

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2014] NZERA Auckland 111  
5389182

BETWEEN KATHERINE PRYCE-JONES  
Applicant

AND WENDELIEN BOMER  
First Respondent

ROTHESAY BAY  
PHYSIOTHERAPY (2000)  
LIMITED  
Second Respondent

ROTHESAY BAY  
PHYSIOTHERAPY LIMITED  
Third Respondent

Member of Authority: R A Monaghan

Representatives: H White, counsel for applicant  
P Wicks, counsel for respondents

Investigation meeting: 22 January 2014

Determination 26 March 2014

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**DETERMINATION OF THE AUTHORITY**

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**A. Katherine Pryce-Jones was in an employment relationship with Rothesay Bay Physiotherapy 2000 Limited.**

**Employment relationship problem**

[1] In a determination dated 7 January 2013<sup>1</sup> (the 7 January determination) I addressed:

- whether Katherine Pryce-Jones was in an employment relationship or whether she was an independent contractor; and

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<sup>1</sup> *Katherine Pryce-Jones v Wendelien Bommer & Anor* [2013] NZERA Auckland 7

- if Mrs Pryce-Jones was an employee, who was her employer.

[2] I found there was an employment relationship. In a memorandum dated 20 January 2013 Ms White's instructing solicitor drew to my attention that the intituling on the determination identified the second respondent as Rothesay Bay Physiotherapy (2000) Limited (RBPL2000), while the body of the determination recorded findings in respect of Rothesay Bay Physiotherapy Limited (RBPL). The first respondent, Wendelien Bomer is the director and shareholder of both companies.

#### 1. Investigation to be reopened

[3] The difficulty raised by the memorandum concerned questions of substance, in particular which of the two companies was or should have been identified as the employer. Following a teleconference with counsel, by Minute dated 1 February 2013 I ordered that the investigation be reopened.

[4] That the reopened investigation would concern which of the three respondents - rather than which of the two named companies - was the employer was confirmed in a teleconference on 26 November 2013. Accordingly this determination addresses the identity of the employer.

#### 2. Addition of party

[5] In the interests of effecting a fair and efficient resolution of this employment relationship problem, I also order that RBPL be added as third respondent in this investigation.

### **Background**

[6] Mrs Pryce-Jones was a physiotherapist in the United Kingdom, and sought to emigrate with her family to New Zealand. As discussed in the 7 January determination she came into contact with Wendelien Bomer, who operated a physiotherapy practice in Rothesay Bay Auckland. The two women explored entering into a commercial transaction, but to secure an appropriate visa Mrs Pryce-Jones and her family were obliged to meet immigration requirements. When

discussion turned to that matter, Mrs Pryce-Jones entered into an arrangement which I have found was an employment agreement.

[7] Regarding the identity of the employer party to the agreement I found reliable the evidence of Malcolm Mackinlay, the principal of the firm of accountants who advised and acted for the respondents in relevant matters. At the reopened investigation Mr Mackinlay produced a series of recent financial reports for RBPL and RBPL2000 which supported what he said about the structure and purpose of the companies.

[8] My findings draw on that evidence.

## 1. RBPL

[9] RBPL was registered under the Companies Act 1955 on 19 October 1988, and was re-registered under the Companies Act 1993 on 1 July 1997.

[10] Ms Bomer operated a physiotherapy practice through RBPL until April 2000, trading under the name Rothesay Bay Physiotherapy. RBPL also owned the building which housed the practice on the ground floor, as well as residential accommodation on the first floor.

[11] On the advice of its accountants RBPL's activities were restructured and a new company, RBPL2000, was registered to operate the physiotherapy practice. There were genuine reasons for establishing that structure.

[12] RBPL remained registered as a company for the sole activity of continuing as the owner of the building.

[13] Ms Bomer and her partner lived in the residential accommodation. Although there was no written lease agreement, the arrangement was reflected in the parties' accounts. The arrangement was genuine, and I do not find it assists in determining the identity of the employer.

## 2. RBPL2000

[14] RBPL2000 was registered on 17 March 2000.

[15] RBPL2000 took over the operation of the physiotherapy practice on or about 1 April 2000. It: received sales income from the practice; paid rent to RBPL for the area of the premises occupied by the practice<sup>2</sup>; paid contractors engaged by the practice; treated Ms Bomer as a shareholder employee, paying a shareholder's salary to her as well as making associated ACC payments; met other expenses of the kind commonly associated with the operation of a small business; and paid Mrs Pryce-Jones.

### 3. Ms Bomer

[16] Ms Bomer was still the leader of the physiotherapy practice in 2008, being approximately the time of her initial discussions with Mrs Pryce-Jones. Her role was continuing at the time of Mrs Pryce-Jones' engagement several months later, and Ms Bomer was the person with whom Mrs Pryce-Jones negotiated. In saying Ms Bomer was the employer in her personal capacity Mrs Pryce-Jones continues to rely on those facts, together with: the written employment agreement and immigration documents discussed in the 7 January determination; and the absence of any mention of the existence of RBPL2000.

### **The identity of the employer**

[17] Ms White submitted that:

- (i) Ms Bomer was the employer; or
- (ii) all three respondents jointly were the employer, or
- (iii) as the director of both of the other two respondents, Ms Bomer is personally liable to Mrs Pryce-Jones.

