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'Dependent' contractor further clarified

Ontario lawyer had several agreements renewed with law office over 13-year period

BY SARAH DOBSON

THE QUESTION of how to characterize a worker who's not quite permanent and not quite independent was further clarified with a recent Court of Appeal for Ontario decision.

"If I had to guess going forward, employers are going to be more reluctant to structure relationships in this way… At the end of the day, it just comes down to how [good] of a contract you have and, day to day, what is the relationship like? And can you maintain that going forward?" says Chris Justice, an associate at MacDonald & Associates in Toronto.

"Given the evolution and the trend we're seeing, there's likely going to be more cases coming after [this] that expand on this decision and provide even further clarity."

The question of how to characterize a worker who's not quite permanent and not quite independent was further clarified with a recent Court of Appeal for Ontario decision at Osgoode Hall in Toronto. Trevor Overview Inc (shutterstock)

Background

Barbara Thurston was a sole practitioner lawyer who provided legal services to the Office of the Children's Lawyer (OCL) in Toronto.

She had a series of agreements with the office over 13 years, where she was required to apply for re-appointment for one- or two-year terms as each contract expired, with no automatic renewal.

Thurston also maintained an independent legal practice that formed the majority of her billings. Her OCL work averaged about 40 per cent of her total annual billings over the years.

When Thurston's agreement was not renewed in 2015, she brought a claim alleging she was a dependent contractor and, therefore, entitled to 20 months' notice of termination.

The motion judge found that the lawyer's work for the OCL was continuous, performed under the OCL's control and she was perceived by the public to be an employee of the OCL. Her billings for OCL also had increased in recent years to represent an increasingly larger portion of her income.

The motion judge, therefore, concluded that these factors were sufficient to "tip the balance" in favour of Thurston being a dependent contractor.

But the appeal court said the motion judge erred in its analysis of two cases: *McKee v. Reid's Heritage Home Ltd.* and *Keenan v. Canac Kitchens Ltd*.

In the 2009 *McKee*, a dependent contractor was defined as a non-employment relationship where there is "a certain minimum economic dependency, which may be demonstrated by complete or near-complete exclusivity." But this is a "vaguely worded standard," said Justice Grant Huscroft in his June 24, 2019 decision, adding that its application is "highly context-specific."

"The determination as to dependent contractor status must be made having regard to the purpose of the concept: the extension of the common law entitlement to notice of termination from employees to dependent contractors," he said.

And in the 2016 *Keenan*, the court stated exclusivity was "integrally tied to the question of economic dependency," said Huscroft, and the determination of exclusivity requires consideration of the full history of the relationship.

In this case, Thurston did not work exclusively for the OCL, she did not have any entitlement to a minimum level of work, the children's office expected her to maintain a private legal practice and an average of 40 per cent of her billings came from the

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OCL, he said.

"To be sure, that is a significant percentage of the respondent's billing, and the loss of the OCL retainer would have had a substantial impact on the respondent's legal practice and her income. But that is not determinative of her status as a dependent contractor. On no account can 39.9 per cent of billings be said to constitute exclusivity or 'near-complete exclusivity,' such as economic dependence on the OCL is established."

Near exclusivity "necessarily requires substantially more than 50 per cent of billings. If it were otherwise, exclusivity — the 'hallmark' of dependent contractor status — would be rendered meaningless," said Huscroft.

The appeal court also said the previous decision failed to consider all the relevant factors going to economic dependence, including whether any dependence was self-induced.

The relationship was also not continuous and the OCL did not have a high degree of control over Thurston's work, said the appeal court. The OCL also reserved the right to terminate the retainer agreement at any time, without fault or liability.

"In short, the OCL was one of the respondent's clients — a very important client, but only one of her clients. The loss of a client will be more or less significant to any contractor, but care must be taken in applying dependent contractor case law to professionals such as lawyers working under retainer agreements," said Huscroft.

Defining 'near exclusivity'

Unfortunately, more often than not, employers try to take advantage of this independent contractor situation, says David Master, an associate at Littler Mendelson in Toronto.

