Focus LABOUR & EMPLOYMENT

New category of worker emerges

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The distinction between an employee and independent contractor has puzzled lawyers and the courts for a very long time. In Canada, a third, intermediate category has emerged — that of "dependent contractor."

In fact, a recent case from the Ontario Court of Appeal, *Keenan v. Canac Kitchens Ltd.*, [2016] O.J. No. 455, has not only affirmed this status, it has also confirmed a surprising 26-month termination notice period for two individuals in this category. The result is that identical legal protection has been granted to individuals who fit this label, since they do not fit nicely in the categories of "employee" or "independent contractor."

The facts of this case are straightforward. Lawrence Keenan worked for the defendant, Canac Kitchens, a cabinet manufacturer, for 32 years until 2009. He worked first as an installer of kitchen cabinets and then as a supervisor for the delivery and installation of Canac's kitchen cabinets. Lawrence Keenan's wife, Marilyn Keenan, began working for Canac as a foreman in 1983. She continued to work with the defendant until 2009, after 25 years of service. Lawrence and Marilyn Keenan were 63 and 61 years of age, respectively. The trial of the action addressed the issue of whether the plaintiffs were employees, dependant contractors or independent contractors of the defendant and what notice period was reasonable as a result of the termination of the relationship.

The court held that the evidence overwhelmingly favoured the conclusion that the Keenans were dependant contractors, and, as such, entitled to reasonable notice of termination of the relationship. The trial court held that a finding that the worker was "economically dependent" on the defendant due to "complete exclusivity" or a "high level of exclusivity" weighs heavily in favour of the conclusion that the intermediate category of "dependent contractor" should apply.

The Court of Appeal found that this observation was not only correct, it is vital to understanding how the question of exclusivity is to be approached. It stated that

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exclusivity cannot be determined on a "snapshot" approach because it is integrally tied to the question of economic dependency. Therefore, a determination of exclusivity must involve, as was done in the present case, a consideration of the "full history of the relationship." It is for the trial judge to determine whether, after examining that history, the worker was "economically dependent" on the company due to exclusivity or a high level of exclusivity. With this history of the work relationship between the parties in mind, the Court of Appeal found no error in the trial judge's finding of the requisite high degree of exclusivity and dismissed the appeal.

The general practice of the courts in Ontario is not to award more than 24 months of notice of termination for employees, unless exceptional circumstances are present. In addition, other common law cases have reduced the notice period where there is a finding of dependent contractor instead of employee. For example, see *Erb v. Expert Delivery Ltd.* [1995] N.B.J. No. 381 and *Jackson v. Norman W. Francis Ltd.* [1999] N.B.J. No. 147 where the court had reduced the notice period to half of what it normally would have been for an employee. However, in this case, the Court of Appeal affirmed the award of 26 months of notice even though exceptional circumstances were not found and despite the plaintiffs' status as dependent contractors.

Keenan represents a further example of an ongoing trend where those in "non-standard working relationships" are recognized and offered increased rights and protection. In this regard, there are consultations taking place in Ontario that consider more changes to the *Labour Relations Act* and the *Employment Standards Act, 2000* as a result of the changing nature of the workplace. Some of the many questions as part of the consultations is whether changes to definitions of employees or employers should be considered and whether specific employment relationships (i.e., those arising from franchising, subcontracting or agencies) should require special attention in the *Employment Standards Act*. Those consultations have now concluded and we expect an interim report to be released shortly with the final report and recommendations expected later in 2016.

Considering *Keenan*, there are many steps an employer should take to help minimize the risk of an unfair finding of dependent contractor and those steps should be reviewed carefully with legal counsel.

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