

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2011] NZERA Christchurch 123
5330611

BETWEEN LABOUR INSPECTOR (JO-
ANN DUFF)
Applicant

A N D MAORI HILL &
BALMACEWEN PHARMACY
LIMITED
Respondent

Member of Authority: James Crichton

Representatives: Applicant in Person
Ravi Vohora, for Respondent

Investigation Meeting 19 July 2011 at Dunedin

Date of Determination: 11 August 2011

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant Labour Inspector (the Labour Inspector or Ms Duff) alleges that the respondent employer (the Pharmacy) has failed to maintain and to supply appropriate employment records pursuant to law, has failed to meet the requirements of the Minimum Wage Act 1983 insofar as the Act covers the payment of a training wage and in consequence, payments of arrears of wages are sought together with the imposition of penalties for the various identified breaches.

[2] The Pharmacy denies wrongdoing, denies failing to maintain proper records and failing to provide those records on request of the Labour Inspector and denies the alleged breach of the Minimum Wage Act.

[3] At the investigation meeting to hear this matter, I was greatly assisted by both parties in dealing with the matter appropriately. I indicated orally at the end of the investigation meeting that my provisional conclusion was that there had been breaches

of the Minimum Wage Act in relation to the payment of a training wage, but that I wished to make further inquiries by talking to the Pharmaceutical Society of New Zealand. I took this course of action at the request of Mr Vohora, he maintaining throughout the investigation meeting that the Pharmacy had relied on the advice of the Pharmaceutical Society, and, where there was conflict between different provisions of the Pharmacy Industry Training Organisation (PITO) Guidelines to the National Certificate in Pharmacy (Technician) Programme, the Pharmacy was entitled to rely upon the advice and guidance of the Pharmaceutical Society in resolving that conflict.

[4] So far as the Authority's investigation was concerned, I was particularly keen to establish whether there were any particular circumstances that were unique to the profession of pharmacy and the supervision provided by pharmacists to their technicians which might assist me in my investigation and in particular, displace the provisional conclusion that I had reached that there had been a breach of the Minimum Wage Act 1983.

[5] I received the greatest help and cooperation from the Pharmaceutical Society which was happy to talk to me by telephone and, after considering the nature of my requests for further information, took the trouble to go away and reflect on the matters that I had raised and then come back to me at a later date. In the end, the provisional conclusion that I reached and advised the parties of at the investigation meeting, namely that there had been breaches of the Minimum Wage Act 1983, was reinforced by the assistance of the Pharmaceutical Society and by one other factor which, although not dwelled on in the investigation meeting, was nonetheless a factor which was referred to during the evidence given on behalf of the Pharmacy.

[6] It is appropriate that I also refer at this early point to the fact that there are inter-related claims against the Pharmacy in relation to one of the employees for whom the Labour Inspector is proceeding in the present case. That former employee, Ms Siraya O'Sullivan, has, independently of her wages claim managed through the Labour Inspectorate, brought a claim for unjustified constructive dismissal against the Pharmacy as well and that claim was also investigated by me but is the subject of a separate determination. For the avoidance of doubt, I declare that the present case, as it affects the circumstances of Ms O'Sullivan, relates only to the allegations brought on her behalf by the Labour Inspector as a statutory officer and similarly, her separate

claim for personal grievance, while based on similar facts, stands or falls on its own basis.

Issues

[7] It is appropriate for the Authority to consider each of the aspects of the claim brought against the Pharmacy by Ms Duff. It follows then that the Authority needs to decide:

- (a) If there was a failure by the Pharmacy to maintain proper employment records and to supply them to the Labour Inspector when requested;
- (b) Whether or not there was a breach of the Minimum Wage Act 1983 pertaining to the payment of a training wage; and
- (c) Whether there should be a penalty imposed for any breach found.

Was there a failure to maintain and supply employment records?

[8] It is a fact that the Labour Inspectorate had some real difficulty in identifying what wages were paid to the three employees concerned because of difficulties in understanding the records (or the lack of them) maintained by the Pharmacy. The file discloses that there was a long running course of correspondence between the Labour Inspector and Mr Vohora to obtain clarification of what exactly was paid and when.

[9] The very fact that the Labour Inspector was put to the trouble of having to correspond with the employer on the matter suggests that the record keeping and the provision of the material to the Inspectorate was defective.

[10] I am satisfied then that, despite Mr Vohora's protests that he always supplied material when asked, the record keeping in respect of the employment relationships between the Pharmacy and the three employees represented in the present matter, was defective or, in the alternative, that the Pharmacy failed to provide the Labour Inspector with adequate explanation about the nature of the payments made. Either way, there was a breach of the law.

