

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

**[2014] NZERA Auckland 357  
5445698**

BETWEEN                      DEBORAH MCATANNEY-  
   CLARK  
   Applicant

AND                              JOHNSON & JOHNSON (NEW  
   ZEALAND) LIMITED  
   Respondent

Member of Authority:        Eleanor Robinson

Representatives:             Mark Ryan, Counsel for Applicant  
   Ronni Cabraal & Jennifer Mills, Counsel for Respondent

Investigation Meeting:      On the papers

Submissions received:      21 January 2014 from Applicant  
   22 July 2014 from Respondent

Determination:                29 August 2014

---

**DETERMINATION OF THE AUTHORITY ON A PRELIMINARY ISSUE**

---

**Employment Relationship Problem**

[1]     The Applicant, Ms Deborah McAtanney-Clark, claims that she was employed by the Respondent, Johnson & Johnson (New Zealand) Limited (J & J NZ) from 1 April 2004 until she was dismissed on 29 January 2013.

[2]     J & J NZ denies that Ms McAtanney-Clark was an employee and claims that she was an independent contractor during the period when she carried out work for J & J NZ.

**Issues**

[3]     The preliminary issue for determination before the Authority is whether or not Ms McAtanney-Clark was an employee or an independent contractor during the period she carried out work for J & J NZ.

## **Background Facts**

[4] J & J NZ is a New Zealand subsidiary of the Johnson & Johnson Group of Companies which comprises Johnson & Johnson Medical Pty Limited, its subsidiaries, its parent companies, and ultimate parent company, and those entities' are subsidiaries (The Group). The Group provides consumer healthcare, medical devices, diagnostics products, and pharmaceuticals.

### *Events prior to 2005*

[5] Ms McAtanney-Clark submits that she commenced working with J & J NZ on 1 April 2004. She was required by J & J NZ to:

- obtain a photo ID. card;
- attend two meetings a week to discuss matters including goals and objectives of J&J NZ;
- . required to apply for annual leave and was entitled to take annual leave;
- provided with paid sick leave;
- obliged to complete timesheets;
- was not entitled to subcontract or delegate any work for J & J NZ;
- provided with an office and workplace;
- supplied with all of the materials, tools and equipment to carry out her daily tasks;  
and
- her email address was part of J&JNZ's electronic communication system.

[6] J & J NZ submits that in 2004 Ms McAtanney-Clark's previous employer, Business It Support Limited (BITS) entered into a contract for services with Network and Computing Services Consolidation & Optimisation ASPAC (NCS) which was set up to be responsible for contracting IT services worldwide for The Group, of which it was a business unit.

[7] BITS provided IT services on a three day a week basis to support The Group's subsidiaries at the Newmarket based office in Auckland. The contract covered the six-month

period between 1 May 2004 and 31 October 2004. Ms McAtanney-Clark was a part-time employee of BITS and provided services to NCS in that capacity.

[8] In November 2004 Ms McAtanney-Clark formed a business partnership with Mr Kevin Thrower called Professional IT Consulting Services (PITCS) which submitted a proposal to members of the NCS management team to provide IT services to NCS to support The Group on more favourable terms than BITS.

[9] The proposal described PITCS as a start-up venture and: “a partnership between Clark & Thrower” offering: “a quick-response, reliable source of technical help for Janssen Cilag, Johnson & Johnson Pacific & Johnson & Johnson Medical”.

[10] Mr Pablo Diez Del Corral, Director of NCS, advised Ms McAtanney-Clark and Mr Thrower by email dated 10 February 2005, in response to Ms McAtanney-Clark’s request for an update on the PITCS proposal, that:

*JnJ is a very slow company when making this type of decisions, and the proposal needs to be carefully evaluated.*

*In the last conf call with the NZ MDs (January 2005) the agreement was to run it through both legal in NZ ... and legal in Australia, plus HR in both NCS and in the OPCos.*

[11] Ms McAtanney-Clark resigned from BITS on or about 15 December 2004.

