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LAWYERS FOR EMPLOYERS

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In this Issue

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Beware the Dependent Contractor: Court Awards 26 Months' Notice

In the case of *Keenan v. Canac Kitchens,* the Ontario Superior Court of Justice reminds employers of the factors to be considered in discerning whether an independent contractor agreement or relationship is actually not an employee relationship… or something else.

Lawrence Keenan worked for Canac from 1976 to 2009. Mr. Keenan's wife worked for Canac from 1983 to 2009, prior to which time she helped her husband on an informal basis to install kitchen cabinets and subsequently to supervise the installation, delivery and repair of kitchen cabinets. In 1987 Canac informed the Keenans that they would no longer be employees and would instead carry on their work for Canac as independent contractors. They were informed that going-forward, Canac would set the rates to pay the installers but the Keenans would be responsible for paying installers who would provide their own trucks.

The Keenans signed an agreement with Canac stipulating this new structure without seeking legal advice. Canac issued a Record of Employment indicating the reason for issuance as "quit" and the Keenans registered a business name and obtained insurance as required by the agreement. They also registered with the former Workplace Compensation Board but not with the Canada Revenue Agency. The Keenans worked exclusively for Canac until 2007 and were under the impression that the agreement prohibited them from working for other employers. In 2008, 66% of their work was from Canac and in 2009 that number increased to 73%. Furthermore, they enjoyed Canac employee discounts, wore the company logo and appeared to third parties to be Canac representatives.

In 2009, Canac informed the Keenans that it was closing its doors. It also informed them that they were not required to provide any notice of termination. At issue in this case is whether the plaintiffs were dependent contractors or independent contractors of Canac.

The Court began by restating the law of dependent contracts in Ontario defining it as an "intermediate category of relationship" between employee and independent contractor. It reiterated that dependant contractors are owed reasonable notice on termination and then provided the test which employers should apply to distinguish independent contractors from employees, when considering the status of a commissioned agent:

1. Whether or not the agent was limited exclusively to the service of the principal.
2. Whether or not the agent is subject to the control of the principal not only as to the product sold, but also as to when, where, and how it is sold.
3. Whether or not the agent has ownership of the tools.
4. Whether or not the agent has undertaken any risks in the business sense, or, alternatively, has any expectation of profit associated with the delivery of his service as distinct from a fixed commission.
5. Whether or not the activity of the agent is part of the business organization of the principal for which he works. In other words, whose business is it?

When applying this test to the facts presented above, the Court concluded that the Keenans were dependent contractors from 1987 until their termination, having been employees of the defendant prior to that. The Court concluded:

- The terms of the 1987 agreement could reasonably be interpreted as requiring exclusivity and Mr. Keenan believed that they were not at liberty to work for other kitchen cabinet companies.
- Canac maintained effective control of the business by setting the rates for both the installers and the Keenans, establishing the service standards, dictating work flow, setting deadlines, providing a lawyer to advocate at a workers' compensation hearing for an outcome favouring Canac's interests.
- While the Keenans supplied their own manual tools, Canac supplied a pager, car phone, and mobile phone and office space at Canac's business premises.
- Due to the piecework arrangement for payment and the fact that the plaintiffs were as fully engaged as they could be in working for Canac, there was no genuine opportunity to generate additional profits.
- Finally, it was Canac's business given the representation made to third parties by the requirement to display Canac's logo on vehicles used to transport Canac's product to the job site.

The Court recognized Mr. and Ms. Keenan, respectively, 32 and 25 years of service and awarded 26 months' wages in lieu of reasonable notice of termination.

Employers should be cautious when attempting to create an independent contractor relationship as courts will go beyond the written agreement to determine whether the contractor is a true business and is independent from the employer. The more control that the employer has over the work process, hours of work and rate of pay, the greater the likelihood that the contractor will be deemed an employee or a dependent contractor.

Human Rights Application Withdrawn on First Day of Hearing Warrants Sanctions

In *Drummond v. Community Living Ajax Pickering Whitby*, ("Drummond"), the Human Rights Tribunal of Ontario (the "Tribunal") barred the Employee from filing any future applications against the Employer and declared the Application unsubstantiated.

