IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE

[2019] NZERA 131
3043455

	BETWEEN	DR JOHANN URSCHITZ Applicant
	AND	CENTRAL MEDICAL (OAMARU) LIMITED AND DR JONATHAN SCOTT Respondents
Member of Authority:	David Appleton	
Representatives:	Fred Hills, counsel for the Applicant David Jackson, counsel for the Respondent	
Investigation Meeting:	14 February 2019 at Oamaru	
Submissions Received:	Applicant's written submissions on 26 February and oral submissions on 28 February 2019 Respondent's written submissions on 26 February and oral submissions on 28 February 2019	
Date of Determination:	7 March 2019	

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Dr Urschitz claims that he was unjustifiably dismissed and suffered unjustifiable disadvantage in his employment after having been given notice of dismissal on 12 February 2018. Dr Urschitz also claims that he has been subject to unlawful discrimination on the grounds of his ethnic or national origins. Dr Urschitz also claims breaches by the first respondent of good faith and the duty to ensure his health and safety. He claims that the second respondent instigated and/or aided and abetted those alleged breaches. Finally, he claims arrears of holiday pay and arrears of pay for the period 13 April to 13 May 2018.

[2] These claims are denied by the respondents. Primarily, however, the respondents deny that Dr Urschitz was ever an employee of the first respondent and therefore denies that the Authority has the jurisdiction to investigate Dr Urschitz's claims. Accordingly, this determination is limited to the question of whether Dr Urschitz was an employee of the first respondent or whether he was engaged under a contract for services. If the latter, the Authority would not have the jurisdiction to consider any of Dr Urschitz's substantive complaints.

Background

[3] Dr Urschitz is originally from Austria although he has practised as a general practitioner (GP) for several years in the UK. Following the result of the BREXIT referendum in 2016, Dr Urschitz and his British wife, Susan Urschitz, decided they wished to move to New Zealand. Accordingly, having registered with an agency, NZ Locums, they visited New Zealand in February 2017 to meet with various prospective GP practices. Having met with Dr Scott, he was offered work with the first respondent almost immediately, which he accepted. Arrangements were then made over the following weeks via NZ Locums for Dr Urschitz's essential skills work visa to be issued by Immigration New Zealand ("INZ").

[4] Dr Urschitz obtained the visa in due course, and was originally due to start work for the first respondent in early September 2017, but this was delayed by agreement with Dr Scott because Dr Urschitz wished to see his father, who was by then terminally ill in Austria, for his final birthday. This detail is relevant, as will be seen below. Dr Urschitz eventually started working for the first respondent with effect from 18 September 2017.

[5] Dr Urschitz also had to be subject to supervision in accordance with the requirements of the Medical Council of New Zealand as Dr Urschitz was categorised as an "international medical graduate" (IMG). Dr Scott was accepted by the Medical Council as an appropriate supervisor for Dr Urschitz.

[6] Prior to commencing work, Dr Urschitz was issued with an agreement between himself and the first respondent, prepared by the first respondent, headed "contract for GP services". This described the relationship between the parties at clause 3 as "an independent contractor relationship". Clause 3 specifically stated the following:

> The GP shall be an independent contractor and the GP acknowledges that they are not an employee of the practice and will be responsible for their own

> accident compensation levies, GST and income tax arrangements in relation to payments made under this contract.

[7] On 12 February 2018 Dr Scott came into Dr Urschitz's consultation room and told him that he was terminating his contract. According to Dr Urschitz, the reason given to him by Dr Scott was that his Austrian accent was difficult for patients to understand. Whilst that is a matter that is not to be investigated or determined in the current matter, I note purely for the record that the first and second respondents deny this, effectively alleging that there were wider communication difficulties between Dr Urschitz and his patients which led to patients not wanting to see Dr Urschitz.

[8] Dr Urschitz's work at the practice came to an end on 11 May 2018.

Was Dr Urschitz an employee of the first respondent?

[9] "Employee" is defined in s 6 of the Employment Relations Act 2000 ("the Act"). The relevant subsections of s 6 for the purposes of this investigation provide as follows:

> **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;
> …
> (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.

[10] The methodology for assessing an individual's employment status is well known. It was confirmed by the Supreme Court in the case of *Bryson v Three Foot Six Limited.*[1] The Authority must both examine the terms and conditions of the contract between the parties and the way that it operated in practice, applying the three tests known commonly as the control test, the integration test and the fundamental or economic reality test. This exercise has been described as an "intensely factual" analysis in order to determine the real nature of the relationship between the parties. Industry or sector practice is also a relevant factor.

