

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2013] NZERA Auckland 371
5409817

BETWEEN

DR VIVIENNE TATE
Applicant

A N D

THE MARIANNE CAUGHEY
SMITH-PRESTON
MEMORIAL REST HOMES
TRUST BOARD
Respondent

Member of Authority: Anna Fitzgibbon

Representatives: Linda Hughes, Counsel for Applicant
Jenni-Maree Trotman, Counsel for Respondent

Investigation Meeting: 8 August 2013

Submissions Received: 8 August 2013

Date of Determination: 20 August 2013

DETERMINATION OF THE AUTHORITY

- A. The applicant, Dr Vivienne Tate, was an independent contractor to the respondent, Marianne Caughey Smith-Preston Memorial Rest Homes Trust Board (Caughey Preston), she was not an employee.**
- B. Costs are reserved.**

Employment relationship problem

[1] The applicant, Dr Vivienne Tate, claims that she was unjustifiably dismissed by the respondent, Caughey Preston on 18 May 2012 following a dispute regarding the terms of her contract. Dr Tate claims that despite appearances, in reality she was

an employee of Caughey Preston at the time it terminated their contractual relationship.

[2] Caughey Preston says Dr Tate was not its employee, she was at all times an independent contractor. Caughey Preston says it invoked the termination clause of Dr Tate's contract following breaches by her of the contract.

Issue for determination

[3] The issue for determination by the Authority is whether an independent contractual relationship or employment relationship existed between Dr Tate and Caughey Preston.

[4] If an employment relationship existed, then the Authority has jurisdiction to investigate whether or not Dr Tate was unjustifiably dismissed by Caughey Preston. If no employment relationship existed, then the Authority has no jurisdiction to investigate Dr Tate's claim that she has an employment relationship problem.

The issue

Was Dr Tate an employee or an independent contractor?

[5] The statutory test for determining this preliminary jurisdictional issue is set out in section 6 of the Employment Relations Act 2000 ("the Act"). Section 6 of the Act states:

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; ...*
- (2) *In deciding for the purposes of subsection (1)(a) whether a person is employed by another person under a contract for 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*
 - (b) *Must consider all relevant matters including any matters that indicate the intention of the persons; and*

- (c) *Is not to treat as a determining matter any statement by the persons that describes the nature of their relationship.*

[6] The leading case on s6 of the Act is the Supreme Court decision of *Bryson v Three Foot Six Limited*¹. Chief Judge Colgan in *Singh v Eric James and Associates Limited*² states at para. 16 that the inquiry in each case involving s6 of the Act, is “intensely factual” and at para. 17 sets out a number of principles derived from the *Bryson* decision. The Employment Court in *Poulter v Antipodean Growers Limited*³ summarised the applicable principles derived from *Bryson* and earlier judicial decisions as follows:

- (1) *The Court must determine the real nature of the relationship.*
- (2) *The intention of the parties is still relevant but no longer decisive.*
- (3) *Statements by the parties, including contractual statements, are not decisive of the nature of the relationship.*
- (4) *The real nature of the relationship can be ascertained by analysing the tests that have been historically applied such as control, integration and the “fundamental” test.*
- (5) *The fundamental test examines whether a person performing the service is doing so on their own account.*
- (6) *Another matter which may assist in the determination of the issue is industry practice although this is far from the determinative of the primary question.*

[7] The Employment Court in its judgment in *Poulter* concluded that ultimately the approach necessary to be taken under s6 is for the Authority, or the Court, to gain an overall impression of the underlying and true nature of the relationship between the parties.

[8] Caughey Preston provides hospital, rest home and secure dementia care to its clients across four facilities on its Remuera site, namely Upland Home, Ventnor Home, Caughey Preston Hospital and Marian Court. In order to provide its services to clients, Caughey Preston employs a number of staff and has contract arrangements with various suppliers and professionals. Contractor providers to

¹ [2005] 3 NZLR 721

² [2010] NZEmpC 1

³ [2010] NZEmpC 77, 17 June 2010 at para [20]

Caughey Preston include podiatrists, dieticians, hairdressers, pharmacists and medical officers.

[9] Caughey Preston contracted the services of four Medical Officers (“MO’s”) to provide medical services to clients in its facilities. Following the departure of one of the MOs, Caughey Preston advertised for a replacement in June 2011. The advertisement stated:

This is a part-time contracted role – 8 hours per week

Monday 2.5 hours from 9am

Tuesday 3 hours from 9am

Friday 2.5 hours from 9am

The contract requires that you are also part of the rostered after hours cover in conjunction with our other three contracted medical officers. ...

