Employment Court of New Zealand

Rothesay Bay Phusiotherapy (2000) Limited v Pryce-Jones [2015] NZEmpC 224 (16 December 2015)

Last Updated: 18 December 2015

IN THE EMPLOYMENT COURT AUCKLAND

[2015] NZEmpC 224

ARC 29/14

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	ROTHESAY BAY PHYSIOTHERAPY (2000) LIMITED Plaintiff
AND	KATHERINE PRYCE-JONES Defendant

ARC 30/14

IN THE MATTER OF a challenge to a determination of the

Employment Relations Authority

AND BETWEEN KATHERINE PRYCE-JONES Plaintiff

AND WENDELIEN BOMER First Defendant

AND ROTHESAY BAY PHYSIOTHERAPY (2000) LIMITED

Second Defendant

AND ROTHESAY BAY PHYSIOTHERAPY LIMITED

Third Defendant

Hearing:	21-22 September 2015 (Heard at Auckland)
Appearances:	P Wicks QC, counsel for plaintiff (in ARC 29/14) and defendants (in ARC 30/14) H White and A Parlane, counsel for Katherine Pryce-Jones
Judgment:	16 December 2015

JUDGMENT OF JUDGE CHRISTINA INGLIS

ROTHESAY BAY PHYSIOTHERAPY (2000) LIMITED v KATHERINE PRYCE -JONES NZEmpC AUCKLAND [2015] NZEmpC 224 [16 December 2015]

Introduction

[1] Ms Bomer operated a physiotherapy practice in Rothesay Bay, Auckland. She is the sole director and shareholder of two companies: Rothesay Bay Physiotherapy (2000) Limited (RBPL 2000) and Rothesay Bay Physiotherapy Limited (RBPL). RBPL 2000 has operated under the trading name Rothesay Bay Physiotherapy (RBP) since it was incorporated.

[2] Ms Pryce-Jones is a physiotherapist, originally from the United Kingdom. She wished to emigrate to New Zealand with her family. She responded to an advertisement for a physiotherapist with RBP.

[3] While various discussions are in dispute, it appears to be common ground that both Ms Bomer and Ms Pryce-Jones discussed the possibility that, if the latter was engaged with the practice, she would likely be given the opportunity to acquire the physiotherapy business, which comprised both the business and the property which it operated from, at some later date. This was an opportunity that she was interested in.

[4] In order to work in New Zealand, Ms Pryce-Jones needed to obtain a visa. This required her to establish that she had an offer of work. An independent contractor agreement was initially prepared and signed (at least by Ms Bomer) and was forwarded to Immigration New Zealand in support of Ms Pryce-Jones' application for a work visa. Immigration New Zealand advised that an offer of employment was required. An employment agreement was subsequently provided. Shortly after that, Ms Pryce-Jones secured a work visa and travelled to Auckland with her family, commencing work as a physiotherapist at RBP on 22 July 2009.

[5] The relationship took a turn for the worse some time later and Ms Pryce- Jones stopped work at the practice around February 2012. Ms Bomer took steps to recover an alleged overpayment of fees. The matter found its way into the Disputes Tribunal. Issues were raised in that forum as to Ms Pryce-Jones' status. She later filed a personal grievance in the Employment Relations Authority (the Authority)

claiming unjustified dismissal and wage arrears. Ms Bomer was originally cited as sole respondent. RPBL was later added. The grievance was opposed on the basis that Ms Pryce-Jones had not been in an employment relationship and rather had been engaged on a contract for services. The Authority found that she had been an

employee, that RPBL was the employer and that Ms Bomer was not.1 The Authority

member later reopened the investigation and concluded that RBPL 2000 was the sole employer.2

[6] RBPL 2000 challenges the Authority's determination. It contends that Ms Pryce-Jones was not an employee and was not in an employment relationship with it. It says that the employment agreement was simply a mechanism by which to meet the requirements imposed by Immigration New Zealand, that Ms Pryce-Jones was well aware of this and that she knew from the outset that she was to be engaged as an independent contractor. This, it is said, is reflected in the fact that she signed an independent contractor agreement, apparently on her first day of work, in accordance with the earlier agreement which had been provided to Immigration New Zealand and which (it says) indicates the real nature of the relationship. Finally, it is submitted that if Ms Pryce-Jones was an employee, which is denied, she was employed solely by RBPL (2000).

