

THE FEDERAL COURT OF AUSTRALIA FINDS INDEPENDENT CONTRACTOR ENTITLED TO SUPERANNUATION

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The case of ***Moffet v Dental Corporation Pty Ltd [2019] FCA 344*** was recently determined by the Federal Court of Australia, and is another important decision relevant to dental practices. It considered the critical question of whether a person who was engaged as an independent contractor was in fact an employee.

The case highlights a number of risks that the use by a clinic of an independent contractor agreement may give rise to, including that:

- clinics may be required to make superannuation contributions even if an independent contractor is held not to be an employee at common law
- regardless of the terms of the independent contractor arrangement, what is critically important is considering both the totality of the relationship and the reality of the situation when engaging practitioners
- in the context of the above, the question of whether a person is properly characterised as an employee or independent contractor is "thus not to be resolved by a mechanical reference or application of a "check list" of considerations"
- a critical consideration is not simply whether you exercise control over the practitioner, but whether you can exercise control
- particular consideration should be given to the application of the *Superannuation Guarantee (Administration) Act 1992 (Cth)* (Superannuation Act) where a contract is wholly or principally for labour.

It is important to note that this case dealt with a "Services Agreement" (sometimes known as an "Independent Contractor Agreement") under which Dr Moffet was engaged to provide services to Dental Corporation Pty Ltd (Dental Corporation). That arrangement differs from those under a genuine Services and Facilities Agreement (SFA) where the clinic is engaged to provide services to the practitioner in exchange for a fee.

FACTS

Dr Moffet, a registered dental practitioner, entered into a Services Agreement to perform dental services for Dental Corporation for a period of five years. Following the expiration of the Services Agreement in 2012 (and despite attempts to renegotiate the terms of the Services Agreement) Dr Moffet continued to perform dental services for Dental Corporation on these same terms until he resigned.

Subsequently, Dr Moffet filed an application in the Federal Court for relief under the *Fair Work Act 2009 (Cth)* (FW Act), the *Long Service Leave Act 1955 (NSW)* (LSL Act) and the *Superannuation Act* on the basis that he had been engaged by Dental Corporation as an employee and not an independent contractor.

DECISION

In reaching a conclusion, the totality of Dr Moffet's relationship with Dental Corporation was considered in order to determine whether Dr Moffet was an employee or an independent contractor. In fact, there were a number of factors weighing in favour of finding that Dr Moffet had been engaged as an independent contractor, including that Dr Moffet:

- determined his hours and days of work, the time and length of his holidays and the nature of the work he would undertake
- continued to individually promote his own dental practice
- did not receive any directions from Dental Corporation, nor did Dental Corporation supervise or control Dr Moffet in his performance of the dental services
- received remuneration calculated by reference to monthly revenue, as well as annual performance bonuses based on increases to cash flow
- did not retain any right to unilaterally employ or dismiss employees
- was, under the agreement, responsible for the payment of his taxes and superannuation.

In light of the above factors, the Federal Court determined that Dr Moffet had been engaged as an independent contractor and not as an "employee" or "worker" as defined in the FW Act and the LSL Act, respectively.

Despite this, with regard to the claim for superannuation, the Federal Court concluded that the Services Agreement was a contract that was wholly or principally for the labour of Dr Moffet within the meaning of the Superannuation Act. Therefore, for the purposes of the Superannuation Act, Dr Moffet was effectively an employee and Dental Corporation had breached its obligations in not paying Dr Moffet's superannuation entitlements.

TAKE AWAY POINTS

Unfortunately, a number of adverse consequences for dental practices (such as breaches of superannuation legislation) can be triggered by the use of independent contractor agreements or services arrangements. It is important for dental practices that:

- any SFA the practice may put in place is:
 - appropriately drafted and sufficiently comprehensive having regard to the numerous factors to be considered in determining whether an employment relationship exists
 - effectively and consistently implemented by the practice in a manner consistent with the drafting and structure of the SFA

- existing independent contractor and other services arrangements are carefully reviewed in this context.

This decision is an important reminder that every facet of the relationship between the parties will need to be examined and closely considered. This extends both to the form of the agreement in place and the manner in which the relevant arrangement between a clinic and a practitioner is implemented in practice. It also highlights the ongoing potential for adverse consequences that may arise from the use of independent contractor agreements.

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