In *Drummond*, an Employee filed an Application alleging discrimination with respect to employment because of disability and reprisal contrary to the *Human Rights Code* ("Code"). On the morning of the first scheduled day of hearing, the Employee's counsel (the Employee was not in attendance) advised the Tribunal that she was withdrawing her Application.

The Tribunal's Rules of Procedure state that an Application may be withdrawn only under the terms determined by the Tribunal and with its permission.

The Tribunal indicated in its reasons that an Applicant should not be permitted to withdraw an application "in the course of a hearing or on the proverbial courtroom steps after having put the respondent and the Tribunal to considerable expense and inconvenience, without having some type of sanction imposed." Such a conduct should at the very least warrant an order preventing the Applicant from filing any future Application against the Employer.

The Tribunal disagreed with the Employer's argument that the Employee's conduct met the high threshold for a vexatious litigant declaration but agreed nonetheless that her conduct warranted some sanction.

Moreover, the Tribunal added that given "the filing of a human rights application is a serious matter that raises serious allegations against the respondent which may affect the respondent and its employees emotionally and reputational, an applicant should not be permitted simply to withdraw an application during the course of, or on the eve of, a hearing and thereby avoid a decision finding that the allegations raised in the application were unsubstantiated." In the

Tribunal's view, the request for permission to withdraw the Application "is tantamount to a failure to present evidence to prove the applicant's allegations, and warrants a declaration that the allegations raised in the application are unsubstantiated."

This decision demonstrates openness from the Tribunal to sanction Applicants who waste both the Tribunal and the employer's valuable resources. The Tribunal does not have the power to award costs against either party. Although the employer did not receive compensation in this case for its legal costs, if the application had been substantiated by the Tribunal, the employer would not have been required to pay the legal costs of the employee.

Fit As A Fiddle?: Employer Entitlements to Medical Information

In *Western Grain By-Products Storage Ltd. v. Donaldson,* the Federal Court of Appeal decided that employers are entitled to more detailed medical information to establish an employee's fitness to work after an absence of six months or longer.

Peter J. Donaldson had been employed by Western Grain By-Products Storage Ltd. ("Western Grain") for about 20 years. Mr. Donaldson became ill in May 2007, possibly as a result of a toxic allergic reaction to grain dust. He had been off work for close to six months when he attempted to return to work after a workers' compensation board determined that he did not suffer from an occupational disease and dismissed his claim. He presented Western Grain with a short note from his family physician stating that he was able to return to work. In its entirety, the note stated:

> *"Mr. Donaldson is now capable of returning to his job & employment at Western Grain"*

Western Grain refused to permit Mr. Donaldson to return to work until he presented more comprehensive medical information as to his fitness to perform his work duties in that work environment. Shortly thereafter, Western Grain advised Mr. Donaldson that he was being placed on temporary layoff for reasons unrelated to his illness.

Mr. Donaldson claimed that Western Grain's refusal to permit him to return to work constituted unjust dismissal. Pursuant to the *Canada Labour Code*, an adjudicator heard the case and determined that Mr. Donaldson was indeed unjustly dismissed from his employment. First, the adjudicator found that the findings of the workers' compensation board were sufficient for the employer to determine whether the employee was fit to return to work. Furthermore, the adjudicator understood Western Grain's request for medical information as a request to produce medical documentation for a period of over 20 years of employment. The adjudicator held that because Western Grain required an overly broad and onerous production of information before Mr. Donaldson would be permitted to return to the workplace, Mr. Donaldson was entitled to consider himself constructively dismissed.

On application for judicial review, the Federal Court ultimately decided that the adjudicator's conclusion was unreasonable because it was based on a misunderstanding of Western Grain's request for further medical information. Mr. Donaldson appealed this decision unsuccessfully as the Federal Court of Appeal upheld the Federal Court's finding.