[7] Ms Pryce-Jones claims that Ms Bomer, RBPL 2000 and RBPL3 "acted in concert and as her employer". Orders are sought that each was her employer during her time at RBP and that Ms Bomer and RBPL are liable. Liability is said to arise because of their status as joint employer but also because of representations that were said to have been made to Ms Pryce-Jones.

[8] Both challenges were pursued on a de novo basis.

The company structure

[9] I deal with the company structure in more detail at this point as it provides useful contextual background.

1 *Pryce-Jones v Bomer* [2013] NZERA Auckland 7.

2 *Pryce-Jones v Bomer* [2014] NZERA Auckland 111.

3 For ease of reference referred to as "the plaintiffs" in this judgment.

[10] RBPL was incorporated under the Companies Act 1955 on 19 October 1988. RBPL 2000 was incorporated on 17 March 2000. Prior to 1 April 2000 the physiotherapy practice operated through RBPL, trading under the name Rothesay Bay Physiotherapy. RBPL 2000 was formed as a separate trading entity to operate the physiotherapy practice. Following the incorporation of RBPL 2000, RBPL became an investment company holding ownership of a commercial building in Rothesay Bay. The RBP practice operated from these premises (the Rothesay Bay premises/the premises). From 2000 the RBP practice operated through RBPL 2000. RBPL has not been involved as a trading entity of the practice since the incorporation of RBPL 2000. The RBP practice ceased operating in May 2012.

Analysis

[11] There are two distinct issues that arise for determination – whether Ms Pryce- Jones was an employee and, if so, who was the employer?

[12] Ms Pryce-Jones does not fall within any of the statutory exceptions to "employee" set out in s 6 of the Employment Relations Act 2000 (the Act). Accordingly consideration must be given to "the real nature of the relationship". 4 In determining the real nature of the relationship, regard must be had to all relevant matters that indicate the intention of the parties. It is important to have regard to the

way in which the relationship operated in practice. This, in turn, requires an assessment of the whole of the factual matrix. As the Supreme Court observed in *Bryson v Three Foot Six Ltd (No 2)*:5

It is important that the Court or the Authority should consider the way in which the 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 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 at common law. It is not until the Court or 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 light of the control, integration and fundamental tests.

4 Employment Relations Act 2000, s 6(2).

5 *Bryson v Three Foot Six Ltd (No 2)* [2005] NZSC 34, [2005] ERNZ 372 at [32].

[13] The real nature of the relationship is determined, on a de novo challenge, having regard to the evidence before the Court. I turn to consider the relevant indicia that emerged from the evidence in the present case.

[14] There are three written agreements before the Court from which the parties' intention might be discerned. The first in time is an independent contractor agreement. This is the agreement which was forwarded to Immigration New Zealand in support of Ms Pryce-Jones' work visa application. Ms Bomer signed it on 18 June 2008. It is more likely than not that it was forwarded to Ms Pryce-Jones for signing at around this time, although she gave evidence that she could not recall seeing or signing this document at any stage (she accepts, however, that her signature appears on it). This is a point I return to later. However, what is clear is that the independent contractor agreement followed discussions between Ms Pryce-Jones and Ms Bomer about her interest in the role at RBP and an offer that was made to her. Ms Bomer gave evidence before the Court that the discussions, and subsequent agreement, were directed at a contractor position. That evidence tends to be supported by the nature of the agreement that was initially prepared and provided in support of Ms Pryce-Jones' visa application.

[15] As I have said, Immigration New Zealand advised that an employment agreement was required to progress Ms Pryce-Jones' application for a work visa. An employment agreement followed. That agreement was signed by Ms Bomer on 23

June 2008 and Ms Pryce-Jones on 21 July 2008. It was sent to Immigration New

Zealand prior to Ms Pryce-Jones' work visa being approved.

