IN THE EMPLOYMENT COURT
AUCKLAND

[2010] NZEMPC 22
ARC 5/09

IN THE MATTER OF	point of law challenge to a determination of the Employment Relations Authority
BETWEEN	THE CHIEF OF DEFENCE FORCE Plaintiff
AND	FIONA ROSS-TAYLOR Defendant

Hearing: 15 and 16 October 2009
Submissions of the plaintiff filed on 17 November 2009
Submissions of the defendant filed on 4 November 2009
Further submissions of the defendant filed on 2 December 2009
(Heard at Auckland)

Appearances: Joanna Holden and Nigel Lucie-Smith, counsel for plaintiff
Penny Swarbrick and Karen Jones, counsel for defendant

Judgment: 10 March 2010

JUDGMENT OF JUDGE B S TRAVIS

---

[1] The plaintiff has challenged a determination of the Employment Relations Authority (AA20/09) which found that the defendant was an employee and not an independent contractor. There is no challenge to the remedies awarded by the Authority, the fate of which will be determined by this challenge as to the defendant's status.

[2] There is no issue between the parties that the challenge was governed by s 6 of the Employment Relations Act 2000 ("the Act") the relevant portion of which reads:

> **6 Meaning of employee**
> (1) In this Act, unless the context otherwise requires, **employee**—

(a) means any person of any age employed by an employer to do any work for hire or reward under a contract of service; and

(b) includes—

(i) a homeworker; or

(ii) a person intending to work; but

(c) excludes a volunteer who—

(i) does not expect to be rewarded for work to be performed as a volunteer; and

(ii) receives no reward for work performed as a volunteer.

(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.

…

[3] Counsel both cited the leading case on this section, *Bryson v Three Foot Six (No 2)*[1]. The recent Employment Court case of *Singh v Eric James and Associates Ltd*[2] confirms that the enquiry in each case is intensely factual and sets out the following principles identified by the Supreme Court in *Bryson* which include:

- Section 6 defines an employee as a person employed by an employer to do any work for hire or reward under a contract of service, a definition which reflects the common law.

- The Authority or the Court, in deciding whether a person is employed under a contract of service, is to determine "the real nature of the relationship between them": s 6(2).

- The Authority or the Court must consider "all relevant matters" including any matters that indicate the intention of the persons: s 6(3)(a).

[1] [2005] ERNZ 372 (SC), [2005] NZSC 34, [2005] ERNZ 372
[2] [2010] NZEmpC 1

- The Authority or the Court is not to treat as a determining matter any statement by the persons that describes the nature of their relationship: s 6(3)(b).

- "All relevant matters" include 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.

- "All relevant matters" will also include divergences from, or supplementations of, those terms and conditions which are apparent in the way in which the relationship has operated in practice.

- "All relevant matters" include features of control and integration and whether the contracted person has been effectively working on his or her own account (the fundamental test).

- Until the Authority or the Court examines the terms and conditions of the contract and the way in which it actually operated in practice, it will not usually be possible to examine the relationship in the light of the control, integration and fundamental tests.

- Industry or sector practice, while not determinative of the question, is nevertheless a relevant factor.

- Common intention as to the nature of the relationship, if ascertainable, is a relevant factor.

- Taxation arrangements, both generally and in particular, are a relevant consideration but care must be taken to consider whether these may be a consequence of the contractual labelling of a person as an independent contractor.

Factual background

[4] The plaintiff operates at Devonport the New Zealand Defence Force ("NZDF") Navy Hospital ("Navy Hospital"). The Navy Hospital has approximately 25 beds and provides medical advice and assistance to military and non-military patients. The defendant is a civilian medical practitioner. She was first engaged by the Navy Hospital in 1996 when there were approximately 11 medical officers, eight of whom were military medical officers. The civilian and military medical officers worked identically but the military medical officers were employed by the NZDF and the civilian medical officers were taken on as independent contractors.

[5] At the time of her engagement on what she expected to be a short-term locum basis, the defendant had left her own private medical practice and was GST registered. There was no written contract at that stage but she was told by the then director of medical services, Surgeon Commander Kenny, to present invoices for payment as she would do in any other locum role. Her pay was based on a 1993 civilian medical officers pay scale and she was told how much to invoice. Initially she worked two sessions a week which produced about half her weekly income, with the balance coming from other locums and deployments.