#### PITCS Contract 2005

[12] PITCS’s proposal was accepted by NCS and the contract between NCS and PITCS (the PITCS Contract) was signed in May 2005. The PITCS Contract was entitled:

*Contract between:*

*Professional IT Consulting Services  
Network & Computing Services*

*for the provision of local infrastructure support services to all Johnson & Johnson Operating Companies in New Zealand as part of the ANZ Country Support Centre*

[13] It contained the following clauses:

*PITCS is a partnership owned and operated by Deborah McAtanney-Clark and Kevin Thrower.*

- *The objectives of PITCS are to facilitate computer support, including project management for Johnson & Johnson Group of Companies including: Janssen Cilag, Johnson & Johnson Pacific. ...*
- *The initial primary support offered will be hourly technical assistance covering 66 hrs of support per week between staff and PITCS.*

### **3.3**

*Both PITCS staff will report directly to NCS, CSC Management. On a local level Deborah will manage all workloads from internal (helpdesk software) and external sources, general reporting and administrative duties e.g. CER's. Management includes: Time Management for Kevin Thrower right through to job completion and user follow-up. Scoping out projects with realistic timeframes and monthly reporting.*

*Managing Directors of Johnson & Johnson in New Zealand and NCS, CSC management will receive a weekly spreadsheet of workload including work completed and outstanding work.*

*Staff of PITCS have requested they are included in management meetings where IT issues are raised. This will give a realistic IT insight at the time of the meeting.*

### **5.0**

*PITCS's competitive edge is that current staff already have a significant number of high quality relationships with current staff.*

### **7.0**

*PITCS is responsible for taxes and records. PITCS will be solely responsible for and will file, on a timely basis, all tax returns and payments required to be filed with or made to the Inland Revenue, with respect to Contractor's performance of services and receipt of fees under this Agreement. Contractor will be solely responsible for and must maintain adequate records of expenses incurred in the course of performing services under this*

*Agreement. Including GST, ACC cover, pay role tax, holiday accruals and leave entitlements.*

*All PITCS employees providing services to Johnson and Johnson companies should have signed the Confidentiality and Non\_Disclosure Agreements, Secrecy Deed, Business Conduct and Information Asset Protection Policies adherence, before being granted access to Johnson ad Johnson systems and premises.*

#### **8.0 Appendix: Hourly Rates & Expenses**

- *Hourly rate will be set at \$50 per hour + GST for 66 hours per week.*
- *Additional hours will be agreed upon by NCS CSC Management prior to commencement of extra hours.*

#### **9.0 Appendix: Termination of clause & monthly fee details**

- *For these services, NCS shall be billed \$14299.99 per month for service 66 hrs per week. This rate shall remain unchanged for 3 months until we understand the structure to include DePuy in this agreement. After this 3 month period the contract will stand for 12 months unless an adjustment is agreed to by both parties. Billing is on the 5<sup>th</sup> of each month for the month of service and your payment is due by the 125<sup>th</sup> of the same month. This agreement shall continue on a month to month basis unless terminated by either party giving the other 60 days written notice. Immediate termination is allowed but payment in advance will be made for the 60 days notice period.*

#### **Resource IT Contract**

[14] On 13 September 2008 PITCS changed its name to Resource IT (RIT) and was incorporated as Resource IT NZ Limited, a limited liability company. RIT was registered on the Companies Office website from 13 September 2007 until 21 November 2013 when it was struck off. The directors and shareholders of RIT were listed as Ms McAtanney-Clark and Mr Thrower.

[15] In 2007 Resource IT entered into an:

*Agreement for the Provision of  
Information Technology Consulting Services  
Between*

*Resource IT New Zealand Ltd*

*And*

*Johnson and Johnson Group of Companies*

[16] It contained the following clauses:

***1 Definitions as defined by Service Level Agreement***

*:The Client” refers to the Johnson & Johnson Group of Companies.*

*“The Contractor” refers to Resource IT New Zealand Ltd (RIT) a partnership owned and operated by Deborah McAtanney-Clark & Kevin Thrower.*

***2. Undertakings***

- This document is an agreement that defines the relationship between RIT and the Johnson & Johnson Group of Companies.*
- The objectives of RIT are to facilitate computer support including project management for the Johnson & Johnson Group of Companies including Janssen Cilag, Johnson & Johnson Pacific, Johnson & Johnson Medical. ...*
- The primary service offered will be hourly technical assistance, covering 98 hours of support per week between staff of Resource IT.*

