

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2013] NZERA Auckland 7
5389182

BETWEEN	KATHERINE PRYCE-JONES Applicant
AND	WENDELIEN BOMER First Respondent
AND	ROTHESAY BAY PHYSIOTHERAPY (2000) LIMITED Second Respondent

Member of Authority:	R A Monaghan
Representatives:	H White, counsel for applicant M Kamphorst, advocate for respondents
Investigation meeting:	18 October 2012
Additional information received:	14 November 2012
Submissions received:	14 and 20 December 2012
Determination:	7 January 2013

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Katherine Pryce-Jones says she was employed by either or both of Wendelien Bomer and Rothesay Bay Physiotherapy (2000) Limited (RBPL). She says she was unjustifiably and constructively dismissed, and is owed unpaid wages, holiday pay and sick pay.

[2] Ms Bomer and RBPL say Mrs Pryce-Jones was not an employee of either of them, rather she was a contractor to RBPL.

[3] This determination addresses whether Mrs Pryce-Jones was in an employment relationship with either of Ms Bomer or RBPL.

Was there an employment relationship

1. Background

[4] Mrs Pryce-Jones is a qualified physiotherapist. She and her family were interested in emigrating from the UK to New Zealand when, in April 2008, she saw an advertisement for a physiotherapist at a practice in Rothesay Bay, Auckland. Ms Bomer is the sole director and shareholder of RBPL, was the leader of the practice and had placed the advertisement. The two women made contact and met in person shortly afterwards when Ms Bomer was travelling in Europe.

[5] Ms Bomer wished to offer the position as a contracted position, not an employed position. Indeed the parties appear to have signed an independent contractor's agreement dated 22 June 2008, although Mrs Pryce-Jones did not recall doing so. Ms Bomer also hoped to be able to sell the practice to Mrs Pryce-Jones - a possibility in which Mrs Pryce-Jones was interested at the time. Accordingly Ms Bomer agreed to assist Mrs Pryce-Jones in her immigration application although it meant proceeding on the basis that the relationship would be one of employment.

[6] In or about late 2008 Mrs Pryce-Jones made her first approach to the New Zealand Immigration Service regarding residence in New Zealand. She sought to proceed with an application under the skilled migrants category, relying on her receipt of an offer of skilled employment at the Rothesay Bay practice.

[7] The information provided in support of the full application for a residence visa on that ground included a covering letter from Ms Bomer and a signed individual employment agreement. The agreement was comprehensive and was based on a standard agreement or template prepared by an industry body. Among other things it provided that remuneration would be payable at the rate of \$60 per hour, and hours of work were to be 30-40 hours per week worked between 8 am and 4 pm on Monday-Friday.

[8] The residence visa was granted on 9 April 2009.

2. The commencement of the relationship

[9] The Pryce-Jones family moved to New Zealand, and Mrs Pryce-Jones began work at the practice on 22 July 2009.

[10] When Mrs Pryce-Jones reported for work in July 2009 Ms Bomer presented her with a copy of the independent contractor's agreement apparently discussed the previous year, and sought in particular to amend the rate at which remuneration was to be paid. She did so on the basis that she had advised Mrs Pryce-Jones during an earlier emailed exchange that details of their arrangement would need to be reviewed or refined on Mrs Pryce-Jones' arrival, and she was now proceeding accordingly. Mrs Pryce-Jones negotiated an improvement to the amended rate being offered and signed the amendment.

[11] It was not clear whether, in Ms Bomer's mind at the time, the intention to review or refine the details of the arrangement extended to an intention to 'revert' immediately to a relationship of principal and independent contractor. If so, that was not identified at the time.