[6] In 1998 Robin Hulford, who was then the general manager of the Navy Hospital, decided to formalise the relationship and gave the defendant a written draft agreement which the defendant read through very carefully. The defendant had a number of concerns and issues with that draft and in particular medico-legal difficulties in relation to liability issues. The defendant discussed the draft with a senior accountant and had a number of meetings with Mr Hulford. The NZDF agreed with a number of her suggested amendments and the medical consultancy agreement was signed on 4 September 1998.

[7] There is no dispute that the agreement she signed was a contract for services as an independent contractor. I find that the defendant, who was an experienced medical practitioner familiar with running her own private practice and operating as an independent locum, fully understood the nature of the document she was signing.

In later years the defendant acted as the negotiator of the terms of employment on behalf of herself and the other civilian doctors engaged at the Navy Hospital.

[8] The agreement was described as a "Medical Consultancy Agreement for the supply of medical services" and the defendant is named as the consultant "who is employed in the independent professional capacity by the Crown to carry out the Services and includes their executors, administrators, legal successors and permitted assigns".

[9] The agreement states, at cl 2.2, that the consultant was an independent contractor and that "nothing in this agreement shall be deemed to create an employment, joint venture, partnership or agency relationship between the Consultant and the Crown". The defendant acknowledged in the agreement that she was deemed to be fully informed as to her requirements under the agreement. The defendant provided certain indemnities to the Crown and undertook to join and maintain at her cost membership of the Medical Protection Society or the Medical Defence Union (cl 17.1). She was required to meet her taxation liability and ACC levies. Either party was able to terminate the agreement on one month's notice and any matters in dispute not settled by negotiation or conciliation could be referred to arbitration. The defendant acknowledged entering into the agreement in reliance on her own knowledge and skill and not in reliance on the Crown. The agreement did not prevent the defendant having private patients and did not require the exclusive provision of her services.

[10] By the time the agreement was signed the defendant was performing a wider range of services than originally contemplated and had agreed to perform on call duties. Throughout the more than 10 years that the defendant worked at the Navy Hospital she invoiced her services on GST invoices and paid all her professional fees. She sought and obtained the ability to see private patients at the Navy Hospital and in particular private patients she attended to who required aviation medicals.

[11] On 3 June 2003 the defendant signed an "Independent Contractor Agreement" which contained the following clause:

2 INDEPENDENT CONTRACTOR

2.1 The relationship between Navy Hospital and the Provider is and shall be for all purposes an independent contractor relationship and neither this agreement nor anything contained herein or implied shall constitute any other relationship.

2.2 For the avoidance of doubt the parties acknowledge and agree that this agreement shall not operate as, or constitute, an offer or contract of employment either during its currency or on termination for whatever reason.

[12] The defendant signed a similar independent contractor agreement, containing an identical clause 2 in 2005 and again on 2 May 2007. There were a total of four written independent contracting agreements all with materially similar clauses. The 2007 contract was in force at the time the plaintiff gave the defendant notice in accordance with its written terms, bringing to an end the contractual arrangements.

[13] At the time each of the agreements were signed by the defendant it had followed negotiations and the opportunity for the defendant to obtain legal or accounting advice.

[14] The following are some of the relevant terms of the 2007 independent contractor agreement:

- Clause 4 permits assignment, transfer and sub-contracting of the benefits under the agreement providing the Navy Hospital's prior written consent was obtained; such consent could not be unreasonably withheld.

- Clause 6.4 allowed the defendant to change rostered sessions placing the responsibility on her to find a replacement from a Navy Hospital approved list of locums providers.

- Clauses 6.5 and 11.2 made the respondent responsible for maintaining at her cost relevant registration, practicing certificates and professional indemnity insurance.

- Clause 10 required the defendant to submit invoices for services performed and made her responsible for her own tax and ACC levies.

[15] The agreement did not require the defendant to provide services solely for the Navy Hospital. It gave the defendant the right to arrange a 'stand down' period for on call and rostered duties for a period mutually agreed between her and the other medical contractors. This did not require the Navy Hospital's consent.

[16] The agreement provided for a minimum number of hours to be worked, with on call hours to be separately agreed and for the defendant to provide 'cover' for the Navy Hospital in conjunction with other contracted service providers. Sessions could be mutually agreed.

[17] The agreement provided differing hourly rates of pay depending upon whether the defendant was undertaking seasonal work or on call or call out duties.

