was too inconvenient for Dr Mishriki to work in. It also offered the potential for Dr Mishriki to work as a locum as and when needed, which was the type of work he subsequently undertook.

Outcome

[53] Dr Mishriki was not an employee of The Fono Trust. He was a self-employed independent contractor.

Costs

[54] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves. If they are not able to do so and an Authority determination is needed, the Fono

Trust may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of this determination. From the date of service of that memorandum, Dr Mishriki would then have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

[55] If the Authority were asked to determine costs, the parties could expect the Authority to apply its usual daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.⁵

Geoff O’Sullivan
Member of the Employment Relations Authority

⁵ www.era.govt.nz/determinations/awarding-costs-remedies/awarding-and-paying-costs-1