

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 414/08
File No 5122810

BETWEEN	SUZAN GEORGE REZQALLAH Applicant
AND	DENTAL WORLD (NZ) LIMITED (IN LIQUIDATION) Respondent

Member of Authority: Robin Arthur

Representatives: Applicant in person
Iain McLennan for Respondent

Investigation: 8 December 2008 by telephone conference

Determination: 8 December 2008

DETERMINATION OF THE AUTHORITY

[1] On 29 April 2008 Dr Suzan Rezqallah lodged a recovery application in the Authority seeking orders requiring Dental World (NZ) Limited to pay her around \$6128.86 in commissions due for work she did as a dentist for the company.

[2] Three days later Dental World went into voluntary liquidation. Insolvency practitioners Boris van Delden and Peri Finnigan, both partners of the firm McDonald Vague, were appointed as liquidators.

[3] No reply to Dr Rezqallah's application was lodged by the company or the liquidators.

[4] Despite repeated requests from the Authority the liquidators failed to formally respond to the question that must be asked of them under s248(1)(c) of the Companies Act 1993 – would the liquidators agree to Dr Rezqallah continuing her proceedings against the company?

[5] From the papers Dr Rezaqallah lodged with her application it appeared that there may be an issue as to whether she was an employee or an independent contractor to Dental World.

[6] By Minute of 29 May 2008 the Authority asked the liquidators to respond to two questions about Dr Rezaqallah's claim:

- (i) was her claim for commission accepted as a preferential claim; and
- (ii) if there were a dispute as to her employment status – whether she was an employee or an independent contractor – did the liquidators agree to her proceedings in the Authority continuing for the purpose of deciding that question?

[7] If the liquidators had answered yes to the first question, there would have been no purpose in the Authority continuing to investigate Dr Rezaqallah's claim. There had been no dispute from Dental World's director that the money was owed (email of 12 April 2008 to Dr Rezaqallah refers). It would have been a matter of whether there were any funds in the liquidation to meet the claim.

[8] If the liquidators had answered no to the first question and yes to the second question, the Authority could have proceeded to investigate and determine the real nature of the relationship between Dr Rezaqallah and Dental World under s6(2) of the Employment Relations Act 2000 ("the ER Act"). The purpose of that process would be, in effect, to decide where Dr Rezaqallah stood in the "queue" of creditors if there were any funds for distribution once the liquidation was complete. If she were found to be an employee, she would be a preferential creditor under Schedule 7 of the Companies Act 1993 and 'further up' the queue than an independent contractor.

[9] If the liquidators had answered no to the second question, the matter before the Authority would have been at an end. That is because s248(1)(c) of the Companies Act 1993 prohibits a person continuing legal proceedings against a company in liquidation unless the liquidator agrees.

[10] However none of these answers have been forthcoming from the liquidators. They have not replied to letters from the Authority dated 29 May and 28 October

2008. An Authority support officer made contact with Mr McLennan, a consultant to the liquidators' firm and acting for them in this matter. By email to Mr McLennan on 14 August and 20 October 2008 the liquidators were again asked whether they would agree to proceedings continuing.

[11] By telephone conference today Mr McLennan says the liquidators are "*not in a position to agree or disagree*" because they had not yet determined the extent of any funds for distribution.

[12] As I said to Mr McLennan today, it is unsatisfactory for the Authority to have to wait six months without an answer from the liquidators to a question that a statute requires to be put to them.

[13] It is also unsatisfactory, if the situation is as Dr Rezqallah reported it, that Mr van Delden told her during a telephone conversation not to put in a claim. She says that Mr van Delden told her to "*forget it*" if she was a "*subcontractor*" as there was a debt of more than \$500,000 to Inland Revenue which was likely to take up any available funds.

[14] That issue is at the heart of the question to be resolved if the liquidator agreed to continuation of the legal proceedings. If Dr Rezqallah were found to be an employee rather than a contractor, her claim would take preference in any distribution of funds over money owed to IRD: see Schedule 7 of the Companies Act 1993.

[15] While Dr Rezqallah had signed an agreement headed "*Self Employed Subcontractor Contract*", the label given by the parties is not determinative of the nature of the relationship: see s6 of the ER Act. That is a matter to be determined by applying the statutory criteria and a range of tests developed by the Courts.

Determination

[16] The liquidators – through Mr McLennan – say they are not in a position to agree or disagree with Dr Rezqallah continuing her proceedings against the company.

After a six month wait I consider I must take this as effectively a statement that they do not agree. I interpret s248(1)(c) of the Companies Act 1993 as requiring a positive act of agreement if the proceedings are to be allowed to continue. Silence or equivocation is not enough.

[17] In that light I cannot proceed to investigate and determine the matter that Dr Rezaqallah lodged in the Authority, including the issue of her employment status. I cannot dismiss her claim on that basis but neither can I do anything more about it.

Robin Arthur
Member of the Employment Relations Authority