[12] Moreover, any attempt to embark immediately on a relationship of principal and contractor would have been in breach of an immigration requirement known to both parties. That is Mrs Pryce was required to enter into a position of skilled employment – not a contractor's position. The present dispute centres on Mrs Pryce-Jones' view that, even if immigration requirements dictated the need for an employment relationship, she entered into the relationship genuinely intending to observe it and was not attempting to mislead the immigration service. Ms Bomer's approach suggests Ms Bomer provided the employment-related documentation in support either for the purpose of misleading the immigration service (in a misguided attempt to assist Mrs Pryce-Jones and advance her own interests regarding the sale of the practice) – or without otherwise appreciating the legal significance of the documents.

[13] Thus Ms Bomer invoked the June 2008 agreement in support of an argument that Mrs Pryce-Jones knew from July 2009 that she was a contractor. Ms Bomer pointed further to the absence at the time of any taxation arrangements, extending to an alleged lack of advice of Mrs Pryce-Jones' IRD number and the failure to deduct tax from Mrs Pryce-Jones' remuneration. She also pointed to documents headed 'tax invoice/statement', which I accept that Mrs Pryce-Jones provided merely to ensure her wages were paid, and because there was no alternative method of recording her time. I accept overall that any failures on Mrs Pryce-Jones' part occurred because she was a new immigrant unfamiliar with her obligations, and note that no administrative action was taken to address the features now relied on.

[14] In the circumstances I do not consider these features to be indicators that the true nature of the parties' relationship was one of principal and independent contractor.

[15] Moreover if Ms Bomer thought in reality that the relationship either changed in July 2009 or was never anything other than a relationship of principal and contractor, Mrs Pryce-Jones had no such understanding or intention. She was a genuine and credible witness and I do not accept accusations that, knowing she was to be an independent contractor, she portrayed the parties' relationship as one of employment for immigration purposes only.

[16] In contrast, as was made unfortunately and abundantly clear in her own evidence, Ms Bomer was a confused and unreliable witness. Her partner's input did not assist. There were numerous occasions, which I do not detail, when assertions were shown to be wrong, unfounded, or based on misunderstanding or supposition. The Authority was given access to Mrs Pryce-Jones' immigration file in order to test some of the assertions and assumptions, and when these were not supported by the contents of the file an inappropriate suggestion was made to the effect that material must have been withheld.

3. Did the nature of the relationship change after 6 months

[17] Despite taking the stance that the relationship was one of principal and independent contractor from the outset, Ms Bomer also advanced the view that the

employment relationship began in July 2009 with the agreement signed that month merely amending the rate of remuneration. She then relied on an alleged agreement with Mrs Pryce-Jones - reached during their discussions in 2008 - that the independent contractor's agreement would be 'adjusted' to take account of immigration requirements for an employment relationship of at least 6 months. At the end of 6 months the relationship would 'revert' to one of principal and independent contractor.

[18] In support Ms Bomer said she attempted in late 2009 to obtain a new contractor's agreement with Mrs Pryce-Jones. She said in evidence that she gave Mrs Pryce-Jones a contract document to sign, an allegation which Mrs Pryce-Jones denied. A more detailed discussion of this matter suggested that an agreement for a locum was simply left on a desk for Mrs Pryce-Jones to sign. I do not accept that this amounted to a failed attempt to obtain Mrs Pryce-Jones' written confirmation of an agreement already reached regarding an 'adjustment' or a 'reversion' to a relationship of principal and independent contractor. In the true circumstances revealed by the discussion it is not surprising if Mrs Pryce-Jones failed to appreciate that the document was for her attention, and that she was expected to sign it so the relationship could 'revert' as Ms Bomer alleged.

[19] Ms Bomer also pointed to Mrs Pryce-Jones' appointment with Ms Bomer's accountant later in 2009. It was common ground that Mrs Pryce-Jones met with the accountant and that the accountant gave her some basic information about the obligations of the self-employed, including information about GST and other tax obligations. However there was no suggestion that Mrs Pryce-Jones advised the accountant she was in the process of becoming a self-employed person, or that there was any related discussion of that kind. Further, there was no suggestion that the appointment was arranged in the course of any renegotiation of the parties' relationship. From Mrs Pryce-Jones' point of view the information was relevant to her possible purchase of the practice.

