IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON

WA 25/09
File Number 5131626

	BETWEEN	Miriam Hughes Applicant
	AND	Primary Care Development Solutions Limited Respondent

Member of Authority:	Denis Asher
Representatives:	Alan Knowsley & Fiona McGeorge for Dr Hughes Tanya Kennedy for the company
Investigation Meeting	Wellington, 26 February 2009
Submissions Received	By 6 March 2009
Determination:	9 March 2009

PRELIMINARY DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Was Dr Hughes engaged as an employee or a contractor?

Background

[2] Dr Hughes left Canada in 2001 and – after completing her PhD and working as a university lecturer and researcher in Adelaide Australia from 2001 to

2005 – arrived in New Zealand in December 2005. She commenced working for the company from 14 January 2008. Dr Hughes believes her employment ended on or around 24 July 2008 when payments to her by the company ceased.

[3] The company is owned by Dr David Nixon. Another of Dr Nixon's companies holds a 3-year contract with the local primary health organisation. Part of that work was delegated to the respondent. Dr Hughes was engaged to undertake that work.

[4] Following the termination of her employment with the company, Dr Hughes' commenced employment with the Ministry of Health on 11 August 2008.

The Parties' Positions

[5] The company says the parties always intended Dr Hughes' employment would be that of a contractor as set out in a contract for service (doc 18) that Dr Hughes refused to sign. It says it produced employment agreements between the parties, some of which it signed, not because they reflected the true nature of the parties' employment relationship but so as to facilitate Dr Hughes obtaining a bank loan.

[6] Dr Hughes says her employment agreements with the respondent – while varying in some areas – accurately reflected her employment status.

Discussion

[7] Section 6 of the Employment Relations Act 2000 sets out the definition of *"employee"*. Subsection (2) provides that, in deciding whether a person is employed by another under a contract of service, the Authority *"must decide the real nature of the relationship them."*

[8] In determining the real nature of the employment relationship, ss (3) says the Authority:

> *(a) must consider all relevant matters, including … 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.

Case Law

[9] In a decision the parties agree is central to determining this matter, and one that was upheld by the Supreme Court, the Employment Court set out the following principles when determining whether a worker is an employee or an independent contractor:

- The Authority/Court must determine the real nature of the relationship.
- The starting point is an analysis of the terms and conditions which the parties agreed to.
- The intention of the parties is still relevant but no longer decisive.
- Statements by the parties, including contractual statements, are not decisive of the nature of the relationship.
- 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.
- The fundamental test examines whether a person performing the services is doing so on their own account.
- Another matter which may assist in the determination of the issue is industry practice although this is far from determinative of the primary question.

Bryson v *Three Foot Six Ltd* [2003] 1 ERNZ 581, para 19 etc

Analysis of the Parties' Agreed Terms and Conditions

[10] The Authority's investigation had the benefit of hearing evidence from Dr Hughes and the company's consultant, Mr David Sorenson. Despite the respondent's agreement on 26 November 2008 to the date of the Authority's

investigation, Dr Nixon did not appear at the Authority's investigation and no evidence was received from him; he advised instead he was too busy

[11] Unlike *Bryson* (above), and reflecting the parties' conflicting positions as summarised above in respect of the signed and unsigned employment agreements, Dr Hughes' terms and conditions of employment are not recorded in any documents agreed upon by the parties.

[12] The parties do agree that invoices or timesheets were completed by Dr Hughes from 11 February 2008 (doc 2). From 4 April 2008 the same documents make clear that the company was typically processing and direct crediting Dr Hughes' invoices for 70 hours per fortnight at an hourly rate of $35, i.e. $2450 gross, from which 25% withholding tax was deducted, resulting in a net payment to her of $1,837.50.

[13] Dr Hughes says the invoicing system was at her employer's behest and contrary to her request that PAYE be deducted by the company: the respondent says it was always agreed Dr Hughes was a contractor and therefore responsible for her own taxation, etc obligations.