[1] [2005] ERNZ 372.

[11] I should like to acknowledge the thorough and very helpful submissions of both Mr Hills and Mr Jackson.

The contract between the parties

[12] Apart from clause 3, already cited above, the contract signed by both parties included the following clauses and sub clauses which are relevant in trying to understand the intention between the parties at the time they entered into it:

> **Attendance at meetings and training**: Because the GP is not an employee of the Practice, the GP will not be required to participate in regular internal management meetings, employee performance management processes, social events or general training. However, from time to time the Practice may require the GP to attend meetings or participate in training relating to the contract, or invite the GP to attend other events.
>
> **6 GP'S FEE AND EXPENSES**
>
> 6.1 Subject to this contract, and in consideration of the Services provided, the Practice will pay the GP a fee in accordance with Schedule 2.
>
> 6.2 The GP will not be entitled to any other payments from the Practice including (but not limited to) any payment for injury, sickness, superannuation, holidays, redundancy or overtime.
>
> **7 Tax**
>
> 7.1 The GP is responsible for, and will pay on time and in full, all taxes and other levies relating to the Services (including without limitation income tax, GST and accident compensation levies).
>
> 12.1 If the GP at any time in the performance of the Services conceives, invents, discovers or becomes possessed of any work, idea, invention, process, art, service, system, method, or any improvement upon addition to them ("the Intellectual Property") the Intellectual Property will be the sole property of the practice from the time the intellectual property is created. In other words we are happy to receive ideas for any improvements in the practice and services provided to patients.
>
> **13 CONFLICTS OF INTEREST**
>
> 13.1 During the Term the GP will not, without the prior written consent of the Practice, provide services to any person or entity or be involved or interested in any employment, activity, business, or organisation which the Practice reasonably considers conflicts or may conflict with its interest or interferes with the performance of the Service under this contract.
>
> 5 **RESTRAINT OF TRADE**
>
> 1.11 The GP agrees not, for a period of two years after the determination of this contract, to treat as a medical practitioner, either on his or her own account or in a firm or as an employee or locum/GP of another medical practice, any person whom he or she has treated while engaged in the practice

> except for his/her immediate relations, nor will he/she solicit, procure, direct or otherwise be instrumental in the diversion of any patients from the practice to any other practice.
>
> 1.12 Neither will they take steps to employ or engage any of the Practice's employees or staff.
>
> 14.1 The GP shall have and maintain membership and professional liability cover with the Medical Protection Society and shall be reimbursed by the practice.
>
> 14.2 It is a condition of employment that this is up to date at all times and the GP shall indemnify the practice for any acts or omissions including full legal costs and any settlement payments that occur should the identity cover not be in operation at any time.
>
> 18.2 This contract may not be assigned by the GP to any other party without the Practice's agreement in writing.
>
> 18.3 Your name and Photo may be used for publicity and advising the community while you are at Central Medical. This will terminate on your departure.

[13] The contract also required Dr Urschitz to comply with various requirements in the performance of the services. These included maintaining professional standards, performing the general requirements of the practice, complying with expectations of patient care, complying with the New Zealand Medical Association Code of Ethics and the requirements of the Ministry of Health, District Health Board and other regulatory and statutory bodies, keeping medical notes and reporting on visits. The contract also included a dispute resolution clause.

[14] Dr Urschitz was also required under the terms of the contract to help the practice achieve performance targets, maintain Cornerstone Accreditation, and comply with reasonable precautions to ensure the health and safety of himself, colleagues and patients.

[15] Dr Urschitz was contractually entitled to access the practice's equipment and was entitled to be provided with an on call bag under the terms of the contract.

[16] The contract also provided that the practice would make a contribution to Dr Urschitz's relocation costs at the end of the year and that he would get accommodation and a car provided for the first six weeks, followed by a contribution of $100 per week towards the cost of a car and another $100 per week towards his accommodation costs until the end of the first year. The practice also agreed to pay for the Medical Protection Society costs and Dr Urschitz's practising certificate. It also provided that he would get morning and afternoon tea breaks.