[18] In late 2006 or early 2007 the defendant and her husband had a discussion with their accountant who passed a comment to the effect that the defendant should perhaps be looking to form a company. The accountant then expressed concern that from a taxation point of view, because, by that stage, all her income was coming from one source, the defendant could be technically regarded by the Inland Revenue Department as not self employed.

[19] The defendant and another medical colleague at the Navy Hospital approached Jeanette Cahill, who was then the general manager, to discuss the possibility of having employment agreements rather than remaining independent contractors. The defendant's colleague was concerned about job security as there was a suggestion at the time that military doctors might displace the civilian doctors. The defendant's evidence was that this was not her motivation as she was the only female doctor and thought it was unlikely that she would be displaced. She had raised the question of status with Ms Cahill because of the taxation advice she had received from her accountant.

[20] Ms Cahill readily agreed to explore the issue and said that she would take advice from the NZDF's lawyer. After taking that advice Ms Cahill had advised them that there was nothing to prevent them taking the matter further and seeking to have their positions reviewed. Their positions were classified as military posts and, if the status of those roles was to change, they would be likely to be offered to military doctors. At that stage there was no one suitable to fill them from the military and the positions would then have to be advertised in the usual way as civilian staff positions. This appeared to carry the risk that they might not be successful applicants.

[21] The Employment Relations Authority in its determination found that after directly confronting the issue the defendant and her colleague did not pursue the matter further and therefore must be taken to have been content to remain as independent contractors. When that finding was put to the defendant by Ms Holden in cross-examination, the defendant said that she had no concern with that status and was not concerned about the contractual arrangements she had with the NZDF.

[22] Ms Cahill's evidence was that, while she preferred to keep their contractor status for flexibility and seamless cover, she was open to exploring a change in the arrangements. After passing her information to them Ms Cahill advised them to discuss the matter with their advisors and come back to her. Because they never mentioned it to her again she took this as a sign that they were happy with their agreements and their status as contractors. This did not surprise her as employed civilian doctor positions attracted lower remuneration and would be subject to more employer control over working hours, conditions and work content.

[23] The first time the defendant asserted that she might in fact be an employee and not a contractor came after a dispute had arisen about whether the defendant could continue to undertake certain services. In her solicitor's letter dated 14 December 2007 it was stated that the issue of employee or contractor "remains a potential issue for discussion and resolution". The response from the NZDF on the same day purported to terminate the independent contractor agreement with immediate effect and stated that if the intent had been to engage medical service providers in the Navy Hospital as employees they would have been engaged under

the NZDF "Civilian Staff employment agreements, as per the wide number of civil staff employees in the NZDF". By letter dated 11 February 2008 the defendant's solicitors advised the NZDF that they took the view that the arrangements were consistent with an employee/employer relationship, irrespective of the terminology within the contract, that they were within the jurisdiction of the Employment Relations Authority and mediation would be available to deal with the issues of termination.

Intention of the parties

[24] The Authority in its determination found that the parties had entered into multiple successive contractual documents the terms of which were negotiated by the defendant who took advice, as did the NZDF. It found that the defendant was not at a disadvantage in those discussions. It found that the parties had directly confronted the issue of employment status in 2007 but the defendant did not pursue the matter any further and therefore must be taken to have been content to remain an independent contractor. The Authority determined that the intention of the parties was that the defendant was an independent contractor. I entirely agree with those conclusions.

[25] It was to the advantage of both parties that their arrangement was one of a contract of services. This gave both parties the flexibility they desired. The independent contracting arrangements they entered into allowed the defendant, if she wished, the ability to delegate her services, to engage in other contracting arrangements and even to use the Navy Hospital for her private patients. That she did not take up these opportunities towards the end of the contractual arrangements was a matter entirely of her own election. It also gave her considerable taxation advantages. These included the deduction of a home office.

[26] The independent contracting arrangement was also important to the Navy Hospital. It was also important to the NZDF to be able to employ medically qualified military personnel who could then accompany naval vessels overseas. When such personnel became available the civilian medical personnel were to be let go. The defendant, and no doubt the other civilian medical personnel working at the

Navy Hospital, were aware throughout the contracting arrangements of this possibility.

[27] The parties reviewed this situation during the currency of the final independent contract and decided to take no steps to change their status. The plaintiff would have agreed to a change in the defendant's status, but the process of achieving this put the defendant at the risk of having to apply for her own position on less favourable terms.

