Commission des normes du travail v. 1845 William Commandité: Employee Status and the Gig Economy

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Last November, Justice Granosik issued a decision that was in line with the current trend of increased recognition of "employee" status to people who are otherwise often considered to be self-employed.

In *Commission des normes du travail*c.*1845 William Commandité,*1the Court had to determine the status of Jennifer Jackson ("Jackson"), a real estate broker having worked for a company, 1845 William Commandité ("William"), as a sales representative and then sales manager, all under a service agreement providing that Jackson was a self-employed worker.

The facts of this case are simple. William is a company created to manage and complete a real estate development project consisting of three buildings comprising 161 condominiums with a total value of more than $60 million. In August 2011, after acting for a few months as a real estate broker for William, Jackson is offered to work for the company as a sales representative, which she accepted. Under the terms of this agreement, Jackson is paid only on commission, that is a fixed amount of $1,500 for each condominium, $250 for each parking lot, and 5% for any extra sold to William's customers. When Jackson accepted this position, William offered her the opportunity to join the company either as an employee or as a self-employed worker. Jackson made the choice to enter into an agreement under which she retained the status of self-employed worker.

In March 2012, Jackson is appointed as sales director. The agreement that bound her to William then remains substantially the same, except that she must henceforth provide certain reports regarding the sales progress and hours of work of one of the employees of the company, and that she receives commissions both at the time of sale and at the time of delivery of condominiums sold.

In March 2013, following an altercation with William's officers, Jackson decided to leave the company. She then filed a complaint with the *Commission des normes, de l'équité, de la santé et de la sécurité du travail*("CNESST") to obtain the unpaid commissions owed by William when she left. However, following its investigation, the CNESST concluded that Jackson was not a self-employed worker, but an employee of William,

and claimed, on her behalf, the unpaid commissions as wages, as well as vacation and statutory general holidays indemnities.

In his analysis to determine Jackson's status within the meaning of the *Act Respecting Labour Standards*(the "Act") and jurisprudence, Justice Granosik reaffirms that an employee is a person who rents out their services to another a person (including a legal person) who pays them a salary in return. He also states that an employee-employer relationship must include: elements of subordination, that is, an authority or hierarchical relationship; the employer's determination of a working framework, meaning its parameters and objectives; and finally, the remuneration paid by the employer to the employee.2This definition can also include managerial personnel. On the contrary, the relationship between a service provider, or self-employed worker, and an enterprise will be characterized by the worker's independence in the performance of their work, as well as by their chances of profit or risks of loss. Moreover, independent workers will not be evaluated on the quality of their work as such, but rather on the final result of their performance. Finally, Justice Granosik explains that the most important criterion to be analyzed is the presence of a relationship of subordination between the worker and the company.

Applying these principles to the facts of the case, the judge determines that despite the absence of any assessment of Jackson's performance or any sales objective, and despite the fact that she never received or was submitted to the application of any company policy, the overriding evidence establishes the existence of a relationship of subordination between Jackson and William.

Indeed, in the Court's view, the overall relationship between Jackson and William must be qualified as an employee-employer relationship for several reasons. First, all the tools used by Jackson belong to William, besides her cellphone, which is paid for by the company. Second, Jackson's work schedule must be approved by William's officers. Third, Jackson has no discretion with respect to the price of condominiums, cannot sign a purchase agreement herself, and must obtain the consent of William's officers for any changes contemplated at the financial level. Fourth, the Court finds that Jackson, unlike an entrepreneur, runs no risk of loss or has no chance of making a profit because of her performance, since no matter how hard she works, her commissions are determined in advance.

Additionally, the Court notes that Jackson must notify William's officers of each of her absences, and have them approve her vacation. This is indeed what caused the altercation that led to Jackson's resignation, as she was reprimanded for an unplanned absence due to an illness. For the judge, this is clear evidence of a relationship of subordination between Jackson and William, which confirms Jackson's status as an employee, as well as the merits of the claim initiated by the CNESST.

In finding so, the judge rejects William's argument that not only has Jackson always been considered a self-employed worker in the eyes of the tax authorities, but more importantly, that she herself decided to work for William as a self-employed worker, when she had the choice of being an employee of the company.

1 2017 QCCS 5069

2 *Id*., para 37.

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