[17] My analysis of the terms of the contract is that it contains a mixture of clauses, some of which expressly indicate an independent contractor's agreement, some of which imply one, and some of which lean towards an employment agreement. The contract was originally provided to the first respondent by the Medical Assurance Society, an insurance company more commonly known as MAS. However, the copy signed by the parties appears to have been widely amended on behalf of the first respondent (demonstrated by the incoherent numbering in several places) so that it is effectively a hybrid between a contract for services and a contract of service. For example, there are express references to "employment" scattered throughout the contract, including in the "fees and expenses" schedule. I would add, as an aside, that this demonstrates the risk of providing template legal documents to lay persons who do not have a legal training, and who then complete them without taking advice.

[18] The key question to ask in relation to this contract is, what was it that the parties agreed? Were they '*ad idem*' (of the same mind) in relation to the nature of the relationship between them? The contract was originally sent to Dr Urschitz by a relationship manager from NZ Locums. The Authority saw an email from NZ Locums to Dr Urschitz dated 1 March 2017 in which the writer told Dr Urschitz the following:

> I have received the contract from Central Medical Oamaru. This is for an independent contractor which is quite common here in NZ. You will need to pay your own tax so you might want to speak with your accountant if you have any questions on tax etc.

[19] Dr Urschitz says that he was shocked when he saw that the contract stated that he was not to be an employee. He said that he had made clear to Dr Scott that he wanted a permanent position as he was intending to settle in New Zealand permanently. He explained that he had been both an employee and a self-employed locum in the UK, and he equated permanency with employment. This is because being a self-employed locum had involved working short stints.

[20] When asked why he had not queried the contract when he saw that it was not for an employee, Dr Urschitz explained that he had just recently asked Dr Scott to defer his start date, as he wished to see his father for his last birthday, and he did not want to bother Dr Scott again, asking for the contract to be changed. He therefore signed it and submitted it to INZ. It appears to be true, therefore, that Dr Urschitz never raised any issue with Dr Scott about his status, and that the first time he did so was when he first raised a personal grievance in July 2018.

[21] According to Dr Scott, Dr Urschitz told him that he considered a self-employed status to be favourable to him as it provided flexibility and helped him to work towards his goal of being semi-retired. Dr Urschitz denies that he ever said this, however.

[22] Mrs Urschitz explained in her oral evidence that she and Dr Urschitz argued about the contract when it was first sent, as she was apparently less relaxed about it not being an employment agreement than he was. She said, though, that they then realised that INZ required Dr Urschitz to be an employee. I infer from this evidence that Dr Urschitz and she reached the conclusion that Dr Urschitz would have to have the status of employee, because of the immigration requirement, regardless of what the contract said. In his evidence Dr Urschitz said he was confused by the contract but believed that he was an employee.

[23] Whilst Mr Jackson submits that the evidence of Dr and Mrs Urschitz in this regard strains credulity, Dr Urschitz is not an employment law specialist and was unfamiliar with New Zealand laws. Whilst Dr Urschitz clearly understood that the contract stated expressly that he was not to be an employee, he also knew that INZ required him to be an employee to be eligible to receive an essential skills work visa. He submitted the contact to INZ, and it was ultimately accepted. He received no indication from INZ that a special exception had been made to enable him to be an independent contractor whilst holding a work visa. Indeed, all of the communications from INZ to Dr Urschitz made clear, expressly or impliedly, that he had to be an employee to be granted a work visa.

[24] I agree with Mr Jackson that the way that INZ regarded the relationship between the parties, or the fact that immigration regulations usually require a work visa holder to be an employee, cannot determine the real nature of the relationship from an employment law point of view. However, the INZ's published requirement that Dr Urschitz would have to be an employee does shed light on what his intention was likely to be when signing the contract. One must be careful not to impute to Dr Urschitz the same level of sophistication and knowledge about the legal status of the relationship governed by the contract that employment law experts would have, especially when the immigration dimension is added to the mix.

[25] I am also not satisfied that Dr Urschitz clearly knew that there was no difference in New Zealand law between being 'self-employed' and being 'an independent contractor'. He knew he did not want to be self-employed again, but that does not mean he knew that that was the same as being an independent contractor. The regime in the UK (where there is a

third status, that of 'worker') is not identical to that in New Zealand in any event, and Dr Urschitz signed the contract before he had arrived in New Zealand to live and work.

[26] When I stand back and consider these factors, I cannot safely conclude on balance that the parties were of a common mind in relation to the status Dr Urschitz would have. The contract is therefore not definitive, nor determinative of this question, and the entire agreement clause referred to by Mr Jackson in his submissions cannot, therefore, assist the first respondent.