[28] It was not until the events that led to the termination of her agreement that the defendant for the first time claimed that the real nature of the relationship between them was that of a contract of service. One is reminded of the opening paragraph of Lawton LJ's judgment in *Massey v Crown Life Insurance*[3], where he stated:

> In the administration of justice the union of fairness, common sense and the law is a highly desirable objective. If the law allows a man to claim that he is a self-employed person in order to obtain tax advantages for himself and then allows him to deny that he is a self-employed person so that he can claim compensation, then in my judgment the union between fairness, common sense and the law is strained almost to breaking point.

[29] A similar warning, also sourced from *Massey*, is to be found in the judgment of Sir Gordon Bisson J, in *Telecom South v Post Office Union*[4]:

> I am satisfied that the arrangement reached between the parties as to the manner of payment of remuneration in this case did not change the fundamental relationship of a contract of service. However, I think it is necessary to sound a word of warning to those who seek to introduce taxation advantages into the terms of their employment that they may have to abide by the consequence that they be classed as self-employed and not as a worker for the purposes of s 216(2) of the Labour Relations Act 1987. In *Massey v Crown Life Insurance Co* [1978] 2 All ER 576 Lord Denning MR said at p 581:

[3] [1978] 2 All ER 576 at 581
[4] [1992] 1 ERNZ 711 at 725

> In the present case there is a perfectly genuine agreement entered into at the instance of Mr Massey on the footing that he is "self-employed". He gets the benefit of it by avoiding tax deductions and getting his pension contributions returned. I do not see that he can come along afterwards and say it is something else in order to claim that he has been unfairly dismissed. Having made his bed as being "self-employed", he must lie on it. He is not under a contract of service.

[30] It is a very serious matter for the Authority or the Court to find, notwithstanding the clear intention of highly capable and knowledgeable persons who have equal contracting strength and sound reasons for the arrangements they have mutually entered into, that, after those arrangements have been terminated, the real nature of their relationship was completely different. That is what the Authority found in this case on the basis of the skilful legal submissions made on behalf of the defendant. I too had the benefit of these submissions.

[31] Ms Swarbrick, recognising that the intention of the parties as expressed in their written agreements and in their understanding that this was an independent contractor arrangement argued that, notwithstanding the intention of the parties, the Court is free and ought properly to consider a range of evidence when determining employment status. She submitted that even where the parties intended to enter into a contract for services, the Court may disregard that intention if it finds the real nature of the relationship is one of employment. The only authority she cited was that of another determination of the Employment Relations Authority.

[32] Ms Swarbrick submitted that in the present case the Court should find that, even though the parties had labelled their relationship as one of principal and contractor, the real nature of the relationship was that of employer and employee. She cited *Koia v Carlyon Holdings Ltd* [5] and *Bryson* as authority for the proposition that in addition to considering the intention of the parties the real nature of the relationship can be ascertained by applying the control, integration and fundamental tests to determine whether a person is performing the services on their own account. Industry practice may also be relevant. She submitted that none of the tests were decisive in its own right and each needs to be considered.

---

[5] [2001] ERNZ 585

Control

[33] In the past, the degree of control the principal has over the other party has been an important indicator of the true nature of the relationship and has been regarded as being of vital importance: *Performing Right Society Ltd v Mitchell & Booker Palais de Danse Ltd*[6]. The test depends upon whether the alleged employer had the right to control the person alleged to be the employee. Ms Holden correctly submitted that the control test has been diminished by the Court of Appeal's decision in *Cunningham v TNT Express Worldwide (NZ) Ltd*[7]. Ms Swarbrick submitted that because the defendant was governed by set rosters for days and hours of work she was subject to control by the plaintiff.

[34] I prefer and adopt the submissions of Ms Holden. The evidence establishes that the Navy Hospital did not supervise the performance of the defendant's duties and instead she was accountable to the Medical Council of New Zealand and to her patients. She was free to work the hours she chose. She participated in a work roster that was worked out between herself and the other rostered doctors who were also on similar contracts. Her invoices reflected the hours she worked. She was also able to decline to do certain work that did not suit her. Although she was contracted to do medical advisory services and participate in quality assurance activities, her professional body had requirements regarding ongoing training and these were not directly under the control of the plaintiff.

