ACLM Annual Scientific Meeting

"LEGAL MEDICINE IN PRACTICE"

Queenstown New Zealand September 20 2015

Current Issues with Contractors in Health Practice (Contractors or Employees and Restraint of Trade)

Brad Wright BDSc MBA LLB(Hons) GDLegPrac FFDACLM FADI FPFA FICD Barrister

1. Following *Hollis v Vabu* [1], the state of the law governing the determination of whether an individual is an employee or an independent contractor may be summarised as follows as four notions from *Abdalla v Viewdaze Pty Ltd t/a Malta Travel.*[2]

2. Whether a worker is an employee or an independent contractor turns on [3]:

   a. Whether the relationship to which the contract between the worker and the putative employer gives rise is a relationship where the contract between the parties is to be characterised as a contract of service or a contract for the provision of services.

   b. The ultimate question will always be whether the worker is the servant of another in that other's business, or whether the worker carries on a trade or business on his or her own behalf: that is, whether, viewed as a practical matter, the putative worker could be said to be conducting a business of

[1] *(2001)* 207 CLR 21
[2] [2003] AIRC 504
[3] *restated in Tattsbet Limited v Morrow* [2015] FCAFC 62

his or her own. This question is answered by considering the totality of the relationship.

c. The nature of the work performed and the manner in which it is performed must always be considered. This will always be relevant to the identification of relevant ‘‘indicia’’ and the relative weight to be assigned to various ‘‘indicia’’ and may often be relevant to the construction of ambiguous terms in the contract.

d. The terms and terminology of the contract are always important and must be considered. However, in so doing, it should be borne in mind that parties cannot alter the true nature of their relationship by putting a different label on it. In particular, an express term that the worker is an independent contractor cannot take effect according to its terms if it contradicts the effect of the terms of the contract as a whole: that is, the parties cannot deem the relationship between themselves to be something it is not. Similarly, subsequent conduct of the parties may demonstrate that relationship has a character contrary to the terms of the contract. If, after considering all other matters, the relationship is ambiguous and is capable of being one or the other, then the parties can remove that ambiguity by the very agreement itself which they make with one another.

3. Consideration should then be given to the various ‘‘indicia’’ identified in *Stevens v Brodribb Sawmilling Pty Ltd*[4] and the other authorities bearing in mind that no list of indicia is to be regarded as comprehensive and the weight to be given to particular indicia will vary according to the circumstances.

[4] *(1986)* 160 CLR 16

4. Where a consideration of the ‘‘indicia’’ points one way or overwhelmingly one way so as to yield a clear result, the determination should be in accordance with that result.

a) Whether the putative employer exercises, or has the right to exercise, control over the manner in which work is performed, place of work, hours of work and the like
b) Whether the worker performs work for others (or has a genuine and practical entitlement to do so)
c) Whether the worker has a separate place of work and/or advertises his or her services to the world at large
d) Whether the worker provides and maintains significant tools or equipment
e) Whether the work can be delegated or subcontracted
f) Whether the putative employer has the right to suspend or dismiss the person engaged
g) Whether the putative employer presents the worker to the world at large as an emanation of the business
h) Whether income tax is deducted from remuneration paid to the worker
i) Whether the worker is remunerated by periodic wage or salary or by reference to completion of tasks
j) Whether the worker is provided with paid holidays or sick leave
k) Whether the work involves a profession, trade or distinct calling on the part of the person engaged
l) Whether the worker creates goodwill or saleable assets in the course of his or her work
m) Whether the worker spends a significant portion of his remuneration on business expenses

5. This list is not exhaustive. Features of the relationship in a particular case which do not appear in this list may nevertheless be relevant to a determination of the ultimate question.

6. If the indicia point both ways and do not yield a clear result the determination should be guided primarily by whether it can be said that, viewed as a practical matter, the individual in question was or was not running his or her own business or enterprise with independence in the conduct of his or her operations as distinct from operating as a representative of another business with little or no independence in the conduct of his or her operations.

7. If the result is still uncertain then the determination should be guided by ‘‘matters which are expressive of the fundamental concerns underlying the doctrine of vicarious liability’’ including the ‘‘notions’’ referred to in [41] and [42] of *Hollis v Vabu*.