[11] The Labour Inspector, as is usual in cases like this, went to considerable trouble to explain to the Pharmacy the nature and extent of the records that were required to be maintained and to be provided to the Inspectorate when requested, but

it seems that rather than accept that assistance at face value, the Pharmacy chose rather to contest the Labour Inspector's conclusion that the records were defective in the first place.

[12] As I say, the short point is that if the Labour Inspectorate with its extensive experience in this area is unable to follow the calculations made by the employer, then the records are in principle defective. Furthermore, the Authority is entitled to take judicial notice of a submission from a Labour Inspector to the effect that the employment records of an employer do not comply with statute law and I do so in this case, preferring the evidence of the Labour Inspector to the evidence in rebuttal offered by Mr Vohora.

[13] Having reached that conclusion, I need now to turn to the question of penalty in the present case. Clearly the Authority has power to award a penalty, the purpose of which is to try and reinforce the desirability of complying with the law. In the present case, and in relation to the issue of the employment records only, I am not persuaded that the levying of a penalty against the Pharmacy would assist with compliance. The Pharmacy is urged to address the deficiencies in record keeping and if further impartial non-judgmental assistance is required, Ms Duff or one of her colleagues would be happy to provide it.

Was the Minimum Wage Act 1983 breached?

[14] I have reached the conclusion that there is no reasonable doubt that the Minimum Wage Act requirements in respect of the payment of a training wage have been breached in the present case. I reach this conclusion for a number of reasons. The first amongst those reasons is the PITO Guidelines to the National Certificate in Pharmacy (Technician) Programme. That document, a copy of which has been provided to the Authority, sets out the terms and conditions under which pharmacy technicians (the category of employee involved in the present case) can undertake their training. Critically, the document provides under the heading "*enrolment*" broadly that applicants wishing to enrol in the National Certificate in Pharmacy (Technician) course, must first enrol with the PITO. In the present case, not only was there never an enrolment with the Open Polytechnic of New Zealand (which provided the theoretical instruction), but there was also never any enrolment with the PITO. The Pharmacy maintained that the failure of any of the young women employees to enrol was broadly their fault rather than its fault. The Pharmacy maintained that

enrolment matters were for the student and not for the Pharmacy. But that cannot be right because the same PITO document that I refer to clearly casts an onus on both the pharmacist and the technician trainee and not just on one of them. For instance, in the first section of policy, *Organisation and Rules* under the heading “*Forward*”, there is the following statement:

By applying for admission to the training programme both pharmacist and technician trainee agree to abide by these rules. It is essential therefore that you both read and understand these.

[15] The Pharmacy drew my attention to a particular provision in the document from the PITO requiring the employing pharmacist to ascertain that the pharmacy technician trainee has the ability to complete the course and must make a statement to that effect to the PITO. Their evidence was they relied on this provision as a first step in the qualifying process. But the flaw in that argument is that this clause does not apply in all cases and is conditional on the trainee not having an aptitude in maths and English or having English as a second language. In any event, a proper construction of the provision relied upon by the Pharmacy would not allow that provision to override the fundamental enrolment provisions which I referred to above. Clearly, the whole thrust of the PITO document is that enrolment with the Open Polytechnic must be preceded by enrolment with the PITO and in the case of all of these young women, there was no enrolment at all with either institution.

[16] Without enrolment there can be no training and without training there can be no training wage. Mr Vohora for the Pharmacy maintained that his hands-on training of these young people was sufficient to comply with the law, but he is mistaken about that because the relevant wage orders applicable to the current matter requires industry training involving at least 60 credits a year. In the absence of any engagement in any tertiary institution, there is no prospect of those 60 credits being completed for and thus the ability to pay a training wage instead of the minimum hourly rate for an adult worker, falls away. Hands-on personal supervision and training by a pharmacist is a requirement of the training of pharmacy technicians, but it is not the only requirement; in addition, there is a theoretical aspect to pharmacy technician training which is not taught in pharmacies and which is taught in the classroom and the law recognises that aspect by the requirement that the student is enrolled for 60 credits a year. Without that critical aspect, no matter how talented

Mr Vohora is in his training, there can be no reliance on the payment of a training wage.

[17] As if that conclusion is not enough of itself, there are also the relevant provisions in the Medicines Regulations 1984. Those regulations define a pharmacy technician student as:

A person who is undertaking, but who has not yet completed, training and examinations leading to a National Certificate in Pharmacy (Technician).