[10] Dr Tate applied for the position and on 5 July was interviewed by the General Manager, Ms Gloria Budgen. At the interview, Ms Budgen gave Dr Tate a copy of the Visiting Medical Officers’ Contract (“the contract”) which was the same for each of the four MOs. Ms Budgen explained to Dr Tate that Caughey Preston’s new hospital wing which accommodated 40 clients would increase the current client numbers being treated by each MO progressively as beds filled up. Dr Tate and Ms Budgen discussed increases to the retainer to be paid to the MOs as a result of increasing client numbers in the new hospital wing.

[11] Dr Tate took the contract away and returned it to Ms Budgen along with the Code of Conduct – Contractors, approximately 3 weeks later, on 22 July 2011. Dr Tate had signed both documents. Dr Tate’s engagement at Caughey Preston started on 1 August.

[12] The nature of the agreement between the parties is described in the contract as being that of an independent contract relationship. In clause 1.1 it is stated that the MO *shall not be deemed an employee of Caughey Preston for any purpose*. Clause 1.1 provides that the medical officer *is in business on his/her own account and has been engaged to provide services to Caughey Preston*. Clause 1.2 states explicitly that the Employment Relations Act does not apply.

[13] Schedule A specifies the services to be provided by the MOs some of which include:

- Medical care for all residents and patients;
- Clinical care and liaison with the District Health Board geriatricians;
- Liaison with members of the multi disciplinary team;
- Providing on site attendance at Caughey Preston

[14] Schedule B sets out remuneration payable. Dr Tate's remuneration was an annual retainer of \$31,557 per annum for the 7.5 hours per week plus payments for attendances such as telephone calls, afterhours call outs, attendance at Caughey Preston initiated meetings, admission consultations and respite care consultations.

[15] Payment to the MO is made by Caughey Preston upon receipt of a GST invoice at the end of each month. Clause 2.3 provides that the MO is liable:

... for all tax obligations incurred as a result of his/her services. The Medical Officer agrees to indemnify Caughey Preston against any taxes, expenses, penalties, fines, costs (including reasonable solicitor fees), claims, judgments or liabilities arising out of this clause.

[16] A further clause requires the MO to produce evidence each year of the renewal of their annual practising certificate and professional medical indemnity insurance. There is a disputes provision which requires the parties, in the event that they are unable to resolve a dispute, to refer the matter to a referee and if there is disagreement about the referee then *“the referee must be nominated by the President or Vice President of the Arbitrators and Mediators Institute of New Zealand Inc or its successor ...”*

[17] In respect of termination of the contract:

Either party being in breach of the agreement, provided that if such a breach is not remedied or satisfactory other arrangements or undertakings given by the party in breach after 14 days written notice from the complaining party, the complaining party may terminate the agreement immediately.

[18] The contract requires medical officers to be available 48 weeks per annum, there is an allowance for 10 days per annum for sickness or *“other unavoidable*

unavailability". MOs are able to employ locums or practice associates to provide cover as long as they hold a current annual practicing certificate and medical protection cover. There is no provision for paid annual leave or statutory public holidays.

[19] Dr Tate acknowledged in her evidence that at the time of entering into the contract she regarded herself as an *independent contractor*. However, by the time her contract was terminated in May 2012 she says because of changes to her contract, she had become an employee.

[20] Turning now to how the contract operated in practice. At the time of her engagement, Dr Tate had independent contractor relationships with Queen Street Doctors Limited where she had worked for approximately 8 years, the Medical Council of New Zealand and the New Zealand College of General Practitioners. Dr Tate described herself as a "*career locum*" having provided professional medical services to approximately 100 organisations during her career and as an employee to approximately 15-20 organisations. The position at Caughey Preston was attractive to Dr Tate, financially it was rewarding and the hours of work enabled her to continue with her other work commitments.

[21] Dr Tate provided services to Caughey Preston on Mondays from 9am to 11.30am, Tuesdays from 9am to 12pm and from 9am to 11.30 am on Fridays. Dr Tate was also on call one evening a week and one weekend in every four.

[22] Dr Tate submitted monthly GST invoices to Caughey Preston for her services as agreed. Dr Tate undertook any administrative work associated with her contract including preparation of invoices from her home office. Dr Tate claimed part of her home office as a business expense and owned a vehicle which was used for business purposes. Dr Tate paid for and claimed the cost of her annual practising certificate and professional medical indemnity insurance. Dr Tate was responsible for all tax obligations associated with her contract at Caughey Preston. These arrangements did not change during the course of the contract.

