

DENTISTS: EMPLOYEE VS. INDEPENDENT CONTRACTOR?

Date: 8 May 2019

By: Nick Ruskin, Jessica McIntosh

LI V KC DENTAL PTY LTD & ORS [2019] FCCA 104 (24 JANUARY 2019)

This case concerns a dentist, Dr Li who was engaged by KC Dental (operated by a husband and wife team) to provide professional services pursuant to an oral agreement made between the parties.

Several years later, KC Dental attempted to formalise the existing oral arrangement with Dr Li, requesting that she sign a written agreement. The written agreement had been backdated and stated Dr Li was at all times an independent contractor and not an employee of KC Dental. Further, the agreement stated the parties' relationship was terminable on the giving of four weeks' notice.

Dr Li refused to sign the agreement and in response KC Dental threatened to withhold payment to Dr Li whilst the agreement remained unsigned. A heated exchange between the parties occurred, shortly after Dr Li's engagement with KC Dental was terminated.

Dr Li claimed that in terminating her employment KC Dental took adverse action against her simply by virtue of her attempts to assert various workplace rights pursuant to the Fair Work Act 2009 (Cth) (the Act). Whereas KC Dental contended that the termination was at the initiative of Dr Li and such workplace rights were not applicable as Dr Li was not an employee.

Dr Li initiated proceedings on the basis that KC Dental had contravened the Act, as a result of her termination. Critically, each claim raised rested upon a conclusion that Dr Li was in fact an employee rather than an independent contractor. In any event, Dr Li also advanced claims based on an underpayment of sums which Dr Li alleged were due and payable to her as an independent contractor.

Accordingly, the critical questions (in light of no written contract) were:

1. was Dr Li engaged as an employee or independent contractor with KC Dental?
2. in light of the answer to question 1, did the Respondents contravene the Act and/or owed monies to Dr Li with respect to any unpaid entitlements?

The Court considered these questions in light of significant oral and written evidence, the Court observed that the evidence revealed that the nature of Dr Li's engagement with KC Dental changed significantly throughout her time at the clinic .

The Court also noted that for the most part Dr Li presented as an impressive witness whereas Dr Shi (Practice Manager of KC Dental/ Second Respondent) provided '*somewhat contradictory evidence*'.

APPLICABLE PRINCIPLES: INDEPENDENT CONTRACTOR OR EMPLOYEE?

The Court recognised that to make a determination the primary focus must be on the nature of the parties' relationship.

Historically this meant the courts applied a **control** test, however in modern times '*control is no longer a sufficient or exclusive test on the question*'. Instead, the criterion of control is **a strong but no longer determinative factor**.

A multi-factor test is now favoured with the object of the court being to '*paint a picture from the accumulation of the detail of the case*' rather than some sort of mechanical running through of a checklist.

In the present case the relevant factors were:

Control: KC Dental had a clear level of control over Dr Li. The Court did not accept Dr Li had a degree of latitude regarding work hours. Rather, the model employed by KC Dental was driven in large by the demand of prospective patients for an appointment.

Payment: Dr Li was paid by reference to the amount of the patients to whom she had provided dental services and the fees she had earned. The Court stated this was not commonly applied in a usual employment relationship. In this case, Dr Li was remunerated by commission calculated on a percentage basis rather than a set hourly rate of pay.

The Court also found that Dr Li agreed that she always used her ABN and no amounts were withheld or paid as instalments by way of PAYG income tax. This was fatal to her argument that she was in fact an employee.

Superannuation: Dr Li agreed that she held her own Australian Superannuation account and paid money directly to that account. Further, superannuation contributions were never made by KC Dental at any time. This was also a fatal factor.

Tax: The Court considered it clear, based on Dr Li's cross examination that she conducted her affairs in a manner of a business operator. Further the presence of GST collections by Dr Li pointed quite strongly against the relationship being characterised as one of employment.

Employee benefits: Dr Li did not accrue sick, annual or long service leave.

Use of equipment: The court's consideration of this factor produced mixed results. On the one hand KC Dental did provide large equipment, on the other Dr Li paid for particular dental supplies. Further, service fees were charged for laboratory costs, equipment and administration all of which were claimed as tax deductible expenses by Dr Li.

In any event, Dr Shi conceded Dr Li remained out of pocket for some supplies Dr Li purchased, which KC Dental should have reimbursed.

Payment of insurance, education and work seminar expenses: The Court found that Dr Li was responsible for all of these matters. This pointed in favour of the conclusion that Dr Li was in fact an independent contractor.

Delegation to others: The Court attached very little weight to this factor, noting in any event there was little evidence that Dr Li had referred work to other dentists.

OUTCOME

Dr Li was found to be an independent contractor and not an employee of KC Dental. Accordingly KC Dental had not contravened the Act.

However, the Court found that Dr Li had proven entitlement to compensation based upon the failure of KC Dental to give four weeks' notice of termination, therefore compensation was awarded.

KEY TAKEAWAYS

- There is no set checklist that can be deployed to distinguish between an employee and independent contractor. Instead the determination must be made *by taking an evaluative and practical view of the totality of the facts and circumstances of the particular scenario (a multi-factor approach)*.
- The historical test of control is no longer applicable due to the changing nature of modern workplaces and the way in which work is organised.
- Tax arrangements, superannuation and employee benefits are all factors that will be examined and are highly influential in making a determination as to the 'true' relationship that exists between the parties.
- Employers should avoid oral agreements when engaging personnel.
- Any engagement should be formalised in writing.
- In the event the scope of a person's engagement changes, the written agreement which governs such arrangement must also be updated to reflect the changes made.

KEY CONTACTS



NICK RUSKIN
PARTNER
MELBOURNE
+61.3.9640.4431
NICK.RUSKIN@KLGATES.COM

This publication/newsletter is for informational purposes and does not contain or convey legal advice. The information herein should not be used or relied upon in regard to any particular facts or circumstances without first consulting a lawyer. Any views expressed herein are those of the author(s) and not necessarily those of the law firm's clients.