***4.1 Service Description***

*Resource IT New Zealand Ltd ill three main services, corresponding to what we have identified as the primary services in computer support of all three companies*

***4.3 Management Structure***

*Both RIT staff will report directly to ITS Management. ...The Managing Directors of Johnson & Johnson in New Zealand together with ITS Management will receive a monthly spreadsheet of workload ...*

*Staff of RIT request they are included in any management meeting where IT issues are raised. This will give a realistic IT insight at the time of the meeting.*

## **8 Independent Contractor Relationship**

### **8.1 Nature of Relationship**

*The Contractor's relationship with Client will be that of an independent contractor and nothing in this relationship shall be construed to create a partnership, joint venture or employer-employee relationship. The Contractor is not an Agent of Client and is not authorised to make any representation, contract, or commitment on behalf of Client unless specifically requested to do so, by Client, in writing.*

### **8.2 Contractor Responsible for Taxes and Records**

*The Contractor will be solely responsible for and will file, on a timely basis, all tax returns and payments required to be filed with or made to any federal, state or local tax authority with respect to the Contractor's performance of services and receipt of fees under this Agreement. The Contractor will be solely responsible for and must maintain adequate records of expenses incurred in the course of performing services under this Agreement.*

## **9 Payment terms**

*The Client will pay the Contractor on the 20<sup>th</sup> of each month following invoice date by direct credit.*

## **10 Term**

*This Agreement is effective for a period of 12 months from the 1<sup>st</sup> April 2008 unless earlier terminated in accordance with Section 11 below. The term of this Agreement may be extended by mutual agreement of the parties and by addendum to the original or any additional Agreements.*

## **11 Termination**

*The client and the Contractor shall be able to terminate this agreement upon one month's notice. The Client or The contractor shall be able to terminate this agreement immediately where either party has acted in an unprofessional manner.*

## **12. Confidentiality**

*The Client and The Contractor acknowledge that both parties may receive or have available to them material that is the property of the other party. Both parties undertake to keep such information confidential and not disclose to any third party unless required to do so by law.*

[17] In 2009 the RIT contract was extended for another year and subsequently expired in April 2010.

[18] During 2009 and 2010 RIT issued an independent contractor agreement in the name of Regan Ansell and an individual employment agreement in the name of Jayanth Kommu as a service provider to RIT both of which stated that these individuals were to provide services to RIT but not an exclusive basis.

[19] In March 2010 Ms McAtanney-Clark contacted Mr Les Wiggins, MD&D Site Services, in relation to RIT's intention to provide services to another business unit or other companies within The Group. By email dated 22 March 2010 Mr Wiggins stated: "*As long as Strategic Sourcing select RIT as the local source of services on their behalf and your work for them does not cause any issues with your GSS contract.*" He confirmed that he believed the proposal to be a good business move for RIT:

[20] Mr Wiggins further confirmed in a written statement that during the period of the RIT contract, Ms McAtanney-Clark and Mr Thrower undertook work for companies other than J&J NZ and other subsidiaries of The Group, specifically:

- Relocation and closing of J&J sites in Wellington, New Zealand, working with personnel from J&J Medical and J&J Global Project management;
- Mobile phone management working with personnel from J J Medical, J&J consumer and Janassen Cilag NZ;
- Assisting with the Christchurch earthquake, working with Mr Andrew Heggie, J & J Medical Operations Manager New Zealand;
- Partnering with Strategic Sourcing Australia and New Zealand;
- Ms McAtanney-Clark being an employer of IT Resources for Desk Side Support Contract and Mobile Phones; and
- Winding up activities and contract completion.