[27] Before I move on to apply the traditional tests, I shall examine the immigration dimension in more detail, as there is an apparent conflict between INZ's published requirements and their apparent acceptance of a contract for services when Dr Urschitz submitted his documents to INZ.

The immigration position

[28] Being an Austrian citizen Dr Urschitz needed to obtain an essential skills visa to work in New Zealand as a GP. At the time that Dr Urschitz was making his application for the visa, INZ's operational manual stated expressly (at WK2) that applications would not be approved unless they included an offer of employment in New Zealand which was for full time employment. Rule W2.10.10 stated that all offers of employment must be genuine and sustainable.

[29] The INZ website page relating to essential skills work visas also stated, expressly:

> This visa doesn't allow self-employment. If you want to be self-employed, you can apply for an entrepreneur work visa.

[30] The information sheet, INZ1113, dated November 2017, also makes clear that the appropriate relationship for a visa holder would be that of employment.

[31] Dr Urschitz explained in his evidence how he had originally uploaded a copy of the offer letter to the INZ website and that, on 22 June 2017, Dr Urschitz received a letter from INZ advising him that INZ needed more information from him before the application could be processed. One of the pieces of information was described as follows:

> **Full Employment Agreement:** The document you have provided is not a full employment agreement. As per immigration instructions WK2 we require a full employment agreement which must be signed by you and the employer and it will need to demonstrate that your employment meets the minimum statutory requirements, e.g. holidays, occupational health and safety and

> minimum wage. Please include all appendices and attachments, including a full job description.

[32] I understand that the agreement that Dr Urschitz subsequently sent to INZ was a copy of the contract which he had signed, which stated that he was not an employee.

[33] The Authority also saw a copy of the Employer Supplementary Form that needs to be completed by the prospective employer of an applicant for an essential skills work visa and which Dr Scott completed on 13 March 2017 in support of Dr Urschitz's application. This asked for a copy of "the full employment agreement" to be attached. I note, however, that at section B5 of the form, in answer to the question asking for details of pay and conditions of employment, Dr Scott had written "$425 plus GST per session plus on call".

[34] The approval for the visa was sent through to Dr. Urschitz on 6 July 2017. Whilst this did not expressly state that Dr Urschitz could only work as an employee, it did state, as is normal, that he could only work as a general practitioner in Oamaru for Central Medical (Oamaru) Limited. Such a restriction would tend to indicate an employment relationship rather than that of an independent contractor.

[35] There is no suggestion in any of the evidence I have seen that Dr. Urschitz, the respondents, or NZ Locums, have in any way tried to mislead INZ into thinking that Dr Urschitz was to be taken on as an employee rather than an independent contractor. Indeed, the evidence indicates that the respondents were completely open about their intention to engage Dr Urschitz as an independent contractor.

[36] Having made my own enquiries of INZ, which I shared with Mr Hills and Mr Jackson, it is my understanding that a contract for services does not meet the requirements for a temporary essential skills work visa, but that INZ does have the discretion on a case by case basis to waive the requirement of employment where it believes it is justified for certain high value or skilled occupations, including medical professionals. I infer that this is what INZ did in Dr Urschitz's case.

[37] In any event, whilst instructive, the immigration dimension does not assist greatly in establishing the objective reality of Dr. Urschitz's status where it appears that INZ knew that Dr Urschitz was being engaged under a contract for services rather than an employment agreement. In addition, even if INZ has not knowingly permitted Dr. Urschitz to have been engaged as an independent contractor for the purposes of his visa, that does not prevent him from being an independent contractor in law. It would mean only that he, and Central

Medical (Oamaru) Limited, would have been in breach of immigration legislation. However, I emphasize that that is not a conclusion that the Authority can safely come to with the evidence it has seen, although the Authority has no jurisdiction under the Immigration Act 2009 in any event.

[38] I shall now examine the relationship between Dr. Urschitz and the first respondent by reference to the three traditional tests.

The control test

[39] This test examines the extent to which the activities of Dr Urschitz were controlled by the respondents.

[40] First, the terms of the contract itself indicate that Dr Urschitz was expected to comply with the policies of the practice in which he was to work. Dr. Urschitz says that his hours at the surgery were set by the practice manager, Cathryn Scott. He says that he had no control over this. Dr Urschitz also says that he would be on call from 6:00 p.m. to the start of the next working day in accordance with an on call schedule, around once a month. He was also scheduled to be on call during the weekends in December and February.

