

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 275/07
5078229

BETWEEN DANIEL PAUL BOLTON
 Applicant

AND THE RATHBONE CLINIC
 LTD
 Respondent

Member of Authority: Yvonne Oldfield

Representatives: Daniel Bolton in person
 Barbara Beck for Respondent

Investigation Meeting: 31 May 2007

Submissions received: 14 June from Applicant
 23 July from Respondent

Determination: 07 September 2007

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Mr Bolton worked as an osteopath at the Rathbone Clinic (the Clinic) from March 2005 until November 2005, when he advised its director, Ben Evans, that he was leaving to set up his own practice. Mr Bolton told Mr Evans that he was giving five weeks notice however Mr Evans decided that because Mr Bolton was setting up in competition with the respondent, it would be better if he left immediately. No notice was paid to Mr Bolton. It is the Clinic's position that Mr Bolton was a self-employed contractor and so was not entitled to notice or any of the other incidents of an employment relationship.

[2] Mr Bolton never received a written agreement of any sort from the Clinic. He now comes to the Authority seeking:

- i. a declaration that he is an employee;

- ii. five weeks lost wages;
- iii. compensation for humiliation;
- iv. penalty for the Clinic's failure to provide a written employment agreement;
- v. the return of personal information being held by the Clinic, and an undertaking from the Clinic that it will not be divulged to any members of the public, and
- vi. relief in connection with issues that have arisen regarding ACC approvals he gave while at the Clinic.¹

[3] This determination deals only with the preliminary issue of whether Mr Bolton was an employee of the Rathbone Clinic.

Employee or contractor?

[4] Mr Bolton first met Mr Evans when Mr Evans was his lecturer during his osteopathy training. They met again in early February 2005 when Mr Bolton was about to graduate. Mr Evans offered Mr Bolton work in his Whangarei clinic in a series of locum positions during 2005. Mr Bolton accepted. However he told Mr Evans he planned to combine the work in Whangarei with work in a Parnell osteopathy clinic. Mr Bolton had become a director of the company which operated that clinic when it incorporated in late December 2004.

[5] Over the course of the year Mr Bolton divided his time between the Auckland practice and the Rathbone Clinic, which was able to offer work (at varying levels) right through to November 2005. Further work would have been available to Mr Bolton if he wanted it over the summer of 2005/2006 as permanent osteopaths took summer holidays.

[6] Meanwhile the parties had discussed entering into a permanent agreement. Mr Evans told me in evidence that he got as far as presenting Mr Bolton with a draft contract for services. Mr Bolton does not dispute that there were discussions about

¹ Mr Bolton also asked that the respondent provide him with minutes of meetings and other documentation relevant to his problem. This has been done as part of the Authority's investigation of the preliminary issue.

him joining the Clinic on a permanent basis however he denies ever seeing a draft agreement. In any event, the discussions came to nothing as Mr Bolton decided instead to set up his own full time business in Whangarei.

[7] The Authority's task now is to determine the real nature of the relationship between the parties. In the absence of a written agreement this can only be done by considering the nature of the working arrangements between the parties.

[8] Mr Evans told me that the prevailing industry practice is for osteopaths to be self-employed and showed me a recent Ministry of Health workforce survey which indicated that only 12 % of osteopaths nationwide are employees. (This figure includes shareholder-employees.) He told me that the Rathbone Clinic employs two clerical/administrative staff but does not employ its osteopaths (who were referred to as Associates) of whom there are seven in all. The standard form contract he normally used with Associates was expressed to be for an independent contractor. He says that the draft he showed Mr Bolton (which Mr Bolton denies having seen) was in the same form.

[9] Mr Evans was not able to be specific about when and where he presented this document. Although I accept that he planned to do so, I have not been satisfied that Mr Evans got as far as giving a draft agreement to Mr Bolton.

[10] All fees, whether coming direct from clients or from ACC, were banked into the clinic account. The clinic paid GST on this money. Associates were paid (out of that same account) a percentage of the fees they had generated. Mr Bolton received 50% but more experienced Associates who did not require any supervision were on a 60:40 split. In the event of default (or where ACC declined a claim) the clinic and the Associate (including locums like Mr Bolton) each bore their share of the loss. Monies paid to osteopaths were treated in the Clinic's books as a direct cost, unlike the wages or salary paid to the two employees.

[11] It was the responsibility of each osteopath, including Mr Bolton to approve clients for treatment for ACC purposes and to liaise with ACC where issues arose over those approvals. Fees charged had an upper cap, set by Mr Evans in consultation with the other osteopaths, but could be reduced or waived (for instance, for repeat

consultations) at the osteopath's discretion. Mr Bolton and the other osteopaths had some ability to increase their earnings. Although each worked set days (during which a room was at their disposal) they were able to choose what hours they saw clients during that day. In addition osteopaths were able to build up a client base of their own, by taking responsibility for follow up care and by seeing the same clients for repeat visits.