[16] Taken on its face, the employment agreement indicates an intention that the parties would enter into an employment relationship as at mid 2008. Schedule One of the agreement set out the job position (as staff physiotherapist), that Ms Pryce- Jones would report to Ms Bomer and would carry out her duties at the RBP premises. Her hourly rate was to be $60, with usual hours of work of between 30 to

40 hours, with additional hours to be "on contract base at 50% in view of the

demands of patient load of the practice."

[17] The third document was in dispute. It is more likely than not that it is the independent contractor agreement that had initially been prepared prior to the employment agreement, and that it was revitalised once Ms Pryce-Jones arrived in New Zealand, consistently with the earlier discussions between Ms Bomer and Ms Pryce-Jones. It is in the same format as the first agreement and is signed and dated under Ms Bomer's hand on 18 June 2008. The plaintiffs say that this agreement was signed by Ms Pryce-Jones on the first day of work and reflects the true intention of the parties, namely that she was to be engaged on an independent contractor basis. As I have said, Ms Pryce-Jones says that she has no recollection of signing the document. She also suggests that it is not a comprehensive document in any event.

[18] Although Ms Pryce-Jones gave evidence that she could not recall signing the document, she accepted that her signature appears next to the words: "Signed by the Contractor". Ms Pryce-Jones' handwriting also appears in three other places. The parties are referred to on the first page, as Ms Bomer ("the Principal") and Ms Pryce- Jones (as "the Contractor"). Under the reference to Ms Bomer, Ms Pryce-Jones has written: "Rothesay Bay Physiotherapy".

[19] Clause 2.1 of the independent contractor agreement (which relates to the term of the agreement) states that it shall be from 22 July 2009. The date is handwritten. Ms Pryce-Jones was adamant that she had not inserted the "9" in the reference to the year. She did however accept that she had written 22 July. This is significant because she started work on 22 July 2009. As she accepted in cross-examination, the start date was not known until shortly beforehand, and certainly not in 2008 when the agreement had been provided to, and rejected by, Immigration New Zealand. This supports the view that the independent contractor agreement was finalised on

22 July 2009, her first day with the practice.

[20] The third place in the independent contractor agreement where Ms Pryce- Jones' handwriting appears is at Schedule One. As she pointed out, Schedule One has a typed reference to "Employee" on the top left hand corner of it. She also noted that the document did not appear to have been stapled. I took her to be suggesting that this page did not 'fit' with the rest of the document, and that the lack of fit supported her suggestion that the document was not comprehensive and had been

interfered with. I am not satisfied that it was an incomplete document as Ms Pryce- Jones suggested. While it is true that a copy of an

independent contractor agreement for a locum physiotherapist which was before the Court did not include such a schedule, I do not consider that this materially advances matters. The original independent contractor document for Ms Pryce-Jones which had been forwarded to Immigration New Zealand contained a schedule in precisely the same form as the document she signed.

[21] There is a handwritten notation, which Ms Pryce-Jones accepts is hers, under hourly rate and usual hours of work in Schedule One. The original notation (which is in Ms Bomer's writing) was "50% of all fees". Ms Pryce-Jones' notation is: "52%: **updated 22/7/09** Retainer $1000 per week". Ms Pryce-Jones' initials appear beside the notation.

[22] Finally, it appears from a perusal of the original independent contractor agreement that the same coloured ink appears on each page containing Ms Pryce- Jones' handwriting, namely page one, under "Parties" and "Term"; Schedule One, under "Remuneration"; page seven, where her signature appears next to the words: "Signed by the Contractor" and page 14, where she has written "minimum 30 hrs p/w".

[23] Ms Pryce-Jones gave evidence that she believed as at 22 July 2009 that she was employed under the 2008 employment agreement. It is difficult to reconcile this with the fact that, even on her evidence, she made handwritten amendments to a document clearly entitled "Independent Contractors Agreement" on that day. She said that she did not notice the title of the document, although it is written in large bold font and capital letters. As Ms Pryce-Jones accepted, she had written "physiotherapist" directly underneath her name on the first page, which itself was directly underneath the title of the agreement and in very close proximity to the words "Independent Contractors" and "the Contractor". Further, a cursory comparison of the employment agreement and the independent contractor documents reflects that they are very different in terms of content, format and layout.