Statement of Work Agreement

[21] On 1 July 2010 RIT signed a new contract for provision of services:

*Statement of Work*

*Agreement Between Resource IT NZ Ltd*

*And*

*I/T SS Global Site Services, ANZ*

*a Johnson & Johnson Group of Companies.*

[22] The Statement of Work Agreement was signed by RIT for a period of two years until 1 July 2012. Clauses included:

**1 Client and Service Provider details**

*“The Client” refers to the I/T SS Global Site Services, ANZ (I/T SS GSS)*

*“The Service Provider” refers to Resource IT New Zealand Ltd (RIT)*

**2 SOW & Service Description**

**2.1 In Scope Services** provided by RIT are documented in the I/T SS Global Site Service Catalog.

**2.2 RIT will work on general computer troubleshooting including but not limited to:**

- *Operating Systems upgrades*
- *Hardware and Software upgrades*
- *Asset Management and Tracking*
- *Break/Fix hardware issues*
- *Security Updates*
- *Remote Connectivity issues*

**2.3 Out of Scope**

*Will be handled as separate workloads with extra resources allocated to perform the specific tasks.*

### **3 Roles and Responsibilities**

#### **3.1 RIT's Responsibilities**

*RIT Staff to be included in monthly reports on service level performance*

### **4 Independent Service Provider Relationship**

#### **4.1 Nature of Relationship**

*The Service Providers relationship with Client will be that of an independent Service Provider and nothing in this Agreement shall be construed to create a partnership, joint venture or employer-employee relationship. The Service Provider will supply persons under direct employment with RIT or as contractors to RIT. The Service Provider is not the agent of Client and is not authorised to make nay representation, contract, ot commitment on behalf of Client unless specifically requested to do so, by Client, in writing.*

#### **4.2 Service Provider Responsible for Taxes and Records**

*The Service Provider will be solely responsible for and will file, on a timely basis, all tax returns and payments required to be fled with or made to any federal, state or local tax authority with respect to the Service Provider's performance of services and receipt of fees under this Agreement. The Service Provider will be solely responsible for and must maintain adequate records of expenses incurred in the course of performing services under this Agreement.*

### **5 Termination**

*The client and The Service Provider shall be able to terminate this agreement upon one month's notice. The Client or The Service Provider shall be able to terminate this agreement immediately where either party has acted in an unprofessional manner.*

### **5 Confidentiality & NDA (Non Disclosure Afreement).**

*The Client and The Service Provider acknowledge that both parties may receive or have available to then material that is the property of the other party. Both parties undertake to keep such information confidential and not disclose to any third party unless required to do so by law.*

***Appendix A: Pricing***

*Pricing is based on the expected minimum number of hours per month.*

*Extra hours as required will be charged at \$65 per hr, per person.*

*Refer to section 2.2 “Out of Scope”*

***Payment terms***

*The Client will pay the Service Provider seven days after invoice date by direct credit provided that The Service Provider will provide the client with a Tax Invoice by the 1<sup>st</sup> day of the month.*

***Appendix C: Hours of operation and site coverage:***

*RIT will provide hours of coverage between 8am to 6pm Monday to Thursday and 8am to 5 pm on Friday’s.*

[23] J & J NZ states that during the period covered by the Statement of Work Agreement, McAtanney-Clark took approximately 5 months’ leave of absence from provision of services to The Group to pursue alternative opportunities, and that during this period RIT engaged another staff member, Ms Carol Ann Harrison, to undertake the contracted hours which had been agreed. In an email dated 6 April 2009 Ms McAtanney-Clark confirmed the names of the RIT staff, which included Ms Harrison, who would fulfil the contractual requirements of RIT. Ms McAtanney-Clark also provided the date she would finish, this being 7 April 2009.

[24] After a lengthy period of consideration in 2008, The Group finally made a global decision during 2012 to dispense with individual IT service providers within The Group and obtain such services from a single Vendor. This had been made known to all service providers, including RIT, with effect from 2008. The Group negotiated and ultimately executed a contract with Xerox Global Services.

[25] On 10 July 2012 J & J Medical Pty Limited on behalf of The Group wrote to all companies currently providing services to The Group, including RIT, terminating their services in accordance with the termination clause of the Statement of Work Agreement.

[26] On 27 July 2012 J & J Medical Pty Limited wrote to RIT withdrawing its notice of termination and offering an extension of the Statement of Work Agreement to continue with a variation to hours, to allow Xerox Global Services interim support during the transition process.

