

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2013] NZERA Auckland 82
5350816

BETWEEN RACHEL ROBERTS
Applicant

AND ASPIRING HEALTH
LIMITED
Respondent

Member of Authority: R A Monaghan

Representatives: A Taylor, advocate for applicant
D McLeod, advocate for respondent

Investigation meeting: 25 January 2013 at Taupo

Determination: 8 March 2013

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Rachel Roberts says her former employer, Aspiring Health Limited (AHL) affected her employment to her disadvantage by its unjustifiable actions. Ms Roberts seeks remedies in that respect, as well as orders for the payment of outstanding wages and holiday pay.

[2] AHL says the parties were not in an employment relationship, rather one of principal and independent contractor. This determination addresses that matter.

The parties' agreement

[3] Ms Roberts is a qualified physiotherapist, and AHL offers physiotherapy services at its clinic in Taupo. In January 2011 the parties entered into a written 'contract for physiotherapy services', which was to commence on 28 February 2011.

The contract described Ms Roberts as a contractor, and stated at cl 10 that her engagement was as an independent contractor and not as an employee.

[4] The contract also said:

- Ms Roberts would provide physiotherapy treatment and rehabilitation sessions, fitness assessments, trial personal training sessions, and ancillary assistance (Schedule 1);
- the services would be provided for a minimum of 3 days per week during school hours (because of childcare requirements) with the possibility of a future increase (Schedule 1);
- Ms Roberts would protect and promote the interests of AHL, observe its policies and procedures, comply with lawful and reasonable directions, promote health and safety, and carry out her obligations promptly and efficiently (cl 4);
- Ms Roberts would maintain public liability and professional indemnity insurance (cl 4);
- AHL would provide suitable facilities to assist in the provision of services, advise of its policies and procedures, and provide a healthy and safe workplace (cl 5);
- Ms Roberts would be paid under a fee structure (agreed as 50% of the revenue generated from clients she saw but exclusive of any payments made by the ACC), with her expenses being reimbursable (cl 6);
- Ms Roberts was responsible for her own tax payments (cl 8);
- Ms Roberts could use certain of AHL's equipment but was otherwise to use her own equipment (cl 9);
- confidentiality and restraint of trade provisions applied (cl 11 and 12);
- any intellectual property developed while performing services for AHL was the property of AHL (cl 14);
- Ms Roberts could not, without AHL's permission, provide services which might conflict with AHL's interests (cl 15);
- disputes could be resolved using a mediation and arbitration procedure through LEADR New Zealand (cl 17); and

- the parties were to indemnify and hold each other harmless, except in the case of negligence or wilful default (cl 17).

[5] Ms Roberts had operated her own physiotherapy practice and understood the difference between an employment relationship and one of principal and contractor. She entered into a principal and contractor's relationship willingly at the time.

Were the parties in an employment relationship

[6] Section 6 of the Employment Relations Act 2000 reads in part:

(2) In deciding ... whether a person is employed by another person under a contract of service, the ... Authority ... must determine the real nature of the relationship between them.

(3) For the purposes of subsection (2) the ... Authority –

(a) must consider all relevant matters, including any matters that indicate the intention of the person, and

(b) is not to treat as a determining matter any statement by the persons that describes the nature of their relationship.

[7] In *Bryson v Three Foot Six Limited*¹ the Supreme Court said 'all relevant matters' include:

- the written and oral terms of the contract, including terms indicating the parties' intentions,
- any divergences from those terms in practice,
- the day to day implementation of the contract, and
- the tests of control and integration, and whether the contracted person is effectively working on his or her own account (the fundamental test).

[8] Industry practice can also be relevant, but no industry practice is relied on here.

1. The written and oral terms of the contract

¹ [2005] NZSC 54

[9] I give weight to the fact that the parties defined their relationship as that of principal and independent contractor, and accept that was their intention regarding the nature of the relationship. I acknowledge that this factor is not determinative.

[10] Some additional provisions in the contract point clearly to the true nature of the relationship being that of principal and independent contractor. They include: the obligation to obtain insurance; the obligations regarding the payment of tax; the fee-based remuneration; the method of dispute resolution; and the parties' obligations to indemnify and hold each other harmless.

[11] The absence of a provision for paid leave, and the absence of a problem-solving procedure of the kind required under the Act, are also pointers to the true nature of the relationship being one of principal and independent contractor.

[12] Mutual obligations regarding health and safety are neutral as to the true nature of the relationship. Confidentiality and restraint of trade provisions may be present both in independent contracts and employment agreements, so I also regard those provisions as neutral. Finally, because of its vagueness, I would place the hours of work provision in this category with the evidence of how the provision operated in practice being more relevant to the nature of the parties' relationship.

[13] Provisions relating to equipment and facilities are of mixed significance. That Ms Roberts was not obliged to pay any form of rent for the use of AHL's premises and some of its equipment indicates an employment relationship. By the same token it is to be expected that AHL provide something in return for its share of the fees generated by attendances on clients. Otherwise, however, Ms Roberts used her own equipment, indicating a contractor's relationship.