[24] I appreciate that there was a lot going on in Ms Pryce-Jones' life on 22 July

2009, that she had not been an employee before and that she was not well versed in New Zealand law. She emphasised a number of times in evidence that it was of particular importance to her that she was in an employment relationship, including because of the security that this would afford her in coming to New Zealand with her family. There was however an understanding that Ms Pryce-Jones may well take over the practice at a later date, which was an option she was keen to pursue. She had had her own business for many years. The distinction between an independent contractor agreement and an employment agreement must have been clear, as Immigration New Zealand had refused to accept the former but had accepted the latter. Ms Pryce-Jones knew that and she is plainly an intelligent person. She also accepted in cross-examination that she worked as a contractor in the United Kingdom and that she understood the notion of being a contractor as opposed to being an employee, although she later resiled somewhat from this concession. I was not drawn to Ms Pryce-Jones' evidence that if she had received the independent contractor agreement, which she said she could not recall, she would have paid it little attention and even if she had noticed that it referred to a contractor relationship (rather than an employment relationship) she would probably not have known the difference.

[25] An email chain of correspondence between Ms Bomer and Ms Pryce-Jones shortly before she commenced work is also revealing. On 21 April 2009 Ms Pryce- Jones emailed Ms Bomer. The email stated:6

We probably need to go over the terms of my employment again at this stage so that we are both clear as to hours you need covering, pay, freq of pay, holidays etc. It was such a long time ago and then so in the air ! *I know for the purpose of fulfilling my conditions of immigration I need to be employed by yourself.*

[26] Ms Bomer responded the same day. Her email stated that:7

The physios here are on contract. This means how many patients you do that is how much you will earn. This is the fairest way in private practice because some weeks is more. It will be a big step. but with the recession this country maybe easier to survive the depression as in Europe.

6 Emphasis added.

7 Emphasis added.

[27] It was suggested that the reference to other physiotherapists being on contract was vague and that it was not clearly directed at Ms Pryce-Jones' position. I do not accept that it can sensibly be read in this way. Ms Bomer was making it plain, in response to Ms Pryce-Jones' query, that she would be on contract and that the amount of money Ms Pryce-Jones would earn would depend on how many patients she took on. Mr Wicks questioned Ms Pryce-Jones as to the way in which the final sentence of her email (as quoted above) was drafted:

Q. Well you make great effort to make the statements that you know for the purpose of fulfilling my conditions of immigration I need to be employed by yourself. If you were certain that that's what was going to happen, I suggest that was not a sentence or a statement that you even needed to contemplate making.

A. I felt that I needed – I don't recall writing this email as in it was a very long time ago. The purpose of this email was to actually find out, because it was working at 30 hours, I wanted to know how the clinic was running, whether I was going to be having to do more hours than that. I don't read anything else into this email other than that.

Q. You could have simply said that and nothing more couldn't you?

A. I guess I could have written anything.

[28] It is also revealing that Ms Bomer's reply did not include any of the detail (as to the usual trappings of employment) that Ms Pryce-

Jones had sought, and nor did Ms Bomer confirm an employment relationship. Quite the contrary. Nor did Ms Pryce-Jones take any further steps to seek clarification as to holidays and sick leave prior to commencing work (as she accepted in cross-examination). Nor, as Ms Pryce-Jones accepted, were there any further talks between herself and Ms Bomer about the basis for her engagement following the above email exchange prior to her arrival at the practice on 22 July, some three months later.

[29] I have concluded that it is more likely than not that the independent contractor agreement was discussed between Ms Bomer and Ms Pryce-Jones and that Ms Pryce-Jones signed it on 22 July 2009, after having made the handwritten notations to it on points that had emerged from their discussion. The document is clearly one directed at recording an independent contractor relationship. It post- dates the signed employment agreement. On its face the document suggests that the

parties' intention as at 22 July 2009 (if not before) was that Ms Pryce-Jones was to be a contractor, not an employee.