[27] On 29 January 2013 J & J NZ Medical Pty Limited wrote to RIT giving official notice of the termination of the Statement of Work Agreement to be effective from 31 March

2013, noting that: “*all Desk Side Support Services have now transitioned to XEROX Business Services*”

### **Determination**

[28] Ms McAtanney-Clark claims that she was an employee of J & J NZ whilst carrying out work for J & J NZ. In deciding whether or not Ms McAtanney-Clark was engaged by J & J NZ as an employee, I apply s 6 of the Employment Relations Act 2000 (the Act) which provides:

*Meaning of employee:*

(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.*

[29] Furthermore in *Bryson v Three Foot Six Limited (No2)*<sup>1</sup> the Supreme Court stated the following:

*“‘All relevant’ matters certainly includes the written and oral terms of the contract between the parties, which will usually contain indications of their common intention concerning the status of their relationship. They will also include any divergences from or supplementation of those terms and conditions which are apparent in the way in which the relationship has operated in practice. It is important that the Court or the Authority should consider the way in which parties have actually behaved in implementing their contract. How their relationship operates in practice is crucial to a determination of its real nature. ‘All relevant matters’ equally clearly requires the Court or the*

---

<sup>1</sup> [2005] 1 ERNZ 372

*Authority to have regard to features of control and integration and to whether the contracted person has been effectively working on his or her own account (the fundamental test), which were important determinants of the relationship in common law. It is not until the Court or the Authority has examined the terms and conditions of the contract and the way in which it actually operated in practice that it will usually be possible to examine the relationship in the light of the control, integration and fundamental test”.*

*Contractual basis and Identity of the Employer*

*(i) Contractual Basis of Relationship*

[30] Ms McAtanney-Clark’s claim is against J & J NZ. There is no employment agreement between Ms McAtanney-Clark and J & J NZ, nor is there any such agreement between Ms McAtanney-Clark and any other member of The Group.

[31] In 2004 Ms McAtanney-Clark and Mr Thrower formed a partnership named PITCS, and in 2005 PITCS entered into the PITCS Contract with NCS, a part of The Group. In the Contract PITCS is described as a: “*partnership owned and operated by Deborah McAtanney-Clark and Kevin Thrower.*”.

[32] Subsequently Ms McAtanney-Clark and Mr Thrower formed RIT, a registered company listed as such on the Companies Office website with effect from 13 September 2007 until 21 November 2013 when it was struck off. Ms McAtanney-Clark and Mr Thrower were listed as the sole Directors and Shareholders of RIT.

[33] RIT and J & J Group entered into the RIT Contract with which described RIT as a Limited Liability Company and: “*a partnership owned and operated by Deborah McAtanney-Clark and Kevin Thrower*”.

[34] I find the formation of the original partnership and then a registered company in which she occupied the roles of director and shareholder to indicate that Ms McAtanney-Clark was an astute business woman and capable of understanding the contractual implications of business transactions freely entered into between two contracting entities.

[35] The PITCS contract expressly states that it is: “*a start-up venture between Clark and Thrower*” and further: “*it is a partnership owned and operated by Clark and Thrower*”. At clause 3 it states that: “*PITCS’s competitive edge is that current staffs already have a significant number of high quality relationships with current staff*” (referring to J & J companies).

[36] Also at clause 7.0 that PITCS would be responsible for: “*all tax returns and payments required to be filed with or made to Inland Revenue.*” And Contractors will be solely responsible for and must maintain adequate records of expenses in the course of performing services under this agreement. Including GST, ACC cover, pay roll tax, holiday accruals and leave entitlements”. It also referred to PITCS employees: “*providing services to Johnson & Johnson companies*”.

[37] I find these clauses to indicate that what was intended by PITCS was that it was an independent contractor providing services to NCS via its current staff members and it being responsible for all costs and expenses associated with such staff members.

[38] This intention I find to be clarified in the RIT Contract between RIT and the Johnson & Johnson Group of Companies which contained clauses which described the nature of the relationship between RIT and The Group as that of an independent contractor and client, and which stated clearly in clause 8 that: “*nothing in this Agreement shall be construed to create a partnership, joint venture or employer-employee relationship*”. Furthermore this agreement signed by Ms McAtanney-Clark contains at clause 2 the statement that: “*This document is an agreement that defines the relationship between RIT and the J & J ....*”.

