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EMPLOYMENT LAW AND THE EMERGING NOTION OF THE DEPENDENT CONTRACTOR

Employers are generally familiar with the distinction between an employee and an independent contractor. A third category of worker, known as the “dependent contractor”, is beginning to be more widely recognized by Canadian courts.

A dependent contractor falls between an employee and an independent contractor. A dependent contractor is typically found to be a contractor that is economically dependent on its principal. A written agreement setting out how the parties wish to label and identify their working relationship is not determinative of the matter, as the courts will look behind the label to determine the true nature of the working relationship. The primary factor the courts will consider in determining whether a contractor is dependent is whether the contractor is working predominantly for one principal.

If the working relationship between a contractor and the principal is found to be dependent, the principal must provide the dependent contractor with reasonable notice of termination, similar to an employer/employee relationship, although the amount of notice may be different depending on the circumstances.

In *Khan v. All-Can Express Ltd.*, (2014 BCSC 1429), for example, the Supreme Court of British Columbia found the existence of a dependent contractor relationship where Khan, an owner-operator of his own truck, entered into a contract whereby he worked nearly exclusive for the Defendant courier company. Although Khan signed a contract providing that he was an independent contractor responsible for the maintenance of his truck, and that he was required to hire a replacement driver when he was not available, the court found he was a dependent contractor because Khan had a nearly exclusive, long term (5 year), indefinite relationship with the courier company, had to wear its uniform, and was required to follow its policies and procedures.

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More recently, in 2016, the Ontario Court of Appeal confirmed that determining the “status” of the worker is essential in determining an employer’s obligations upon termination. The dependent contractor status was recently affirmed by the Court in *Keenan (c.o.b. Keenan Cabinetry) v. Canac Kitchens, a Division of Kohler Ltd* (“Canac”) 2016 ONCA 79.

Lawrence Keenan was the principal of Keenan Cabinetry and worked for Canac for 32 years installing kitchen cabinets. Keenan’s wife, Marilyn also worked for Canac as a foreperson for 25 years. During their early years, the Keenans were listed as employees of Canac, but in 1987 Canac informed the Keenan’s they would be independent contractors rather than employees. The Keenans subsequently signed a document setting out that they were subcontractors of Canac. Between 1987 and 2007, the Keenans worked almost exclusively for Canac, wore shirts with company logos and carried Canac business cards. In 2007 business slowed down and the Keenans began doing some minor for one of Canac’s competitor’s to supplement their earnings.

The Ontario court found the Keenans were dependent contractors of Canac because other than some occasional minor work, they worked almost exclusively for Canac. Although the Keenans owned some of their own tools, they effectively worked out of Canac’s business premises and were Canac’s employees or exclusive contractors to the outside world.

Actions seeking damages on behalf of dependent contractors have also been successful in *Alberta in Drew Oliphant Professional Corp. v. Harrison* (2011 ABQB 216), *Weber v. Coco Homes Inc.* (2013 ABQB) and most recently in Nova Scotia in *Shaham v. Airline Employee Travel Consulting Inc.* (2018 NSSM 18).

Although the legal concept of dependent contractors has yet to be formally recognized in other Canadian courts besides Alberta, British Columbia, Ontario, and Nova Scotia, their recognition in the remaining provinces is likely inevitable and can be applied to an employer retroactively so long as the claim is commenced within the provinces’ applicable limitation period. 

About the Author:

George A. Green is a partner in the Saskatoon office where he practices extensively in the areas of employment law, debt recovery and criminal defense.

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