[14] Restrictions on Ms Roberts' ability to provide services for competitors are indicative of an employment relationship, as is the vesting in AHL of ownership of any intellectual property. While there may be business reasons for such provisions, their potential effect favours AHL significantly, without compensating Ms Roberts. The requirement to accept instructions is also a feature of an employment relationship.

[15] I conclude on balance, however, that the parties intended the relationship to be one of principal and contractor. Overall the terms of their contract reflect that.

2. Divergence from those terms in practice

[16] Ms Roberts said that, despite the written contract, the relationship developed into an employer-employee relationship.

[17] However she was unable to point to any material change in the terms and conditions applying to the relationship. When I asked about this she made it quite clear that her concern was with what she considered to be failures on AHL's part to meet ACC obligations, and a fear of the adverse effect this might have on her own reputation and status as an ACC provider. The discovery meant she no longer wished to be associated with the business as a contractor, rather to be subsumed in it as an employee.

[18] There was no evidence of any divergence from the terms of the contract in practice.

3. The day to day implementation of the contract

[19] Ms Roberts said the day to day implementation of the contract indicates the relationship was one of employment. She said in support: she provided her services to clients of AHL's and at AHL's premises; the clients were not considered to be clients of hers; AHL employees provided associated administrative services such as making and recording appointments; and clients paid AHL rather than Ms Roberts herself for the services they received.

[20] In further support Ms Roberts pointed to: communications between the parties in relation to the timing of and attendances at Pilates classes; and a letter dated 27 June 2011 advising clients that Ms Roberts was 'on extended sick leave' and had 'resigned her position with us'. Indeed Ms Roberts took an extended absence in June 2011 because of her concerns about compliance with ACC procedures as well as a developing personal conflict with a member of the administrative staff, and provided AHL with a series of medical certificates in support of her absence.

[21] AHL, by its directors Catherine Noble and Jeremy Dyer, said clients would approach AHL to make appointments, and might ask for a particular physiotherapist or have one allocated to them. In that sense it was true that clients approached AHL, and that AHL employees provided administrative support. It is also true that the contractual restraints meant the clients were effectively clients of AHL's. The point, however, is that AHL was Ms Roberts' client and that arrangement was agreed at the outset.

[22] It is also relevant that Ms Roberts was in control of her own diary and hours of work. She was free to, and did, block time out of the diary if she was not available to accept appointments. Later there was a requirement that a form be used when leave was required. There was no suggestion Ms Roberts was obliged to ask for leave rather than merely communicate her intentions regarding any absences, and I accept the promulgation of the form was for administrative reasons.

[23] Ms Roberts was paid on receipt of her GST invoice, and attended to her own tax payments. She was provided with lists of the clients she had seen, together with the clients' ACC status, and would compile and forward her invoice on the basis of that information.

[24] Regarding the pilates classes, Ms Roberts is a qualified pilates practitioner and the prospect of her offering pilates classes was discussed at the time of entry into the contract. Both parties were enthusiastic about pursuing that possibility at the time. To that end Ms Roberts approached her children's school, and two other schools, about offering classes there. I consider the correspondence to which she pointed in relation to that matter was no more than a request for information about progress, coupled with suggestions. Further, the establishment of the classes was a benefit to both parties and I do not accept that anything in the matter is indicative of an employment relationship.

[25] Regarding Ms Roberts' absence from the workplace and her resignation, the medical certificates were not solicited or required at the time. The advice of the 'resignation' was intended only to convey that Ms Roberts had terminated the contract and her services were no longer available at AHL.

4. The control, integration and fundamental tests

[26] I accept that AHL exercised a degree of control over Ms Roberts' activities in that there were standards with which she was expected to comply, and she had an obligation to accept instructions. However the law has long recognised that requirements relating to service delivery do not necessarily mean the individual who is to observe the requirements is an employee. The nature and level of the control exercised over Ms Roberts here was not indicative of an employment relationship.

[27] I do not derive any assistance from the integration test. Of more assistance is the fundamental test, or whether Ms Roberts could be said to be in business on her own account. That was certainly the case for tax purposes, although I accept tax issues are not determinative. In addition Ms Roberts could set her own level of income in the sense that, subject to a minimum requirement, she was free to determine the amount of time for which she would be available to provide her services.

[28] On balance I find Ms Roberts was in business on her own account.

Conclusion

[29] For the above reasons I find Ms Roberts was a contractor, not an employee.

[30] Accordingly her claims against AHL cannot proceed in this jurisdiction.

Costs

[31] Costs are reserved. The parties are invited to reach agreement on the matter. If they are unable to do so any party seeking costs shall have 28 days from the date of this determination in which to file and serve memoranda on the matter. The other party shall have a further 14 days in which to file and serve a reply.

R A Monaghan

Member of the Employment Relations Authority