[18] Pursuant to Regulation 42(1), a pharmacy technician trainee not actively working towards the completion of the National Certificate, **is not legally entitled to continue working in the dispensary**. That seems to make the matter free from doubt that the young women employed by the Pharmacy in this particular case, given that they were not enrolled in any course of study, were not legally entitled to be called pharmacy technician trainees because they were not in fact, as a matter of law, pharmacy technician trainees and thus they could not and should not have been in receipt of a training wage. The appropriate wage for these young women was the adult minimum wage. That is the rate of pay to which they are entitled.

Ought penalties apply?

[19] In the normal course of events, the Authority would respond to breaches of this size and type by the levying of penalties. The Pharmacy's Mr Vohora has over 30 years of experience in the profession and the young women trainees were literally just at the beginning of their working lives. It is unreasonable for an employer with that level of experience and dealing with young employees with no experience whatever of the workplace, to expect that those young employees would, of their own motion, arrange for enrolments and take all the steps necessary to commence their trade training qualification. The Pharmacy ought to have taken the lead and ought to have done more to ensure that these young people were appropriately enrolled so that they could begin their course of study. It is not good enough for the Pharmacy to place all of the onus for doing that on young inexperienced employees starting their first proper job in the workforce.

[20] The Pharmacy knew or ought to have known what the position was in respect of the training of technicians and it ought to have imparted that information promptly to the young trainees. This is so partly because of the power and knowledge

imbalance which is implicit in this kind of employment relationship, where the employer is a significantly experienced professional and the employees are literally novices, but it is also implicit in the PITO document that I have relied upon in reaching the conclusions that I have. That document makes it plain that the obligations in the training of dispensing technicians are bilateral obligations not unilateral ones. That is to say, that the obligations rest on both parties to the employment relationship and not just one.

[21] It follows then that I conclude that the Pharmacy failed absolutely to meet its obligations as a good and fair employer ought, so in the normal course, penalties would apply.

[22] However, I propose to stay the Authority's hand in relation to the issue of penalties pending the resolution of the other, more important aspect of getting the moneys owing to the young people employed by the Pharmacy, promptly paid.

[23] Leave will be reserved for the Labour Inspector to come back to the Authority if the orders made in this determination are not satisfied within the time stipulated. Accordingly, there is an incentive for the Pharmacy to deal promptly with the payments due and owing to its former employees and if it attends to that obligation within the timeframe set by the Authority, then the issue of penalties will not apply. Conversely, if the Pharmacy fails to meet its obligations in that regard, leave is reserved for the Labour Inspector to advise the Authority that the payments in question have not been made and in that event, penalties will be applied without the necessity for any further engagement from the parties. There is then a strong incentive for the Pharmacy to make the payments in question to its former employees within the timeframe set by the Authority in order to avoid penalties issuing as well.

[24] I observe that Mr Vohora for the Pharmacy made much of the argument during the investigation meeting that from the point at which the staff members raised their issues of complaint but yet continued to be employed after having failed to interest the Pharmacy in a change in remuneration, the Pharmacy is entitled to treat the rate of pay as in effect having been condoned by the employees. In reflecting on that argument based as it is on the principle of condonation, it is necessary to bring into sharp focus the nature of the employment relationship and the principles which the law adheres to in respect of minimum wage legislation. The essence of those principles, for present purposes, is that the statutory wage minima is determined by the Parliament and is not

capable of being negotiated about. There are no circumstances in which parties can negotiate the terms and conditions of an employee's employment where those terms and conditions do not comply with the statutory wage minima. Put simply, even if it could be said that these young women condoned the continued payment to them of a lower rate of pay than that to which they were actually entitled, that condoning is of no force or effect because the statute says in simple terms that you cannot negotiate out of a minimum rate of pay. Once the basis of the training wage is undermined, as it has been in this case for the reasons I have enunciated, there is an absolute entitlement for the young former employees to receive their legal minimum wage which is the adult minimum wage applying for each and every one of the hours that they worked.

Determination

[25] Ms Duff has calculated the entitlement for each of the employees based on the difference between the amount each worker was paid against the amount they ought to have been paid and then applied holiday pay to the difference so that the sum which I am about to award comprises the difference between wages paid and the amount of wages that ought to have been paid, together with the holiday pay on the shortfall.

[26] The Pharmacy is to pay to the Labour Inspector the following sums:

- (a) \$854.17 for Nicole Jordan;
- (b) \$2,920.51 for Siraya O'Sullivan; and
- (c) \$2,171.19 for Amy Hughes;
- (d) All such payments to be made to the Labour Inspector within 14 days of the date of this determination.

[27] In the event those payments or any of them are not made in full to the Labour Inspector for the use of the former employees, leave is reserved for the Labour Inspector to advise the Authority and a supplementary determination levying penalties will issue without further notice to either party.

James Crichton
Member of the Employment Relations Authority