[41] Dr Scott acknowledges that the sessional times, when the practice was open for patients, did require some set hours. The sessional times also had to be co-ordinated with the administration staff and nurses. However, he says that, outside of sessional times, Dr Urschitz was free to complete his paperwork and other administration matters in his own time, either at home or at the practice. Dr. Scott says Dr. Urschitz was also free to make himself unavailable for sessional times which did not require the practice's approval. Rather, he just had to co-ordinate with the administration function so that no patients were subsequently scheduled to see him, and to ensure that the correct number of GPs remained available.

[42] Dr Urschitz was, according to Dr. Scott, able to take significant time off at his own discretion. Dr Scott says that this time off did not require a leave request or approval but simply co-ordination with the other GPs to ensure that there was appropriate coverage at the practice. Dr Scott says that Dr Urschitz took off periods of leave during his engagement, from 8 to 18 December 2017, from 21 December to 26 December 2017, a further week off, and from 18 to 22 January 2018.

[43] Dr Urschitz on the other hand says that he was told he could have six weeks' leave each year but was not free to take it whenever he wanted. He says he took time off in early December 2017 because he needed to attend his father's funeral in Austria and that this was agreed, after discussion.

[44] Dr Urschitz was obliged to undergo supervision from Dr Scott as he was an IMG as defined by the Medical Council. Dr Urschitz produced a copy of the orientation, induction and supervision guidelines governing this supervision and I note that the guidelines refer throughout to "the employer" and the IMG's "employment". However, other than these passing references to employment, there is no express requirement stated in the guidelines that the IMG has to be employed under an employment agreement. Furthermore, whilst inevitably, the requirement to supervise an IMG implies a certain amount of control over that person, that control derives from the legal requirement for supervision rather than being an aspect of the intentions of the parties. Therefore, I accept Mr Jackson's submission that supervision does not show that Dr Urschitz was an employee.

[45] Whilst Dr Urschitz was not under the control of Dr Scott in the sense that Dr Scott told him how to diagnose conditions, prescribe medication and so forth, one can conclude that there was a significant amount of more general control over Dr. Urschitz's activities. He had to fit in with the needs of the practice in many ways, from the times and days he was available to the way he conducted his own individual practice. Whilst I accept he had some freedom, it was not significant, and was not markedly different from the sorts of freedoms that employees of a similar seniority might enjoy.

[46] However, it is important to identify the underlying reason for the control. A GP's practice is a specialised environment, the operation of which is heavily governed by legislation and codes of practice. Being part of a practice with other GPs, nurses and other staff inevitably means that an individual GP cannot simply provide his or her medical services whenever and however she or he wishes. Any GP based in a single practice (as opposed to a peripatetic locum) has to fit in with the requirements of that practice. Therefore, the aspects of control that are attributable to the generic requirements of the role cannot be said to necessarily reflect the intentions of the two specific parties.

[47] However, regardless of the cause of the extent of the control, the reality of the day to day relationship is that there was a greater degree of control over Dr. Urschitz's day to day

activities by the first respondent than one would expect in a genuine self-employed relationship. The control test therefore tends to suggest an employment relationship.

The integration test

[48] The integration test examines the extent to which Dr Urschitz was integrated into the respondents' business.

[49] Again, given the nature of a GPs role within a GPs practice, this test does not particularly assist in revealing the parties' intentions. For example, the respondent says that Dr Urschitz did not have to wear a uniform, unlike his employees. However, his employees are nursing and administration staff and I believe it would be unusual for most practices in New Zealand to require their GPs to wear a uniform, even if they were employed. The difference is, I believe, more related to the difference in levels of seniority than their employment status.

[50] On the other hand, the fact that the practice provided Dr Urschitz with all the equipment he needed does not necessarily point towards an intention to have an employment relationship as it would be quite impracticable for each self-employed GP to have to provide all of their own specialist equipment needed to carry out their day to day job.

[51] There is a conflict of evidence between Dr Urschitz and Dr Scott as to whether or not he was obliged to attend meetings. Dr Urschitz says that he did attend practice meetings, which were around once a month. However, he also said that sometimes he was unaware that a meeting was taking place and he would only find out that there had been a meeting after his sessions because no one had informed him of it.