[35] The defendant was not under any close control of the Navy Hospital staff as to the performance of her work or the hours involved. Her duties could have been performed by an independent medical consultant or, equally, by a medical officer employee of the NZDF. The control test does not favour the defendant.

---

[6] [1924] 1 KB 762
[7] [1993] 1 ERNZ 695

Integration test

[36] Lord Denning posed the integration test in *Stevenson, Jordon & Harrison v McDonnell & Evans*[8] as follows:

> … under a contract of service, a man is employed as part of the business, and his work is done as an integral part of the business; whereas, under a contract for services, his work, although done for the business, is not integrated into it but is only accessory to it.

[37] Ms Swarbrick correctly submitted that in *Challenge Realty Ltd v Commissioner of Inland Revenue*[9] the Court of Appeal intermingled this test with the 'economic reality' test. This was to determine whether the worker was genuinely in business on his or her own account or whether he or she was 'part and parcel of' or integrated into the enterprise of the person for whom the work is performed. Ms Swarbrick submitted that the defendant was an integral part of and integrated into the defendant's organisation.

[38] Ms Holden submitted that because the Navy Hospital is within the Naval base, which is a military base, a security clearance and identification is needed before entry, regardless of the person's employment status. A service number was also necessary in order to access the computer system. These were operational necessities but she submitted the defendant was not integrated into the work of the Navy or the NZDF generally. Ms Holden submitted the defendant performed services for the Navy Hospital on an independent basis and submitted invoices. The defendant also had the freedom of movement which has been referred to before.

[39] The integration test is of little assistance in the present case. The work carried out by the defendant at the Navy Hospital, as her 10 years of service indicates, could be performed equally well by a contractor or an employee. The defendant's services were essential to the proper running of the Navy Hospital and she did have some involvement in its administration, for medical purposes. She was

[8] [1952] 1 TLR 101 (CA)
[9] [1990] 3 NZLR 42 (CA)

not, however, integral to the NZDF's organisation of the Naval Hospital. This test also does not favour the defendant.

Fundamental test

[40] This test has been variously described as either the 'fundamental test', 'the economic reality test', or the test of whether the person was in business on his or her own account.

[41] The defendant was registered for GST and issued invoices under her letterhead. The evidence established that the defendant had discussed and negotiated for a rise in her fees. Although the evidence suggests that from 1999 the defendant did not work for any other employer, she was free to do so and could use the Navy hospital for her own patients. She also had the ability to alter her work hours. She could increase the number of hours worked and thereby increase her income. She could arrange for other persons to act in her stead. She engaged the services of an accountant and claimed various tax deductions. Her tax returns show these included expenses for a home office, motor vehicle, telephone subscriptions and professional fees. She was free to engage in other paid employment if she wished to and she initially did. From this evidence I conclude that, although by the time the arrangements came to an end she was working only for the NZDF, this was her own choice and she was free to pursue work for other medical practices or have her own private patients. I find that throughout the arrangements she was working on her own account.

Conclusion

[42] The contractual arrangements entered into between the plaintiff and the defendant were between contracting parties of equal status. It is clear that the services performed by the defendant for the Navy Hospital could have been performed under a contract of service or a contract for services.

[43] However the flexibility of the agreement gave to the parties and the right to engage in other activities without restriction were of considerable value to the

defendant. The plaintiff also had good reason to offer an independent contracting arrangement and there was no compulsion on the defendant to accept it. Indeed had the defendant wished to pursue a contract of service the plaintiff would have acceded to this course but with some attendant risks to the defendant of financial and professional disadvantages and a lack of flexibility. I find that the common law tests do not undermine the intention of the parties as evidenced by their freely negotiated contractual arrangements on four separate occasions. The common law tests support this common intention and provide a check for what was clearly agreed to be an independent contracting arrangement.

[44] The plaintiff's challenge succeeds and the finding of the Authority is set aside. The employment status between the plaintiff and the defendant was a contract for services which does not fall within the jurisdiction of either the Authority or the Court under the Employment Relations Act. Leave is reserved if there is a need to make any other orders consequent upon this conclusion.

[45] Costs are reserved and if they cannot be agreed will be the subject of an exchange of memoranda, the first of which is to be filed and served within 30 days of this judgment. The memorandum in reply is to be filed and served within a further 30 days.

B S Travis
Judge

Judgment signed at 4.50pm on 10 March 2010