Intention of the Parties

[14] The parties disagree absolutely as to their intentions: the company says its letter of 13 December 2007 to Dr Hughes (doc 1) reflects oral discussion with the applicant in advance of her engagement and is evidence of its intention – and the parties' agreement – that the applicant's employment was by way of a contract for services. Dr Hughes says she did not see the letter until after her employment finished and as a result of her bringing a grievance, its contents anyway do not make clear her employment status and all relevant conversations proceeded on an understanding she would only give up her permanent employment in Wellington for the same arrangement in the Wairarapa.

[15] In respect of the various signed and unsigned employment agreements between the parties (docs 3, 5, 6, 16, 17 & 48) the Company says they *"… did not reflect the actual nature of the relationship between the parties* (but) *were sufficient for Kiwibank to complete their assessment of her loan application"* (par 34, David Sorenson's witness statement), i.e. they were not genuine records of a

contract of service but were provided so that Dr Hughes' bank would approve her loan application.

[16] The company says that, following the employment agreement being provided to Dr Hughes' bank: *"Both parties were fully aware that* (none of the employment agreements) *reflected the true nature of the relationship and that another contract needed to be written to document and reflect the reality and the intentions of the parties"* (par 37, Mr Sorenson).

[17] Dr Hughes disagrees and says that – while varying in some areas from one copy to another – they genuinely recorded the parties' agreement as to her employee status. She therefore refused to sign a contract for services document given her by the company (document 18).

Statements by the Parties

[18] As is already clear, the parties disagree as to the significance or substance of all of their respective statements in respect of Dr Hughes' employment status.

Historical Tests: Control, Integration and Fundamental Test

[19] The parties disagree also on the extent to which Dr Hughes spent her working time: the applicant says she spent most of the time at the office provided by her employer consistent with its requirement that she work there. The respondent says Dr Hughes spent a lot of time working from her own home.

[20] The applicant says that, from 21 April, she was forewarned of the company's requirement she manage staff, particularly in relation to the project she was engaged to undertake (refer to the diary entries of 21 & 24 April 2008, doc 44). I understand Mr Sorenson's par 40 to confirm that expectation.

[21] Dr Hughes relies on other diary entries as evidence of directions by Dr Nixon as to how she was to work for the respondent, including a requirement she not contact any health providers in the Wairarapa (7 July), being told to stay put and keep working (9 July). She says that Dr Nixon always wanted to know where she was and expected her to work at all times in the office supplied by the respondent.

[22] Dr Hughes' evidence is that she worked only for the company, did not claim from IRD for any costs for undertaking research out of her own home and made no attempt to set up a business on her own account, but instead she was fully integrated into the respondent's business affairs and controlled by it. There is no evidence of Dr Hughes performing services for the respondent or any other entity on her own account.

Industry Practice

[23] Neither party raised argument about industry practice nor did the Authority's investigation suggest this criterion to be relevant.

Findings

[24] By way of a close application of the evidence to the principles set out in *Bryson* (above), in particular Dr Hughes' evidence in respect of the control exercised on her by the company and the discussions she had with Dr Nixon before commencing employment, I am satisfied that the applicant was at all times an employee and not an independent contractor. I prefer Dr Hughes' evidence in the absence of Dr Nixon directly challenging the same.

[25] It is clear that Dr Hughes worked exclusively for the company, varying her hours and duties so as to accommodate its requirements, i.e. that she was fully integrated into its affairs and controlled by the respondent.

[26] There is no evidence of Dr Hughes being in business for herself and of having or of attempting to acquire other customers.

[27] The significance of Dr Hughes invoicing the company and providing it with time sheets is not determinative, I find, of the parties intending their relationship to be by way of a contract for service: even if it were I am satisfied the real nature of their relationship was that of a contract of services.

[28] Unlike Mr Sorenson, I accept her explanation she changed her tax code declaration from employee to "WT" (withholding tax) on the advice of the IRD (doc 9), because of her ongoing difficulties in obtaining the company's agreement she was an employee.

[29] My clear impression is of the company proceeding more by enthusiasm than a clear understanding of relevant legal parameters when engaging staff: that is evidenced by Mr Sorenson's explanation that he did not obtain a contract for services template for the applicant until 6 May 2008 (Dr Hughes having started on 14 January), and after the accountants engaged to manage all payroll services sought confirmation of the respondent's arrangements for Dr Hughes (doc 10).