[23] On 23 September, Ms Budgen sent a Memorandum to Dr Tate and the 3 other MOs proposing a change from 1 March 2012 to the way their services were to be spread across Caughey Preston's four facilities. Feedback was sought by 31 October so that implementation could occur by Christmas. The three other MOs terminated

their contracts with Caughey Preston by giving three months' notice effective as of 23 December. On 15 November, having not received feedback from Dr Tate, Ms Budgen sent her an email following the matter up. The email also informed Dr Tate that Caughey Preston was in the process of engaging 3 new MOs to commence in December and that Ms Budgen wished to implement the proposal before Christmas when the new MOs started.

[24] Dr Tate responded by email saying she accepted the proposed changes because she *“had been employed under the condition that I was going to be allocated patients across the whole facility, I had no objections...”* Dr Tate then sought to change her days of work saying *“...I have found working on 2 consecutive days not very practical and spreading my hours across 3 days very disruptive to my other work and would like to condense it to 2 days (as per contract) spread more evenly.”* Dr Tate went on to say *“...my contract does not indicate the time frame for giving notice and after discussion with an advisor in this field, the normal notice would be the same as my pay schedule which is monthly, so 1 month.”*

[25] Dr Tate and Ms Budgen had a lengthy exchange of emails regarding the change to Dr Tate's hours and days. On 3 December, Dr Tate emailed Ms Budgen saying *“...Unfortunately, my anticipated timetable for next year means I will not be available for Monday work and if my wishes can't be accommodated then I will need to reconsider my options.”*

[26] Dr Tate and Ms Budgen finally agreed that Dr Tate would work on Tuesdays and Fridays and her on call day would be on a Tuesday. Agreement was confirmed in an email from Ms Budgen to Dr Tate on 12 December. Dr Tate worked to the hours agreed until 1 February 2012 at which time she raised issues concerning her hours of work and proposing a change. Ultimately it was this issue that resulted in Dr Tate writing to the Chairman of Caughey Preston on 13 February with her concerns. In her letter she says:

“ I am a medical officer contracted to the “Caughey Preston” to provide specific medical services outlined in my contract, which I commenced on the 1.8.11.... Now with the “new system” in place nearly 6 weeks, having sent several emails to the General Manager about contractual issues and with what appears to be, little earnest effort to resolve them, I am forced to write to the board, whom I signed the contract with, in an effort to resolve these issues.... I do not need to remind the Board of their legal obligation to uphold the contract and that any changes should be by negotiation and mutually

agreed upon, not unilateral decisions directed to the person via an email under the umbrella of 'policy change'.

[27] On 5 March, Dr Tate in accordance with clause 11 of the contract gave notice to Caughey Preston that she had a dispute about the interpretation of the contract. A meeting was held between Dr Tate, Ms Budgen and their legal representatives on 16 March in an attempt to resolve issues but the issues were not resolved.

[28] On 28 March 2012, Dr Tate's lawyer, Ms Linda Hughes sent a letter to the Arbitrators' and Mediators' Institute of New Zealand (AMINZ) stating, among other things, the following:

As requested, I enclose a copy of the "visiting medical officer's contract" dated 13 July 2011 (contract). Clause 11 of the contract details the procedure to follow in the event of a dispute. The parties attempted to resolve the issues in dispute at a meeting on 16 March 2012, but without success.

There has been no communication between the parties in respect of the dispute since that meeting. At the meeting, the parties agreed that AMINZ be requested to appoint a referee pursuant to clause 11.3 of the Contract. As the dispute involves the interpretation/application/operation of the Contract, it is requested that a lawyer be appointed as the mediator/arbitrator. ...

[29] A referee was appointed by AMINZ on 5 April 2012. However, on 3 May Caughey Preston gave notice to Dr Tate pursuant to clause 4.2 of the contract seeking that she remedy claimed breaches of the contract by her within 14 days. Dr Tate did not remedy the alleged breaches and accordingly Caughey Preston terminated the contract on 18 May. Dr Tate claims she was unjustifiably dismissed by Caughey Preston on 18 May.

Intention of parties

[30] I find that the actual intention of Dr Tate and Caughey Preston, as expressed by them in the contract dated 13 July 2011, while not determinative, should in the particular circumstances of this case, be given greater weight as an indicator of the real nature of the relationship than in other cases. Dr Tate was not naïve and uninformed about the legal and commercial differences between a contract for services and a contract of service. Indeed, Dr Tate had been engaged in more than 100 contract arrangements and 15-20 employment relationships during the course of her lengthy career to date. Immediately following the termination of the contract, Dr Tate obtained employment as a General Practitioner pursuant to a fixed term written

employment agreement with the Auckland University of Technology. At the same time Dr Tate incorporated a company called Dr Viv Tate Limited which purchased a share of a medical practice called Mt Eden 575 Doctors Limited (“575 Doctors”).