[18] Mr Wicks submitted that RBPL2000 was the contracting party, without conceding on behalf of the respondents that there was an employment relationship with any of them.

[19] For convenience here I use the term 'employer' when discussing the submissions.

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<sup>2</sup> In that rent was not always paid regularly or in full, the liability was at least recognised in both companies' accounts.

## 1. Was Ms Bomer the employer

[20] I am assisted by the judgment of the Employment Court in *Colosimo & Anor v Parker*.<sup>3</sup> The question there was whether Mr Colosimo or a company associated with him was the employer. The Court said the issue was whether Mr Colosimo ever held himself out to be Mr Parker's employer, and if so the circumstances which would entitle the Court to conclude he personally entered into binding legal relations with Mr Parker. The court also noted that, while it is desirable that the true identity of the employer be made known to the employee at the outset, that does not always occur.

[21] Here the absence of any statement that a particular company was to be the employer, rather than Ms Bomer in her personal capacity, is not determinative.

[22] It is unhelpful to Ms Bomer's position that the employment agreement cited her as the employer party to the relationship. Even so, she purported to execute the agreement on behalf of RBPL and she is not identified as the employer party in her personal capacity anywhere else. Although confusing for Mrs Pryce-Jones, the reference to a company should not have been entirely surprising since the parties' discussions had commenced in the context of a possible commercial transaction involving potentially significant assets.

[23] I also take into account that throughout their association the parties typically referred to 'Rothesay Bay Physiotherapy'. Even the documents presented for immigration purposes (except the employment agreement) referred to the employer as 'Rothesay Bay Physiotherapy,' and there were other general references to the physiotherapy practice.

[24] Beyond the citation in the employment agreement, there was nothing to indicate Ms Bomer held herself out to be Mrs Pryce-Jones' employer. In fact, the physiotherapy practice had been operated through RBPL2000 for at least 8 years and even had other staff members contracted to it. It is inherently unlikely that Ms Bomer would seek to bind herself in her personal capacity when Mrs Pryce-Jones was also to work as a physiotherapist in the practice.

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<sup>3</sup> AC 68/06, 6 December 2006

[25] While the lack of precision was unwise, it does not mean Ms Bomer was the employer. I find accordingly.

## 2. Were the three respondents jointly the employer

[26] The parties cited in submissions judgments of the Employment Court in *Orakei Group (2007) Limited v Doherty*,<sup>4</sup> and *Hutton & Ors v Provenco Cadmus Limited (in rec) & Anor.*<sup>5</sup> Both of those cases raised a question of whether the employee concerned was employed by more than one of the respondent companies jointly<sup>6</sup>. The court said:

- the onus is on the employee to establish the identity of the employer on the balance of probabilities;
- whether there are joint employers requires objective consideration;
- there must be a sufficient degree of relationship between the joint employers, and will depend on the details of the relationship; and
- common control is usually an element of such a relationship.

[27] I do not accept that Ms Bomer was the employer either on her own account or jointly. Moreover there was no evidence that she conducted any business activity on her own account, rather than through either of the companies. I therefore address whether PBPL and RBPL2000 were joint employers of Mrs Pryce-Jones. The task is to consider the information available, and decide on an objective basis whether that information means it is probable that the companies were joint employers of Mrs Pryce-Jones.

[28] That Ms Bomer was the director and shareholder of both RBPL and RBPL2000 is relevant but not determinative. However the factors I consider most persuasive is the clearly defined separation in 2000 of the activities of RBPL and RBPL2000, and the subsequent consistently maintained separation of those activities. There are no grounds for finding that the two companies employed Mrs Pryce-Jones jointly.

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<sup>4</sup> WC 12A/08, 15 August 2008

<sup>5</sup> [2012] NZEmpC 207

<sup>6</sup> That there could in law be joint employers was acknowledged

### 3. Is Ms Bomer liable as director

[29] Ms Bomer's liability - other than as the employer in her personal capacity - is outside the scope of the reopened investigation. I do not determine it here.

[30] In any event, no breaches for which Ms Bomer could arguably be held liable as director have yet been identified. Further, consideration of Ms Bomer's liability as director may be more appropriate in the context of any future enforcement proceedings.

### 4. Is RBPL2000 the employer

[31] For the reasons discussed above, I find RBPL2000 was the employer.

### **Next steps**

[32] Whether Mrs Pryce-Jones was unjustifiably and constructively dismissed – and whether she is owed wages, holiday pay, and sick pay – are yet to be investigated.

[33] In the light of indications from counsel, including but not limited to the prospect of further mediation, the investigation in the Authority of Mrs Pryce-Jones' substantive claims is adjourned. If or when the parties wish the Authority to resume an investigation, they should advise it accordingly.

### **Costs**

[34] Costs are reserved.

[35] I propose now to resolve the matter of costs in respect of the overall investigation in the Authority to date. Accordingly if a determination on costs is sought there shall be 28 days from the date of this determination in which to file and serve memoranda on the matter. I invite counsel to agree on a suitable timetable to accommodate that timeframe, and to advise the Authority of it.

R A Monaghan

Member of the Employment Relations Authority