"One of the most litigious areas in Canadian employment law is mischaracterization of workers — mischaracterizing them as independent contractors when they are, in fact, actually employed. So, this category [of] dependent contractor is the court's way of essentially bridging that gap and implementing some type of fairness in the process."

While the Court of Appeal said it's about looking at near exclusivity to demonstrate economic independence, it's challenging to really know what that is, he says.

"Thankfully, with this case, we have what I would say is a floor… essentially, more than 50 per cent of your income from one source. And if you have that, then we can have a discussion and look at the whole relationship. But where the initial court went wrong was they didn't prioritize that; they looked at the whole relationship but didn't first look at 'How much are the billings? How much is the economic dependence?' And those other factors only become relevant once you get more than 50 per cent of the billings."

The court seems to be saying there needs to be near complete exclusivity, says Justice.

"Basically, if someone in this woman's situation can prove that substantially more than 50 per cent of their earnings or their business comes from one company, that doesn't necessarily mean that they're automatically going to be deemed a dependent contractor. But it appears as though that's at least a requirement that will go into the overall analysis. So, if they don't have that, it's almost like the courts are saying, 'You're not a dependent contractor.' And if you do have that, they're saying, 'You're not necessarily one. But we'll look at some other factors.'

"And if a person's economic dependence is self-induced, and they worked exclusively for that company out of their own volition, there may be cases where companies say, 'OK, we may have been his only source, but we didn't say that he could only work for us. And, furthermore, he was only working for us five hours a week. So, he was fully entitled to go elsewhere and earn income. So, to say that [they're] now dependent upon us is only telling half the story,'" he says.

Takeaways for employers

Employers need to be very careful before claiming someone is not an employee, says Mark Geiger, a partner at Blaney McMurtry in Toronto.

"The courts have said, many times, 'We don't really care what the actual written documentation says the relationship is, we care what the actual relationship is.' And there are cases, for example, when people have set up companies and then act as essentially an employee for a company in order to try to avoid tax liability. And that doesn't work because Revenue Canada can come along and say, 'No, no, no, you're really an employee.'"

The problem is workers calling themselves independent contractors may be terminated and then apply for EI [employment insurance]. That person is now liable to pay tax as an employee, says Geiger.

"But it causes the employer a huge problem, because Revenue Canada can go back and claim contributions for EI and CPP [Canada Pension Plan] for four or five years."

There also needs to be consistency between the agreement or the policies and practices and what's actually happening, says Master.

"You can have an agreement that says, 'You're free to take jobs from whoever you want.' But then if the contract requires this person to work nine to five or be available from nine to seven on a moment's notice, well, how are they going to do that? So there needs to be consistency between the reality and the expectations."

While an employer might have a contract with a well-worded termination provision that provides the minimum obligations under the legislation, says Justice, the question is: Why are you characterizing the relationship that way?

"A lot of times, I find that employers are trying to structure relationships in this way for the main reason of avoiding any liability in the event of a termination," he says. "And, sometimes, that can work — and I think you can definitely craft an agreement and work on a go-forward basis in a way that would give you a pretty solid case to say that they're an independent contractor."

But, you never have that guarantee. And, sometimes, it's not worth the confusion or the doubt, because things change along the way and things aren't kept up to date — it's very easy to slowly slip into more of an employee-employer type relationship," says Justice.

An employer could have a contract that says, "You are not an employee, you are an independent contractor" a million times and be very clear in that regard, but

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the courts will look behind that and really examine the relationship between the two parties, he says.

It's definitely beneficial for a company to have a contract that says there's no guarantee of work and the person doesn't have to work exclusively for that employer, along with "something that doesn't give them any kind of guaranteed payment," says Justice.

You want to make sure you're limiting the liability as much as possible, says Monty Verlint, a partner at Littler in Toronto.

"You can't really force them or create that situation where they have many different clients. The one thing you can do, though, is you can say that… they're free to work for many different entities and that they're not prevented from doing that."

An employer can also tell the person they have to use their own tools of the trade, and the best thing to do is to contract for a fixed term or a specific project because that goes a long way as a factor in establishing a contract relationship, he says.

"[Otherwise,] you get into situations where the employee may be working for many, many years… and that's the problem that you're really getting into that you're trying to avoid — the dependent contractor situation."

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