[52] Dr Scott says that Dr Urschitz was not obliged to attend meetings and that, whilst he was invited to take part in informal group discussions, Dr Urschitz preferred to go home as soon as possible. Dr Scott said that if Dr Urschitz had been an employee his attendance at the meetings would have been mandatory. However, I note that Dr. Scott is reported to have told the Medical Council of New Zealand that one of his concerns about Dr. Urschitz was that he did not regularly attend practice meetings.

[53] With respect to these meetings, the fact that Dr Urschitz was often, according to him, not told about a meeting does suggest that he was not treated as an employee or as an integral part of the practice, although that is contradicted by Dr. Scott's expectation that he was expected to attend them, for supervision purposes. However, that expectation came from the

supervision requirements rather than from an intention on the part of Dr. Scott that Dr. Urschitz was an employee.

[54] In his evidence Dr. Scott referred to Dr. Urschitz as a 'locum'. However, he was not a locum doctor in the sense of being peripatetic, working in different practices to meet short term shortages. Dr. Scott was solely based at the first respondent's practice, and saw the practice's patients only, every week, save when he was on leave. Indeed, I understand from oral evidence that there was another GP who attended the practice occasionally and who was regarded as a locum.

[55] Again, I do not believe that the integration test is a useful test for assessing the parties' intentions in this particular context, where a significant part of the way that the practice operated meant that Dr Urschitz had to be integrated into the practice in many respects. Therefore, again, those aspects of integration were a function of the nature of the requirements of a GP's practice rather than a reflection of the intentions of the parties.

[56] However, regardless of the cause of the extent of the integration, the reality of the day to day relationship is that there was a greater degree of integration into the first respondent's practice than one would expect if Dr. Urschitz were genuinely self-employed. The test therefore points more to an employment relationship.

Economic Reality Test

[57] This test examines the extent to which Dr Urschitz took a financial risk himself in providing his services. I believe that this is a more effective test in assessing the real nature of the relationship in this particular case.

[58] Whilst Dr Urschitz did get paid a fee per session worked, rather than a salary or an hourly wage, the fee was set by the practice, and was not referable to the number of patients he saw. In addition, whilst Dr. Scott says that Dr. Urschitz could have increased his earnings after the first year, when the basis of payment changed to a percentage of fees received, by increasing his patient base, in reality he could not have taken any active steps to canvass patients. He could not have advertised personally for patients, nor given them inducements. If he had, he would have effectively been in competition with the other GPs in the practice. In any event, what may have happened in the future cannot be relevant to the relationship between the parties at the time it was terminated.

[59] Whilst Dr. Scott said that, theoretically, Dr. Urschitz could have worked elsewhere, such as a hospital, it is clear that he could not have worked for another practice, as that would have caused confusion for patients, and would have required permission from the Medical Council, because of the supervision requirements, and from INZ. In any event, his work visa did not permit him to work elsewhere.

[60] Dr. Scott said that he and Dr. Urschitz had had discussions at the beginning of the relationship about Dr Urschitz being allowed to operate an acupuncture clinic from the practice. This, however, never eventuated, and Dr Urschitz says that it had never been his intention to do this. The fact that he had brought his acupuncture equipment to New Zealand does not necessarily indicate an intention to set up as an acupuncturist, as suggested by Mr Jackson. It may simply be a result of Dr. and Mrs Urschitz moving all of their possessions to New Zealand, as immigrants with an intention to settle often do.

[61] Dr Urschitz did register for GST, and the invoices that were generated by the practice in respect of his sessions included a GST element. However, that was a requirement of the practice rather than his own choice. He also paid his own tax, although he said he did not pay his own ACC levies. Dr. Urschitz also said that he did not have the opportunity to off-set his professional expenses against his tax liability as the first respondent refunded his professional expenses, such as his Medical Protection Society indemnity insurance and his practising certificate fee. It also provided him with a telephone for when he was on call, and paid a contribution towards his car use, presumably to acknowledge his occasional use of the car for patient visits.

[62] I note that Dr. Urschitz used the same accountant as the practice, as he did not have his own.

[63] On standing back, there is very little arising from the application of the economic reality test that suggests that Dr Urschitz was a self-employed contractor. In particular, there was nothing he could have done in practical terms to have proactively increased his income. This is fundamentally different from a person in business on his or her own account, who has the freedom to advertise, market themselves, conduct business development activities and take on as much or as little work as they wish. By way of example, an orthopaedic surgeon with his or her own practice can do all of those things. Dr Urschitz, on the other hand, had little control in this respect, and gave evidence that Dr Scott had decided unilaterally to

reduce his number of sessions shortly before his agreement was terminated. This supports Mr Hills' submission that there was an inherent power imbalance between the parties.