8. This passage from *Brodribb* is particularly useful as an overview

> “*Those which indicate a contract for services include work involving a profession, trade or distinct calling on the part of the person engaged, the provision by him of his own place of work or of his own equipment, the creation by him of goodwill or saleable assets in the course of his work, the payment by him from his remuneration of business expenses of any significant proportion and the payment to him of remuneration without deduction for income tax*.” Wilson J and Dawson J in *Brodribb* at 11.

9. “Where a consideration of the ‘‘indicia’’ points one way or overwhelmingly one way so as to yield a clear result, the determination should be in accordance with that result.” (Abdalla v Viewdaze Pty Ltd t/a Malta Travel ; supra)

10. Another relevant factor is insurance: in Gardiner v Workcover/CGU (Country Metropolitan Agency Contracting Services)[5] is authority for the proposition that a worker who takes out income protection and public liability insurance is one who is more likely to be an independent contractor.

11. In the Australian Medical Officers Salary Case[6] the matters of health practice were considered.

12. It was noted that in Ellis and Wallsend Hospital[7] held that a visiting specialist was not an employee, after citing a long list of English cases where a surgeon was not deemed to be an employee.

13. The Full Bench stated that the following factors pointed to an independent contractor agreement:[8]

    a. The Claimant is a professional

    b. The claimant had a right to work for others and did so

    c. The work could be delegated

    d. PAYG tax was not deducted

    e. No leave for holidays or sick leave

14. In that matter the issue of control arose. Control cannot any longer be regarded as determinative.

15. Delegation and termination were found to be irrelevant considerations in such an analagous medical setting.[9]

16. The contract removed doubt about the proper characterisation of the arrangement.[10]

---

[5] *[2002] SAWCT 64 at [19]*
[6] *Australian Salaried Medical Officers Federation and Australian Capital Territory and the Australian Capital Territory Health Care Service v ACT Visiting Medical Officers Association - PR958666* [2005] AIRC 525
[7] (1989) 17 NSWLR 553
[8] *Australian Salaried Medical Officers* at 25
[9] Ibid [at 30]
[10] Ibid [at 33]

17. In *ACE Insurance Limited v Trifunovski* [2013] FCAFC 3, GST compliance registration and BAS submission was held to be a relevant consideration.[11]

18. Workers compensation cases were considered,[12] references to control, provision of equipment and payment by results are all instructive.

19. If a person doing the work only agrees to produce the result but is not subject to control then he is an independent contractor.[13]

Restraint of Trade[14]

1. The common law of restraint is essentially that restraint must be reasonable. If a restraint of trade is not reasonable, it is void.[15] The onus of showing the reasonableness is on the person seeking to enforce the restraint.[16] The onus of showing that the restraint is injurious to public interest rests on the party alleging that restraint.[17]

2. The validity of the restraint is tested at the time of entering into the contract and by reference to what the restraint required, not what the parties intended to do or what they have done since.[18]

3. Reasonableness is tested by reference to the interests of the parties and the public, and the restraint must provide no more than adequate

---

[11] [2013] FCAFC 3 at [33]
[12] Ibid at [61]-[65]
[13] Ibid at [61]
[14] *Some of the structure and case law in the paper about restraint of trade was assisted by and in part derived from a presentation by Justice Martin (President of the Queenland Industrial Relations Commission) at an Employment Law Conference at the Gold Coast on 22nd of August 2015*
[15] *Amoco Australia Pty Ltd v Rocca Bros Motor Engineering* (1973) 133 CLR 288 and *AGA Assistance Australia v Tokody* [2012] QSC 176
[16] *Adamson v NSW Rugby League* (1981) 27 FCR 535 and *Stacks/Taree Pty Ltd v Marshall No. 2* [2010] NSWSC 77
[17] *Stacks/Taree* Supra
[18] *Woolworths Limited v Olsen* [2004] NSWCA 372 and EZY DVD Pty Ltd v LAHRS Investments Queensland Pty Ltd [2010] 2 QDR 517

protection.[19] So matters that can be protected include, knowledge of the employers affairs obtained by an employee in the ordinary course of trade, protection against mere competition is not allowed unless it is reasonably necessary to protect legitimate business interests.[20] Also customer connection can support a restraint if the employee is the human face of the business.[21]

4. Solicitation is an issue in terms of solicitation of clients, employees and customers. Solicit, as it is normally defined, means to ask or make requests or to persuade. Any complete ban on dealing with any customer or a former employee of a former employer is likely to be void.[22]

5. Limitation to customers of the business during all or part of the employment may be acceptable. A common covenant to be enforced is a restriction to the customers with which the employee dealt. The obligation under this type of clause depends on two (2) factors. An employee must have been in a position to gain trust and confidence, and the relationship between the employee and customer is such that there is a possibility that the business may go with the employee.[23]

6. In terms of remedies, injunctions, damages or both - significant cases are *BearingPoint Australia Pty Ltd v Hilliard* [2008] VSC 115, but alternative results are found in *BDO Group Investments v Ngo* [2010] VSC 206 and *Andrews Advertising v Andrews* [2014] NSWSC 318.