[31] Dr Tate’s bio on the 575 Doctors website is as follows:

I graduated from Auckland Medical School in 1986 and went on to do diplomas in obstetrics and sports medicine, along with a certificate in A&E medicine and became a FRNZCGPs in 2004. I have been working in the field of general practice since 1990, as a part-time locum and long time associate both in NZ and overseas ... I am interested in all aspects of general practice with a special interest in sports medicine, older people’s health, women’s health and travel medicine.⁴

[32] Caughey Preston wished to engage an independent contractor and the contract was specifically written in terms which reflected this. Dr Tate was aware of the differences between an employee and a contractor, took the contract away for some weeks and returned it signed. I find both Dr Tate and Caughey Preston intended their contractual relationship to be that of an independent contract, not employment when Dr Tate was engaged.

[33] There is insufficient evidence to persuade me that the intention of the parties altered during the course of the contract. Indeed, Dr Tate right up until the contract was terminated on 18 May, asserted her rights as an independent contractor pursuant to the contract. Dr Tate wrote to the Board asking it to honour the terms of the contract and then pursuant to her contract requested AMINZ to appoint a referee for the purposes of resolving the dispute. The dispute resolution procedure relied on by Dr Tate was that contained in her contract and not the personal grievance procedure that an employee would invoke.

[34] Dr Tate gave evidence that she was aware from the outset that she was an independent contractor and was aware of the benefits of such an arrangement. These included the ability to claim GST, claim tax rebates in relation to a home office and vehicle. Dr Tate paid for and was also able to claim expenses such as her professional medical indemnity insurance and the cost of her annual practising certificate.

[35] After executing the contract, Dr Tate issued GST invoices to Caughey Preston for services rendered. No tax was withheld by Caughey Preston or submitted to IRD by Caughey Preston, these were matters attended to by Dr Tate. Similarly, Caughey Preston did not deduct PAYE or ACC levies. Dr Tate operated through out her contract with Caughey Preston as an independent contractor.

Control and Integration

[36] As to the control test, it must be considered against the circumstance that Dr Tate is a qualified, trained and experienced professional person. As in many cases, Caughey Preston did exert some control over how Dr Tate performed her duties. These controls were largely in respect of her availability to attend to clients rather than how she actually discharged her professional duties. Caughey Preston set the rosters but this was an operational task and was necessary to ensure clients were adequately treated and facilities operated smoothly.

[37] The treatment of clients was largely left to the professional skill and judgment of Dr Tate. Caughey Preston reviewed Dr Tate's work to ensure its clients were adequately serviced and that Caughey Preston was complying with applicable legislation such as the Health and Disability Services Act 2001. While there were aspects of control, on balance the control test points more to an independent contract than an employment relationship.

[38] Dr Tate's role was an important one but was not an integral part of Caughey Preston's business. Dr Tate was engaged by Caughey Preston for 8 hours a week. For the rest of her time Dr Tate contracted her services to a number of other organisations. Dr Tate was not provided with a consulting room or a computer by Caughey Preston. Dr Tate was provided with some clinical equipment but carried her own Doctor's bag and stethoscope. These tests in my view point to an independent contractual relationship.

Fundamental

[39] The fundamental test considers whether Dr Tate was really in business on her own account. I find that Dr Tate was in business on her own account and this did not change during the course of the contract. Dr Tate's business is to provide medical services. To that end during her engagement by Caughey Preston she provided this service to a number of other organisations, including Queen Street Doctors Limited,

the NZ College of General Practitioners, the Medical Council of NZ and St Heliers Health Centre Limited. Dr Tate was entitled to employ locums to perform her medical services. Dr Tate claimed business expenses including her practising certificate, insurance, home office, car and was responsible for her own tax returns, GST, ACC.

[40] From the evidence, the overall impression gained by the Authority on the underlying and true nature of the relationship between Dr Tate and Caughey Preston is that it was one of a contract for services. In *Brunton v Garden City Helicopters Limited*⁵ Judge Travis stated:

As I have previously expressed, it is a very serious matter for either the Employment Relations Authority or this Court to find, notwithstanding the clear intention of capable and knowledgeable persons who have equal contracting strength and sound reasons for the arrangements they have mutually agreed, after those arrangements have terminated, that the real nature of their relationship was completely different.

[41] For the above reasons, the Authority determines the real nature of the relationship between Caughey Preston and Dr Tate was that of a contract for services.

[42] It must follow that any claims Dr Tate has in relation to the performance of that contract or the termination of it must be determined in a jurisdiction other than the Authority.

Costs

[43] Costs are reserved. Counsel for the respondent is to file a memorandum as to costs within 14 days and counsel for the applicant has 14 days from receipt of the memorandum to file her reply.

Anna Fitzgibbon
Member of the Employment Relations Authority

⁵ [2011] NZEmpC 29, 31 March 2011, para. 84