[12] Mr Evans told me that when Mr Bolton first started at the clinic he explained to him the implications of self employment including ACC obligations and the need for an accountant. Mr Bolton denies this. To back Mr Evans up on this point, one of the other long serving Associates gave evidence to say that he had received such advice and had also heard Mr Evans give it to other Associates when they started work. However, I am not satisfied that it happened in Mr Bolton's case. He started as a locum, not in a permanent capacity, and unlike the permanent osteopaths, he did not receive a written agreement. On balance I conclude that Mr Evans neglected to give him the sort of induction he was accustomed to giving new permanent staff.

[13] Mr Bolton never completed a PAYE form and the Rathbone Clinic did not deduct tax from payments made to him or any of the other osteopaths. All the osteopaths were GST registered. Invoices were prepared on their behalf by the Clinic administrator and all invoices (including those for Mr Bolton) bore individual GST numbers. Mr Evans told me that he understood that the GST number on Mr Bolton's invoices was that of his Auckland practice. That practice did have a GST number at the time but Mr Bolton says he did not provide it or any other GST number to the respondent. He said he did not know how the respondent obtained the number it had or what it related to. He assumed if it was the number of the Auckland practice that the Clinic administrator must have obtained it directly from that practice. In her evidence she said she did not do this. She said she thought she got the number either from Mr Bolton himself, or from Mr Evans. Mr Bolton told me he could not check whether the number was in fact the one used by the Parnell practice as he no longer has any association with it.

[14] Mr Bolton paid his own professional registration and indemnity insurance and made sure he had a current first aid certificate. His insurance covered him to work at the Rathbone clinic and at his Auckland clinic. Both parties agreed that if they had

entered into a permanent written agreement, they would both have expected it to contain a restraint of trade clause however since they had not done so Mr Evans was free to work elsewhere. Mr Bolton provided his own diagnostic tools such as a hammer and blood pressure meter. The Rathbone Clinic provided rooms, furniture, clerical and administrative support and some equipment. Mr Bolton never received holiday or sick pay.

[15] Mr Evans argues that all of these features indicate that the relationship is one of principal and contractor.

[16] Mr Bolton disagrees, pointing out that he was required to work set days and to use the clinic facilities. He said that clients were clients of the clinic. He was not responsible for marketing the clinic or his own services, bore minimal risk, and had no financial stake in the business. He did not deal with client payments. Invoices were prepared by clinic staff from clinic records with no input from him. He said that a true self employment arrangement would have seen him receive and bank 100% of fees and then pay the clinic a set amount for the use of the room and facilities. He also noted that he was not allowed to take patient notes when he left, as he would if they were actually his patients. (He had asked to do so, but Mr Evans declined, citing patient confidentiality.)

[17] As for his relationship with ACC, Mr Bolton denied that this was fully independent. While he was personally responsible for approving treatment for ACC, he used the Clinic's locum number for this rather than his own provider number (which he used when working at the Auckland clinic.) Finally he noted that he received professional supervision from Mr Evans, who checked diagnoses and treatment plans for him.

[18] Mr Evans does not dispute any of this. He accepts that the relationship contained some elements which are found in employment relationships. However he says these were outweighed by the number of features normally found in contracts for services.

Determination

[19] Section 6 of the Employment Relations Act provides:

“(1)...employee

(a) means any person of any age employed by an employer to do any work for hire or reward under a contract of service...

(2) In deciding for the purposes of subsection (1) (a) whether a person is employed by another person under a contract of service, the Court or the Authority (as the case may be) must determine the real nature of the relationship between them.

(3) For the purposes of subsection (2), the Court or 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.”

[20] In most of the cases where the Authority is asked to determine the nature of a working relationship, that relationship contains features which are typically to be found in a contract of service (otherwise known as an employment agreement) as well as features typically found in a contract for services. It falls to the Authority to decide what the real nature of the relationship is notwithstanding the fact that it is often a sort of hybrid. A range of tests are applied, the levels of control and integration are considered and the question is asked whether the worker can be considered to be in business on his or her own account. This case is no different.

[21] I have not found the control or integration tests decisive in this case. Mr Bolton worked with a high level of autonomy however I consider this to be a function of the professional role. Many professional employees work independently with clients. Conversely, the sort of supervision Mr Evans provided is often accessed by self-employed professionals who set up formal supervision arrangements with experienced colleagues. (I note also that Mr Bolton could be said to be paying for that supervision as it resulted in a reduced rate of commission for him, compared to his more experienced colleagues.)

[22] After weighing all the features of the relationship, I have concluded that (consistent with the industry practice) the relationship was one of principal and contractor. It is true that Mr Bolton did not have a stake in the business but I conclude that he was a sub contractor. He was, in a limited way, in business for himself. He was not paid an hourly rate, he had opportunities to influence his level of earnings, and he was able to establish something of a client base of his own. It would appear indeed that some of this base did later follow him to his new practice.

[23] For these reasons I conclude that the relationship was not one of service. Mr Bolton was not an employee, and it is not within my jurisdiction to anything more to assist with this problem.

Yvonne Oldfield

Member of the Employment Relations Authority