[39] The RIT Contract was superseded by the Statement of Work between RIT and I/T SS Global Site Services, ANZ a Johnson & Johnson Group of Companies. Again in clause 4 of the Statement of Work the relationship between RIT and the Client is described as being that of an independent service provider and included for the sake of clarity is the statement that: “*nothing in this Agreement shall be construed to create a partnership, joint venture or employer-employee relationship*”

[40] In *Cunningham v TNT Express Worldwide (NZ) Ltd*<sup>2</sup> the Court of Appeal established that the terms of a written contract must be placed at the forefront of consideration of the working relationship.

[41] I find that the PITCS Contract, the RIT Contract and the Statement of Work Agreement to be sophisticated legal agreements, professional, articulate and detailed in nature. Based on these contracts which were in place between the parties, I consider that Ms McAtanney-Clark, who was a partner of PITCS, and a partner, director and shareholder of RIT, had intended the relationship between PITCS, RIT and The Group to be that of independent contractor and client.

---

<sup>2</sup> [1993] 1 ERNZ 695

[42] Further there is no written individual employment agreement between Ms McAtanney-Clark and the Respondent J & J NZ, or indeed of any of the documentation normally associated with an employment relationship, which I find to refute any indication by Ms McAtanney-Clark that the working relationship was intended to be with her personally as one of a contract for service. I find rather that there was an agreement with RIT, the company of which she was partner, director and shareholder, for the provision of services by Ms McAtanney-Clark to The Group.

(ii) *Identity of Employer*

[43] As stated, there is no written employment agreement between Ms McAtanney-Clark and J & J NZ. The PITCS Contract, the RIT Contract, and the Statement of Work Agreement are all described as being for the provision of support services to: “*all Johnson & Johnson Operating Companies in New Zealand*”.

[44] The contracting party to the PITCS Contract is NCS, the contracting party to the RIT Contract is the Johnson and Johnson Group of Companies and the contracting party to the Statement of Work Agreement is I/T SS Global Site Services. None of these various contractual agreements identify J & J NZ as a contracting party.

[45] The Applicant has not claimed a tripartite relationship in which an individual employed by one party may also at the same time, be employed by a third party, however I proceed to see if a tripartite relationship may exist in the circumstances of this case.

[46] In *McDonald v Ontrack Infrastructure Ltd*<sup>3</sup>, the Employment Court examined the issue of tripartite relationships. It was observed by the Court that:<sup>4</sup>

*The test was to determine that real nature of the employment relationship which included examining whether there had been an intention to create legal relations and the issues of agreement and consideration*

[47] Whilst Ms McAtanney-Clark claims that she was an employee of J & J NZ, the contractual documentation before the Authority indicates that she was during the period from November 2004 until 21 November 2013 initially in a partnership with Mr Thrower, and latterly as a director and shareholder of RIT.

[48] The contractual documentation establishes that RIT contracted to provide specialist IT services to the Johnson and Johnson group of companies, which includes J & J NZ among

---

<sup>3</sup> [2010] NZEmpC 132

<sup>4</sup> Ibid at Para [45]

others. However the contracting parties to the various agreements have been NCS, the Johnson and Johnson Group of Companies, and I/T SS Global Site Services respectively, and not J&J NZ.

[49] The invoices provided in evidence were submitted for payment to J & J Medical Pty Limited in Australia in the name of RIT, and were based on the number of Desk Top Support hours provided by RIT in provision of the contracted services from RIT rather than by Ms McAtanney-Clark personally. Payment details identified the internet banking details of RIT. There is no record of any payments being made direct to Ms McAtanney-Clark.

[50] RIT was a registered company whose sole shareholders were Ms McAtanney-Clark and as such was a separate legal entity to Ms McAtanney-Clark personally.

[51] I also find that the evidence submitted establishes that RIT did not only undertake work for J & J NZ, but for other entities in The Group as identified by Mr Wiggins, including J & J Medical, J & J Consumer, and Strategic Sourcing Australia and New Zealand.

[52] On this basis I find no evidence to support a tripartite relationship or that there was a direct contractual link between Ms McAtanney-Clark and J & J NZ such as to identify J & J NZ as the employer of Ms McAtanney-Clark.

#### *Control and Integration*

[53] Ms McAtanney-Clark claimed that she was subjected to the control of J & J NZ in certain areas, specifically in relation to her attendance at the J & J NZ site, arrangements regarding leave requirements and timesheets, and an inability to delegate.