[30] There was a suggestion that Ms Pryce-Jones had effectively been forced to accept reduced terms of engagement when she commenced work at the practice. It is convenient to record at this point that I am not satisfied, based on the evidence put before the Court, that this was so. The handwritten notations to Schedule One reflect that the terms of engagement recorded in the original independent contractor agreement were discussed and that there was a two per cent increase in the amount of all fees negotiated on 22 July 2009 (noted as being "updated" on this date), with a minimum of 30 hours work per week (rather than what had previously been described as negotiable hours).

[31] There was evidence before the Court that physiotherapists were never engaged as employees by the practice – rather physiotherapists were always engaged on an independent contractor basis. Ms Bomer's evidence in this regard was supported by the terms of her email of 21 April 2009 (which I have already referred to). It is also supported by the evidence of Mr Mackinlay (who provided accountancy services to the companies) and Ms Stone (the receptionist who worked for the practice for a number of years and was very familiar with its operations). It seems to me to be inherently unlikely that Ms Bomer would depart from her usual approach in Ms Pryce-Jones' case, even though physiotherapists were in short supply in New Zealand at the relevant time.

[32] Ms Bomer was cross-examined on documents filed in the Authority which suggested that the intention had been to convert Ms Pryce-Jones' status from employee to contractor after six months, when issues relating to her visa were no longer engaged. As will be apparent, Ms Bomer's evidence in the Court was to different effect. It is clear that Ms Bomer was keen to secure Ms Pryce-Jones' services promptly, as reflected in communications with Immigration New Zealand. Having weighed the evidence, including the sequencing and nature of the documentation I have already referred to, I consider it more likely than not that Ms Bomer considered that the way to secure Ms Pryce-Jones' services and to overcome Immigration New Zealand's issues with the contractor agreement, was to provide an

employment agreement for the sole purpose of advancing Ms Pryce-Jones' visa application. Ms Bomer unreservedly accepted in evidence before the Court that this was "wrong". Plainly it was. This was compounded when a further letter was forwarded to Immigration New Zealand on 13 January 2010, at Ms Pryce-Jones' request, in support of the removal of conditions on Ms Pryce-Jones' visa, in which Ms Pryce-Jones was alluded to as an employee. Ms Pryce-Jones was advised of the removal of her visa conditions shortly afterwards, on 10 February 2010.

[33] I record a submission advanced on Ms Pryce-Jones' behalf that because of the contention that Ms Pryce-Jones was complicit in the provision of a sham agreement to Immigration New Zealand that aspect of the evidence ought to be established to a high standard. I was not referred to any authority in support of this submission. Events surrounding the provision of the employment agreement are simply part of the factual matrix that needs to be assessed and weighed in considering the issues before the Court. I do not consider it necessary to approach an assessment of the facts relating to an assessment of the real nature of the relationship between the parties on anything other than the usual basis.

[34] I note too that while there were a number of inconsistencies and difficulties with parts of Ms Bomer's evidence, that does not mean that the entirety of her evidence is to be discounted. Ms Pryce-Jones' evidence tended to be more straight- forward but there were important aspects of what had occurred which she was unable to recall or provide any real explanation for. It is likely that the passage of time has not helped, and it is conceivable that memories have faded and that the timing of events and the way in which discussions took place have taken on a particular perspective over time. I have found the documentation helpful in determining what probably occurred and why.

[35] Although I conclude that it is more likely than not that the parties' common intention was that Ms Pryce-Jones was engaged as a contractor, that in itself is not conclusive of the real nature of the relationship.8 I turn to consider other relevant

indicia.

8 See *Atkinson v Phoenix Commercial Cleaners Ltd* [2015] NZEmpC 19, (2015) 12 NZELR 627 at

[58].

