

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2016] NZERA Auckland 123  
5558938

BETWEEN DANIEL LOHR  
Applicant  
A N D ACCIDENT COMPENSATION  
CORPORATION  
Respondent

Member of Authority: T G Tetitaha  
Representatives: Applicant in person  
P McBride, Counsel for Respondent  
Investigation Meeting: On the papers  
Submissions Received: 25 June 2015 from Applicant  
22 June 2015, 7 and 9 March 2016 from Respondent  
Date of Determination: 22 April 2016

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**DETERMINATION OF THE AUTHORITY**

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- A. The applicant was not an employee of ACC under a contract of service. The application is dismissed because there is no jurisdiction for the Authority to determine the matter.**
- B. Costs are reserved. If either party seeks an order for costs a memorandum shall be filed and served 14 days from the date of this determination. The other party shall have 14 days to file and serve a reply.**

**Employment relationship problem**

[1] Daniel Lohr is a chiropractor and acupuncturist contracted to provide these services to the Accident Compensation Corporation (ACC). He alleges he is owed money for services provided and filed an application seeking payment. ACC has filed

an application to strike out his claims because there was no employment relationship between the parties. This determination deals with the strike out application only.

## Issues

[2] The Employment Relations Authority (Authority) is empowered to make determinations about employment relationship problems.<sup>1</sup> Therefore the applicant must prove he was an employee. If not, the application shall be dismissed because it does not arise from an employment relationship and I have no power to determine it.

### What is an employee/employer?

[3] An employee is defined as “any person of any age employed by an employer to do any work for hire or reward under a contract of service”.<sup>2</sup> Whether a person is employed by another person under a contract of service, requires me to determine the “real nature of the relationship between them.”<sup>3</sup>

[4] In determining the “real nature of the relationship” I am required to consider “all relevant matters, including any matters that indicate the intention of the persons” but am not required to treat as decisive any statement that describes the nature of that relationship.<sup>4</sup>

[5] All relevant matters may be determined by applying the control, integration and the fundamental tests.<sup>5</sup> This requires an examination of the terms and conditions of the contract and the way in which it actually operated in practice when applying those tests.<sup>6</sup>

[6] The control test considers the degree of control or supervision exercised by the alleged employer over the applicant's daily work.<sup>7</sup> The integration test considers whether the work performed by the applicant is an integral part of the business and whether he or she has effectively become “part and parcel of the organization”<sup>8</sup>. For

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<sup>1</sup> Section 161(1) Employment Relations Act 2000 (the Act).

<sup>2</sup> Section 6(1) of the Act.

<sup>3</sup> Section 6(2) of the Act.

<sup>4</sup> Section 6(3) of the Act.

<sup>5</sup> *Bryson v Three Foot Six Ltd* [2003] 1 ERNZ 581 (EmpC) at [19]; [Curlew v Harvey Norman Stores \(NZ\) Pty Ltd](#) [2002] 1 ERNZ 114 (EmpC) at [46].

<sup>6</sup> *Bryson v Three Foot Six Ltd* [2005] NZSC 34 at [32].

<sup>7</sup> [Curlew v Harvey Norman Stores \(NZ\) Pty Ltd](#) [2002] 1 ERNZ 114 (EmpC) at [76].

<sup>8</sup> *Bank voor Handel en Scheepvaart NV v Slatford* (No 2) [1953] 1 QB 248 (CA) at 295.

the fundamental test, the question is whether the alleged employee was a person in business on their own account.<sup>9</sup>

### **Was the applicant an employee?**

#### ***Terms and conditions of employment***

[7] It is common ground there was no written employment agreement between the parties. The applicant applied and was registered as a “ACC Health Provider” and elected to be paid per ACC patient.<sup>10</sup> The provision of services was governed by statute, regulations and a treatment provider handbook.<sup>11</sup> The applicant was required to invoice for services using specified forms and attaching clinical treatment notes, hold a current annual practising certificate and use best clinical practice in treating ACC patients.<sup>12</sup>

#### ***Control test***

[8] The applicant determined the patients and treatment they received and ran his own clinic.<sup>13</sup> There was no evidence ACC required him to accept patients, work certain hours or places. Nor was there evidence ACC checked up on his work. The only control exercised by ACC pertained to his invoicing and whether it met their criteria for payment. There was little other control or supervision of the applicant’s daily work by ACC.

#### ***Integration test***

[9] It is common ground the applicant used a company known as “Advent Management Limited” to invoice and process payments from ACC. Although his work was of assistance to ACC it did not appear that he was personally an integral part of their business. ACC has provided evidence it does not employ or engage treatment providers such as the applicant and he was at best a ‘vendor’ receiving

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<sup>9</sup> *Bryson v Three Foot Six Ltd* [2003] 1 ERNZ 581 (EmpC) at [52].

<sup>10</sup> Application for ACC Health Provider Registration Form appended to statement of problem.

<sup>11</sup> Accident Compensation Act 2001 and its regulations; Treatment Provider Handbook [http://www.acc.co.nz/PRD\\_EXT\\_CSMP/groups/external\\_providers/documents/guide/wpc096382.pdf](http://www.acc.co.nz/PRD_EXT_CSMP/groups/external_providers/documents/guide/wpc096382.pdf).

<sup>12</sup> Correspondence dated 25 January and 6 August between the parties appended to statement of problem.

<sup>13</sup> Affidavit E Riley sworn 9 March 2016 at paras 2 to 4.

payment for treating ACC clients.<sup>14</sup> I accept that evidence because there is corroborating evidence including a form headed “Provider/Vendor” details appended to the applicant’s statement of problem.

***Fundamental test***

[10] There is evidence the applicant was running his own business. It is accepted he invoiced ACC for his services rendered through his company. The company’s GST number was used for taxation purposes. He ran his own clinic and provided his own equipment. There is no evidence he used ACC equipment, staff or premises to provide his services.

**Determination**

[11] The evidence favours a conclusion he was in business on his own account. The applicant was not an employee of ACC under a contract of service. The application is dismissed because there is no jurisdiction for the Authority to determine the matter.

[12] Costs are reserved. If either party seeks an order for costs a memorandum shall be filed and served 14 days from the date of this determination. The other party shall have 14 days to file and serve a reply.

**T G Tetitaha**  
**Member of the Employment Relations Authority**

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<sup>14</sup> Affidavit E Riley sworn 9 March 2016 at paras 6 to 8.