[54] I note that RIT provided IT services, a site service separate to J & J NZ's core business of selling medical and pharmaceutical products. It is not uncommon within New Zealand for the requirements for IT services, which are highly specialised, to be provided by a sub-contractor.

[55] In *Singh v Eric James & Associates Limited*<sup>5</sup> Chief Judge Colgan observed.<sup>6</sup> *“Industry or sector practice, while not determinative of the question, is nevertheless a relevant factor.”*

[56] Whilst not determinative of the matter, I do find such industry practise to be a highly relevant factor in the circumstances of this case.

---

<sup>5</sup> [2010] NZEMPC 1

<sup>6</sup> Ibid at para [7]

(i) *Attendance at the J & J NZ site*

[57] Ms McAtanney-Clark said that she was provided with a workplace and office by J & J NZ, that she had to attend two meetings a week to discuss the goals and objectives of J & J NZ, and that she had been provided with a photo ID card in addition to materials, tools and equipment and a J & J NZ email address.

[58] I note that at all relevant dates the J & J NZ registered address and office was 105 Carlton Gore Road, Newmarket, and the registered address of RIT was the same, 105 Carlton Gore Road Newmarket. Also the various agreements state that, '*RIT will work from the premises of Johnson and Johnson, 105 Carlton Gore Road, Newmarket.*' In the case of PITCS it states '*PICTS is run from the premises of Johnson & Johnson, 105 Carlton Gore Road, Newmarket.*' The premises are a commercial office block used by many companies.

[59] It is clear from the contracts that it was PITCS and RIT that were provided with office space and not Ms McAtanney-Clark personally, and therefore, whilst I accept that RIT employees could use the facilities within the J & J NZ office premises, I find this not be inconsistent with industry practice for an IT company providing IT site support services. Equally it is a technical requisite and the accepted industry practice that such IT services be carried out by using and accessing the client's current IT hardware and software. I therefore find the provision and utilisation of J & J office space to and by PITCS and RIT did not in any way indicate that Ms McAtanney-Clark was an employee of J & J NZ.

[60] Turning to the issue of the provision of a photo ID card to Ms McAtanney-Clark, it would also be standard practice for frequent visitors to secure premises such as J & J NZ's office to be issued with an ID card which also opens doors thereby allowing access to all areas and facilities. There is no evidence that other staff members of PITCS and RIT were not issued with such ID cards. I find that the provision of photo ID cards to Ms McAtanney-Clark and other staff members of PITCS and RIT not to be indicative of an employment relationship between Ms McAtanney-Clark and J & J NZ..

[61] Similarly in the case of utilisation of email facilities I observe that in the case of an IT service company providing real time on site services to a company it would be both cost and operationally efficient to utilise the onsite company server for email communication. Especially so in the case of J & J that had sites world-wide. I note that in the case of Ms McAtanney-Clark, her email headers were '*Resource IT NZ Ltd*' and the identifying suffix tag following her name was "*ITSNZ*".

[62] The other members of the RIT team had similar identifying tags, e.g. "*Thrower, Kevin (ITSNZ)*". Also on occasions in this context I observe that emails from The Group personnel

to Ms McAtanney-Clark identify her as: “ *ITSNZ – Non J&J*”. I find that the use of the J and & J NZ email server by RIT personnel did not in any way indicate that Ms McAtanney-Clark was an employee J & J NZ.

[63] As regards Ms McAtanney-Clark’s claim that it was a requirement for her to attend two meetings a week I observe that the PITCS Contract at clause 3.3 states that: “*Staff of PITCS have requested they are included in management meetings were IT issues are raised.*”, and this request is reiterated in the RIT Contract at clause 4.3. The Statement of Work Agreement does not state any requirement for Ms McAtanney-Clark to attend management meetings.

[64] I find that the request to attend meetings was initiated by RIT and specified that it was for the purpose of it providing: “*a realistic IT insight at the time of the meeting*” such that it would benefit RIT in its provision of services. I further find that there was no requirement that Ms McAtanney-Clark personally attend these meetings, the request is from PITCS/RIT for its staff members to attend.