[36] Ms Bomer says that Ms Pryce-Jones referred to herself as a contractor. This evidence tends to be supported by the way in which Ms Pryce-Jones crafted a letter dated 3 February 2012, shortly after her departure from the practice. Ms Pryce- Jones' letter to Ms Bomer refers to "fees I have earned as *a contract physiotherapist*

with the practice".9 Ms Pryce-Jones gave evidence in cross-examination that she

was simply reflecting back the contents of Ms Bomer's earlier letter and that she was in a state of shock at the time she wrote her reply. However I consider it telling that Ms Pryce-Jones did not at this stage refer to herself as an employee. It was not until after she had

received a letter of demand and matters had progressed to the Disputes Tribunal several months later that employee status was asserted.

[37] Ms Pryce-Jones issued invoices to RBP for her services, and consistently with the independent contractor agreement. This is reflected in handwritten invoices before the Court which Ms Pryce-Jones had prepared. The invoices are for fortnightly periods and for "physiotherapy services" at a cost of $2,000, with some additional payments for further patients charged at 52 per cent.

[38] Ms Pryce-Jones says that she prepared these invoices for provision to Immigration New Zealand. I do not accept that this was the sole reason why this documentation was prepared. It is apparent from a letter of 3 February 2010,10 that Ms Pryce-Jones wrote to Immigration New Zealand enclosing "3 months payslips", together with other material that had been requested. The payslips were the handwritten invoices. It can be inferred from correspondence which followed shortly afterwards, that the material was provided in support of the removal of conditions on Ms Pryce-Jones' visa. As Mr Wicks pointed out to Ms Pryce-Jones in cross-examination, the payslips she referred to covered a period of approximately seven months. This undermines any suggestion that the "payslips" had been solely prepared for Immigration New Zealand, and at Ms Bomer's behest. Rather, it appears to me to be more likely that they were generated by Ms Pryce-Jones in order

to facilitate payment to her for the services she had provided.

9 Emphasis added.

10 Which appears to be erroneously dated 3 February 2009. The date stamp from Immigration is

8 February 2010.

[39] A perusal of the accounts for RBPL 2000 reflects that payments to Ms Pryce- Jones were accounted for as sub-contractor payments. Mr Mackinlay (who is a chartered accountant with over 35 years of experience, and who has acted as the accountant for RBPL 2000 and RBPL for many years) gave evidence that Ms Pryce- Jones was described in this way in the annual accounts in accordance with advice he received from Mrs Bomer as to Ms Pryce-Jones' status. The first payment was made just after Ms Pryce-Jones started with the practice.

[40] Ms Pryce-Jones gave evidence that she provided Ms Bomer with her IRD number. It is clear that she obtained an IRD number about three weeks before the independent contractor agreement was finalised. Ms Bomer asserted that she had not been provided with a copy of it and that she had made it clear to Ms Pryce-Jones that she was to be responsible for her own tax. Ms Stone was well placed to give evidence as to what went on within the practice at the relevant time and she had no discernible interest in the outcome of the litigation. She said that no IRD numbers were required from the practice's contractors (including Ms Pryce-Jones), that she maintained the files for each of the physiotherapists engaged by the practice and that she was certain that Ms Pryce-Jones had not provided an IRD number at any time. Ms Pryce-Jones gave evidence-in-chief that she thought that Ms Bomer had deducted PAYE from her 'wages' however she accepted in cross-examination that she had received gross payments, calculated on the basis of the fees received.

[41] It was put to Ms Bomer that when a contractor has not provided a tax number, withholding tax has to be taken. This proposition was also put to Mr Mackinlay and rejected. He gave evidence that he had given Ms Bomer advice that no withholding tax applied as a matter of law. There was a difference of view between Mr Mackinlay and Mr Hussey (an accountant who Ms Pryce-Jones called to give evidence) on the legal requirements relating to fringe benefit tax. It is not necessary to resolve that issue. The salient point is the advice Mr Mackinlay gave Ms Bomer, which explains the way in which the tax arrangements were dealt with.