7. Determining factors in failure or success are, whether the restraint period is too long or too broad,[24] has the informational business interest

[19] *Nordenfelt v Maxim Nordenfelt Guns* [1894] AC 535 and *Coops Martin v Reeves* [2006] NSWSC 449
[20] *Wright v Gasweld Pty Ltd* (1991) NSWLR 317 and *Harlow Property Consultants v Byford* [2005] NSWSC 285
[21] *Cactus Imaging Pty Ltd v Peters* (2006) 71 NSWLR 9
[22] *Smith v Ryngiel* [1988] 1 QDR 179
[23] *Wallis Nominees (Computing) Pty Ltd v Pickett* [2013] VSCA 24
[24] *Sports Bet v Carpanini* [2014] VSC 166

been identified, is the informational business under threat, are there other ways to protect the interest and has the employer moved quickly enough.[25]

8. It is fair to say that the law looks differently at restraint of trade post employment and restraint of trade post sale of business. It is generally the case that enforcing a restraint of trade after the sale of a business by a vendor is easier than enforcing a restraint of trade against an ex employee, particularly because each turns on the particular factual circumstances.

9. Another consideration is the severance and the blue pencil test which is set out in Nordenfelt's case[26]. The last time this was considered in Australia was in *SST Consulting Services Pty Ltd v Rieson* [2006] HCA 31. There the Court found that there were three (3) relevant questions to be asked:

    a. Whether it could be enforced if it had been more narrowly drafted;
    b. Whether the one seeking to enforce the promise can enforce it in consideration of which the restraining covenant was given (if it is not illegal);
    c. Whether if a contract is unenforceable, transactions connected or associated with it are also unenforceable.

10. One must never assume a court will apply the severance test liberally to a post employment restraint of trade.[27] However, *Austra Tanks* [2010] NSWCA 267 is authority for the proposition that where a complex and difficult restraint of trade clause with multiple combinations and permutations is so impenetrable as to lack coherent meaning, it may be

[25] *Fairfax Media Management v Harrison* [2014] NSWSC 470
[26] Ibid
[27] *Wallace Nominees* Supra

struck out. The more complex the cascading system, the more likely it is to be struck out for uncertainty.

11. Recently in a decision of the Queensland Supreme Court *Auto Parts Group Pty Ltd v Cooper & Ors* [2015] QSC 155, the Court made a finding against an employee and made preliminary orders restraining ex-employees from working for another business for a period of six (6) months from the date of the commencement of proceedings.

12. Relevantly in this matter, the Court was of the view that a six (6) month period was reasonable, the geographic area of the restraint, the entirety of Queensland, was reasonable and that particularly because of the real possibility of the misuse of confidential information, the Court found the employees should be the subject of injunctions restraining them in an appropriate manner.

13. The Court cited the judgment in *Vision Eye Institute Limited v Kitchen* [2014] QSC 260

> *Subject to reasonable restraints to protect an employers legitimate interest and employees should be free to pursue a living in his or her chosen field. The principle interest which can be protected by restraint against a former employee is a benefit of the former employer of the relationships with its customers. In general, restrictive covenants restraining an employee will be scrutinised more strictly than in covenants in relation to the sale of a business. A restraint upon a former employee may be reasonable if it allows a replacement employee to establish a connection with customers and thereby protect the employer's goodwill… One test is to ask how long it will take the connection between the ex-employee and the customer to die away.*

14. In general terms, health practitioners working with corporate entities or indeed other health practitioners, whether they be independent contractors or employees, need to pay close attention to the contracts that they execute relating to restraint. The terms the of contract may not necessarily be capable of enforcement where the parties agree to a restraint that is against public policy and does more than is reasonable to protect the employers business.

Brad Wright
Chambers

brad.wright@bennettchambers.com.au