The Federal Court of Appeal made the following findings of fact and conclusions:

- The decision of the workers compensation board was not conclusive as to Mr. Donaldson's capability to return to work. Therefore, Western Grain was not precluded from obtaining further medical information from Mr. Donaldson directly.
- The two-line note from the Mr. Donaldson's physician lacked any explanation as to why he was now fit to return to work. It was reasonable for an employer to obtain further medical information from an employee upon his or her return from a lengthy period of sick leave in order to fulfil its obligations under Part III of the *Canada Labour Code* to ensure the health and safety of its employees. Therefore, the request for more substantive medical documentation did not amount to a change in a fundamental term of Mr. Donaldson's employment such as to constitute a constructive dismissal.

Mr. Donaldson's appeal was dismissed and the adjudicator's order set aside.

This case confirms that employers have the right to request substantive medical documentation confirming an employee's fitness for work when the employee has been absent from the workplace due to a medical condition for an extended period of time. Employers should consider including a detailed job description with its medical request to ensure that the physician understands the work environment and the duties which the employee will be expected to perform. The response to the request should provide sufficient detail of the employee's physical and/or mental restrictions to assist the employer to make an informed decision as to whether or not the workplace is safe for the employee and if not, whether any modifications are needed to ensure a safe return.

Consultations with the Ministry of Labour

The Changing Workplaces Review

The MOL has launched public consultations on the changing nature of the modern workplace.

The Changing Workplaces Review will consider the broader issues affecting the workplace and assess how the current labour and employment law framework addresses these trends and issues with a focus on the *Labour Relations Act* (*LRA*) and the *Employment Standards Act, 2000* as amended *(ESA)*.

Consultations will be led by two Special Advisors.

Special Advisors will seek to determine whether changes should be made to the *LRA* and the *ESA* in light of the changing nature of the workforce, the workplace, and the economy itself, particularly in light of relevant trends and factors operating on our society, including, globalization, trade liberalization, technological change, the growth of the service sector, and changes in the prevalence and characteristics of standard employment relationships.

What the consultations will not consider:

- the construction industry provisions of the *LRA*;
- the minimum wage; and
- policy discussions for which other independent processes have been initiated.

Employers should note that comments will be accepted by the MOL until September 18, 2015.

Employer to Pay Reasonable Notice due to "Ambiguous" Termination Clause

Recently, in *Howard v. Benson Group,* the Ontario Superior Court of Justice determined that a termination clause was ambiguous and therefore unenforceable. Consequently the Employer had an obligation to provide reasonable notice at common law as opposed to the minimum statutory requirements under the *Employment Standards Act, 2000* as amended (*ESA*).

The Employee was a Truck Shop Manager for the Employer's business of automotive parts and service repair. The Employer terminated the Employee's employment by providing him with two weeks' working notice and two weeks' severance pay. At the time of dismissal, he had completed two years of service with the Employer.

The clause read:

> 8.1. *Employment may be terminated at any time by the Employer [the defendant] and any amounts paid to the Employee [the plaintiff] shall be in accordance with the Employment Standards Act of Ontario. [sic]*

The employee argued that the clause was void and unenforceable for a number of reasons such as:

- The phrase "amounts paid" in the Clause does not specify which amounts are included in the payments such as base salary, bonus and benefits. Clauses limited to continuation of base salary only are considered in violation of the *ESA*;

The provision of reasonable notice by an employer to an employee who was dismissed will only be rebutted if the employer achieves the degree of clarity required.

The Tribunal will hear the parties' submission on the reasonable notice and mitigation issues in October of this year. We will keep you informed on the amount of notice awarded to the Employee.

Termination clauses are a key tool to protect employers at the outset of the employment relationship. Employers must ensure that these clauses comply with the minimum standards under the ESA and that they clearly outline what will be provided to the employee in the event of a termination without cause.

Employers should also consider a periodical review of their employment contracts to ensure their compliance with the most recent court decisions.

Ontario to increase Minimum Wage in October 2015

As of October 1, 2015 the General Minimum Wage in the province of Ontario will increase from $11.00 to $11.25. The Minimum Wage prior to June 2014 was $10.25.

The minimum wage rates are subject to annual indexation based on the rate of inflation. If that rate is changed, the new rate will be published on or before April 1 of each year and will come into effect on October 1.