[42] Ms Pryce-Jones gave evidence that she worked regular hours and at the direction of Ms Bomer. She said that she would need to ask Ms Bomer's permission if she wished to leave early and that Ms Bomer exercised a high level of direction

and control in respect of her work, and how and when it was undertaken. I accept that Ms Bomer exercised a degree of control in relation to what went on in the practice, although that is largely explained by the nature of the business and her role within it. I preferred Ms Stone's evidence in relation to the way in which Ms Pryce- Jones carried out her work in practice, namely that Ms Pryce-Jones worked hours that were convenient to her, and as set by herself. Ms Stone said that from her observations Ms Pryce-Jones was free to take on, or decline to take on, appointments. She also gave evidence that Ms Pryce-Jones worked flexible hours, and would often leave if she had no patients booked, or attend to personal commitments at the clinic. Ms Stone's evidence was that Ms Pryce-Jones would note any days that she was not going to be present at the practice. Her evidence in this regard tended to be supported by extracts from a practice diary that were before the Court. Ms Pryce-Jones accepted in cross-examination that she took unpaid time off.

[43] It is apparent that there was significant flexibility around Ms Pryce-Jones' working hours, the patients that she chose to see and when, and that she exercised a high degree of autonomy in relation to how she undertook her work. It is also apparent that she did not work solely for the practice and that she was engaged in work elsewhere during her time with RBP, although it appears that she obtained Ms Bomer's approval prior to doing so.

[44] It is clear that Ms Pryce-Jones had the ability to increase her earnings, through taking on more patients and through various initiatives (such as a women's health programme, which she instigated and which generated a higher percentage of fees for her). The invoices rendered by Ms Pryce-Jones over time reflect the varying amounts generated depending on the number of patients seen by her in each period.

[45] It is common ground that Ms Pryce-Jones ran the practice while Ms Bomer was away overseas for a period. I view this in the context of previous discussions relating to the possibility that Ms Pryce-Jones would take over the practice at a future date.

[46] The evidence before the Court, including the way in which payment was organised and the way in which Ms Pryce-Jones

undertook her work, points away from an employment relationship. Also pointing away from an employment relationship was the scope available to Ms Pryce-Jones to increase her remuneration by simply increasing the number of patients she took on, and the hours she worked.

[47] The provision of tools and equipment may be relevant to an assessment of the real nature of a relationship.11 Ms Pryce-Jones suggested that she may have been reimbursed by Ms Bomer for some minor purchases relating to her work, although this aspect of her evidence emerged in cross-examination and neither Ms Bomer nor Ms Stone had an opportunity to comment on it. She accepted that she had personally provided the patient bed required by her to undertake her work. I regard these

factors as neutral in the particular circumstances.

[48] Balancing all relevant matters, I conclude that the real nature of the relationship was one of independent contractor. That means that there is no need to proceed to consider issues relating to the identity of the employer.

[49] Finally, Ms White submitted (although I did not understand her to be strongly pursuing the point) that the nature of the relationship was dictated by the legal requirements imposed by Immigration New Zealand, and that the only relationship permitted in law was an employment relationship. It was said that if it is held that Ms Pryce-Jones was engaged as a contractor it would raise issues of legality which constituted a "relevant matter" for the purposes of s 6(3) of the Act. However, there was no evidence as to the basis for the requirement for an employment agreement, and accordingly I am not in a position to form a view as to the merits of the argument.

Conclusion

[50] The inquiry into the nature of the relationship is an intensely factual one. The preponderance of factors in this case, based on the evidence before the Court on

11 *TNT Worldwide Express (NZ) Ltd v Cunningham* [1993] 3 NZLR 681 (CA) at 697.

the de novo challenge, point away from employment status. Ms Pryce-Jones was not an employee.

[51] The challenge against the Authority's determination finding that Ms Pryce- Jones was an employee is allowed. Ms Pryce-Jones' challenge is dismissed.

[52] The parties are urged to agree costs. If that does not prove possible, the successful parties (RBPL 2000, RBPL and Ms Bomer) may file and serve submissions and material in support within a period of 45 days from the date of this judgment, with Ms Pryce-Jones filing and serving within a further 20 days and anything strictly in reply within a further 10 days.

Christina Inglis

Judge

Judgment signed at 3 pm on 16 December 2015