[64] The fact that Dr Urschitz received a per session fee is, in reality, just a matter of nomenclature. The fact that he was treated for tax reasons as an independent contractor is actually a reflection of how the practice treated him, rather than because Dr Urschitz was in business on his own account.

[65] There have been cases where individuals have been found to be 'dependant contractors'[2]. However, the circumstances of Dr Urschitz's relationship do not have the hallmarks of *Singh*, where there was clear evidence of entrepreneurship in operation.

Industry or sector practice

[66] I heard no direct cogent evidence on this, although I believe that Mr Hills is correct to suggest in his submissions that the category that should be examined is that of IMGs, rather than GPs in general[3]. This is because IMGs are, by definition, subject to two sets of limitations and requirements which other GPs are not; namely from INZ and from the Medical Council. Aspects of these limitations and requirements are strongly aligned towards an employment relationship, rather than an independent contractor arrangement. That is to say, they are more easily achieved in an employment relationship. An employed IMG would not need INZ to exercise a special discretion, and would work much more under the direct control of the supervising GP than a self-employed IMG would theoretically be. However, I do not believe I can take this any further without having heard evidence about the usual way that IMGs work in GPs' practices across New Zealand.

Discussion and Conclusion

[67] One prevailing issue that I have to grapple with in this case, which is not often the case in independent contractor/employee disputes, is the extent to which the limitations and requirements on Dr Urschitz of INZ and the Medical Council should be taken into account.

[68] I agree with Mr Jackson that the INZ and Medical Council requirements were not incorporated into the contract between the parties. However, they did define the parameters within which Dr Urschitz's relationship with the first respondent operated. Dr Urschitz could not work for any other practice without first having the condition of his visa varied, and a true

[2] See, for example, *Narinder Pal Singh v Eric James & Associates Limited*, [2010] NZEmpC 1.
[3] According to an extract from The Medical Council's report "The New Zealand Medical Workplace in 2016", submitted by Mr Hills, 40.4% of doctors in New Zealand in 2016 were IMGs.

independent contractor probably would not have been able to have satisfied the supervision requirements, or at least, not easily.

[69] In my view, the day to day operational reality of the relationship between the parties was materially affected by the INZ and Medical Council requirements and it would be artificial to ignore that fact.

[70] Having considered all of the evidence in the round, my conclusion is that Dr Urschitz was not an independent contractor in law, and that he was therefore an employee of the first respondent. This conclusion is reached for the following key reasons:

(a) He did not have the intention of entering into a contract as an independent contractor as he wanted to have a permanent contract, which he understood could only be achieved by being an employee. The fact that he signed an agreement which stated that he was not an employee cannot be treated as determinative because he understood, reasonably for a lay person, that an essential work visa holder had to be an employee in law, despite what the contract said.

(b) He took on no financial risk, he had no real influence over his income and was not in business on his own account.

(c) His tax status followed from the way he was treated by the first respondent, and was not his choice.

(d) The control and integration tests do not point to an independent contractor arrangement.

(e) The constraints created by the conditions of his work visa and by his supervision as an IMG prevented him from operating as a true independent contractor.

[71] I would conclude by saying that the fact that I have found that Dr Urschitz was an employee in law does not mean that the same conclusion would necessarily apply to the first respondent's other GPs who work under the same or a similar contract, as they may well have intended to be independent contractors when they signed the contracts, and their contracts may well operate differently in practice. Each case has to be considered on its own merits.

Next steps

[72] Having found that Dr Urschitz was an employee while working for the first respondent, it follows that the Authority has the jurisdiction to investigate his claims arising from his dismissal. However, pursuant to s 159 of the Employment Relations Act 2000, the Authority must consider whether an attempt has been made to resolve the matter by the use of mediation. Due to the jurisdictional dispute, the parties have not yet attended mediation.

[73] I therefore direct that the parties attend mediation with a view to resolving their employment relationship problem. If, after having attended mediation, matters remain to be resolved, the applicant is to inform the Authority and a case management telephone conference call will be arranged to set down a date for a substantive investigation, and to agree timetabling.

Costs

[74] Costs are reserved until after the substantive investigation meeting, if one proves to be necessary.

David Appleton
Member of the Employment Relations Authority