[20] After the investigation meeting had concluded Ms Bomer provided the Authority with a letter purporting to be from another accountant and advising that Mrs Pryce-Jones had obtained tax advice from him (or her), in February 2010. The letter was unsworn and is not evidence. In any event it, too, indicates only that information

about tax matters relevant to self-employment was discussed and I do not consider it advances matters.

[21] Finally, there was no evidence of any agreement that the nature of the relationship would change at the end of 6 months. I consider it likely that particular timeframe was identified with hindsight.

[22] I say this firstly because Ms Bomer asserted that the 6-month period expired on 11 January 2010. It was not clear how she identified that date, but in January 2010 Mrs Pryce-Jones provided the immigration service with evidence that certain conditions to which her visa was subject had been met. These included a requirement that she take up the offer of skilled employment underlying the grant of her visa and remain in the employment for a specified period. An associated application for the removal of the conditions included a letter from Ms Bomer dated 13 January 2010 confirming that Mrs Pryce-Jones had taken up her employment and that the employment was ongoing, as well as the documents headed 'tax invoice/statement' which Mrs Pryce-Jones described at the time as 'payslips'.

[23] The conditions were removed and the parties' association continued. There was no associated discussion to the effect that their relationship would now become one of principal and independent contractor.

[24] Secondly, changes to the way the ACC funded physiotherapy services had come into effect in November 2009. The changes had an adverse effect on the business of the practice, which began to suffer a serious downturn in 2010. Ms Bomer sought to link the changes with the change in Mrs Pryce-Jones' status as an employee, but I do not accept that matter was the subject of any discussion or agreement.

4. Did the nature of the relationship change subsequently

[25] Unfortunately the downturn in business meant the payments being made to Mrs Pryce-Jones could not be sustained, and that matter has led to the substantive claim for loss of wages.

[26] The loss of business and associated changes in the practice meant there were also changes in the way the parties worked. For example, and with permission, Mrs Pryce-Jones took on activities elsewhere on a very part time basis. I do not accept that this was evidence of Mrs Pryce-Jones' entry into business on her own account, so that in reality she was a contractor. Further, I do not accept overall that the changes were evidence of a move to a relationship of principal and independent contractor. Again there was no associated discussion and agreement to that effect.

5. Conclusion

[27] For the above reasons I find that the parties' relationship was one of employer and employee from the outset, and did not change.

[28] This means Mrs Pryce-Jones' substantive claims can proceed in the Authority.

Identity of the employer

[29] The employment agreement cited Mrs Pryce-Jones as the employee party and Ms Bomer as the employer party, although Ms Bomer signed the agreement 'for Rothesay Bay Physiotherapy Limited'.

[30] The submissions regarding the identity of the employer were very brief. The submissions on behalf of Mrs Pryce-Jones concerning Ms Bomer as the employer relied primarily on the above provisions in the employment agreement. The only other reason for citing Ms Bomer as the employer in her personal capacity appeared to be that she was the person with whom Mrs Pryce-Jones had dealings.

[31] Otherwise there was no challenge to the proposition that the practice operated through RBPL. Moreover Mrs Pryce-Jones was at least on notice of the existence of the company at the time when the relationship began, and there had been generalised discussion about the possibility of her purchasing the business. Thus while the citing in the employment agreement of Ms Bomer as the employer party to the relationship was unfortunate, I am satisfied it did not reflect the parties' intentions.

[32] For these reasons I conclude that RBPL was the employer.

Directions of the Authority

[33] The parties are to advise the Authority by 8 February 2013 of their views on whether further mediation is appropriate in this matter. The Authority will then contact them again regarding a procedure for addressing the substantive claims.

Costs

[34] Costs are reserved pending a final resolution of this matter.

R A Monaghan

Member of the Employment Relations Authority