[30] I similarly reject Mr Sorenson's claim that *"it was finally agreed by all of us about 26th May that contractor status was correct"* for Dr Hughes (par 45 of his statement). Dr Hughes does not accept that was the case, as is confirmed by her refusal to sign the proffered contract for services.

[31] Document 1, the respondent's 13 December 2007 *"job offer"* to Dr Hughes contains no hint it represents a contract for services proposal. In normal circumstances, and this controversy aside and talking as it does of a project for the next 12 months and other lines of research, it amounts to an unremarkable contract of service offer. That is because it *"envisaged that this will be a full-time position but that you will not be on site full-time as we have discussed …* (and the) *salary for the position will be $50,000 per annum that we have discussed but there will obviously be conference, research and travel expenses in addition to this . This package will initially be reviewed 31/3/08 in light of pending project developments then … annually thereafter. We look forward to having you as part of the team at PCDS and the larger team at The Doctors Masterton. Yours sincerely Dr David Nixon Director"* (above).

[32] Finally, I must accept the signed employment agreement as evidence of the respondent's agreement to a contract of service as it would otherwise be exposing itself to the potential of legal proceedings for misrepresentation.

[33] For the reasons set out above I am satisfied Dr Hughes' claim she was an employee and not a contractor must succeed.

90 Days

[34] The question of whether Dr Hughes' grievance was brought within 90-days will need to be investigated further, so as to take evidence from her previous and current counsel on this matter as well as to provide the parties with an

opportunity to reflect on this determination and the observations set out below.

Determination

[35] The preliminary question is decided in favour of the applicant: Dr Hughes was at all relevant times an employee and not a contractor.

[36] Costs on this preliminary question are reserved.

Observations

[37] As expressed to the parties during the investigation, and given they are represented by counsel experienced in employment law, this is a problem deserving of proper risk assessment. That is because considerable costs have been incurred to date on what is still only a preliminary matter, and a contribution to reasonable costs recovery for the successful party will fall well short of what is actually incurred.

[38] Dr Hughes costs currently approach $30,000. An investigation into a claim of unjustified dismissal will take another day. These costs must be measured against likely outcomes, and best/worse case situations. Reality is required. In particular, the applicant should consider the following: it was not until the day of the Authority's investigation that she reduced (properly) her claim for lost wages from 3-years (i.e. the unexpired portion of what at times she has claimed was a fixed-term agreement entered into with the company) to 5-weeks, i.e. the difference between her last pay by the respondent and the commencement of her current employment.

[39] Dr Hughes also seeks $30,000 compensation for hurt, notwithstanding well known Employment Court and Court of Appeal decisions that make clear payments of this sort are uncommon to rare being brought to her attention. No evidence has so far been produced by the applicant in support of that claim: she may yet succeed. On the other hand a cautious approach to these proceedings will have full regard to typical awards made by the Authority for similar unjustified dismissal findings.

[40] For its part, notwithstanding its claim the applicant abandoned her employment, the respondent must consider the risk of a finding of unjustified dismissal in favour of the applicant: that is because the company appears to have acted toward Dr Hughes at the termination of their employment relationship as if she was a contractor, and apparently relied on its draft contract for services document to cease paying the applicant and effected her termination. It may struggle to sustain a claim her employment was justifiably concluded.

[41] It faces similar difficulties with a claim Dr Hughes' grievance was brought outside of 90-days. Even if it is found that the applicant's claim was filed outside of 90-days, her (yet untested) evidence is she instructed other counsel to file a personal grievance: if it is found they – or her current counsel – failed to do so, and if Authority discretion is applied per s. 114 of the Act, then the parties must undertake further mediation (ss 114 (5) of the Act) and hence incur further costs.

[42] Also to be borne in mind in determining exceptional circumstances, is the failure by the respondent to provide the applicant with a written employment agreement in advance of her employment: see *Bryson No 2*.

[43] While I retain an open mind on these issues I urge the parties to bring an unhappy employment relationship to a conclusion that is fair and reasonable to them both.

Denis Asher
Member of the Employment Relations Authority