[65] Ms McAtanney-Clark claimed that she had to apply for annual leave and complete timesheets. I find in the documentation reference to the hours it was expected RIT would provide in the provision of the contracted services

[66] However it would not be inconsistent with a client/contractor relationship for the client to request a contractor supplying IT site support services to advise and make arrangements to cover those periods when a particular contractor might be unavailable to deliver the services by ensuring alternative cover.

[67] I find that whilst Mr Wiggins’ emails indicate that he wanted to be provided with coverage details, there is no documentation supporting the claim that Ms McAtanney-Clark had to personally attend to provide the services, or that timesheets were required for anything other than to ensure the client was paying for the service hours supplied by the contractor.

[68] There is no evidence to support the claim that Ms McAtanney-Clark applied for, or was paid, annual or sick leave by J & J NZ.

[69] There is no evidence to support a requirement that Ms McAtanney-Clark report to J & J NZ, other than as the lead representative of PITCS and RIT. because the contractual arrangements and reporting lines were between PITCS Contract and NCS, RIT and the Johnson and Johnson Group of Companies, and RIT and I/T SS Global Site Services.

[70] Having considered all the circumstances, I do not find evidence that Ms McAtanney-Clark was subject to the control of J & J NZ in the provision of services, or that her position was integral to the operation at J & J NZ.

*The Fundamental Test*

[71] I now consider whether or not Ms McAtanney-Clark had been effectively working on her own account (the fundamental test). Ms McAtanney-Clark did not provide evidence, nor did she claim that she was paid directly by J & J NZ and the billing accounts provided in evidence showed that the billing authority was PITCS and/or RIT. I find therefore that Ms McAtanney-Clark performed services for and was remunerated at the relevant times by PITCS and RIT.

[72] Clause 4.1 of the Statement of Work Agreement supports this argument stating, “*The Service Provider (in this case RIT) will supply persons under direct employment with RIT or as contractors to RIT.*” There is no indication that Ms McAtanney-Clark was under any obligation to personally undertake the work identified in the PITCS Contract, the RIT Contract or the Statement of Work Agreement, rather than it being undertaken by other staff members of PITCS or RIT such as Mr Ansell, Mr Kommu or Ms Harrison.

[73] I observe that Ms McAtanney-Clark work with the J & J Group was not at all times her sole source of income, as she performed IT services for others via RIT, she had a corporate structure in place and there was commercial ability for her to increase the annual profits of PITCS and RIT. This is indicative of Ms McAtanney-Clark being in business on her own account.

[74] Specifically I note that Ms McAtanney-Clark was able to undertake work for other businesses beside J & J NZ, both within The Group as specified in the various agreements, but also to external parties. I note that the Respondent has also supplied documentation that evidences that in April 2009 Ms McAtanney-Clark provided services to another company, Provoke Solutions Limited, for a period of 5 months.

[75] Significantly there is no evidence throughout the whole period that RIT was providing services to The Group that Ms McAtanney-Clark raised the issue of her being an employee of J & J NZ, or indeed of The Group.

[76] Chief Judge Colgan observed in *Singh v Eric James & Associates Limited*<sup>7</sup> that: “*Taxation arrangements, both generally and in particular are a relevant consideration.*”

---

<sup>7</sup> [2010] NZEMPC 1

[77] The PITCS Contract, the RIT Contract and the Statement of Work Agreement specify that: “*the Contractor will be responsible for and will file ... all tax returns and payments*”. There is no documentation to support a contrary inference that J & J NZ would calculate, deduct or pay PAYE on behalf of Ms McAtanney-Clark. Nor is there any evidence submitted by Ms McAtanney-Clark to establish that it did so.

[78] I find the fact that neither J & J NZ nor Ms McAtanney-Clark ever raised the issue of tax returns and/or associated documentation during more than 6 years of relationship to be indicative of a client and contractor relationship.

[79] I determine that Ms McAtanney-Clark was an independent contractor whilst working for J & J NZ.

### **Costs**

[80] Costs are reserved. The parties are encouraged to agree costs between themselves. If they are not able to do so, the Respondent may lodge and serve a memorandum as to costs within 28 days of the date of this determination. The Applicant will have 14 days from the date of service to lodge a reply memorandum. No application for costs will be considered outside this time frame without prior leave.

**Eleanor Robinson**  
**Member of the Employment Relations Authority**