Ontario Court of Appeal Provides New Guidance in Assessing Dependent Contractor Status

December 02, 2019

In its recent decision in *Thurston v Ontario (Children's Lawyer)*, 2019 ONCA 640, the Ontario Court of Appeal has shed some significant light on an issue increasingly faced by employers — the determination of whether an individual who had been retained as an independent contractor has, in fact, accrued rights as a dependent contractor because of the nature of the arrangement.

Facts

In *Thurston*, the plaintiff, Barbara Thurston, was a sole practitioner lawyer who provided legal services to the Office of the Children's Lawyer (OCL) over a period of 13 years, pursuant to a series of fixed-term retainer agreements.

These agreements did not include an automatic right of renewal and specified that:

> (i) the plaintiff did not work exclusively for the OCL and would concurrently continue her private practice;
>
> (ii) the plaintiff was not guaranteed any minimum volume of work from the OCL; and
>
> (iii) the OCL reserved the right, at its sole discretion, to terminate said retainer agreement at any time, without fault and without liability.

Throughout her 13-year relationship with the OCL, the plaintiff maintained her independent legal practice, which accounted for the majority of her income during that period. The plaintiff's OCL work constituted an average of 39.9 per cent of her annual billings over the course of her retainer and only twice surpassed 50 per cent, reaching 62.6 per cent in 2012-2013 and 50.1 per cent in 2014-2015.

When her last contract expired in March 2015, the OCL informed the plaintiff that her retainer would not be renewed. The plaintiff (respondent) brought a claim alleging that she was a dependent contractor and was therefore entitled to 20 months' notice of

termination. The OCL moved for summary judgment to dismiss her claim, but the motion judge dismissed the OCL's motion and held that the plaintiff was a dependent contractor.

The Superior Court of Justice's conclusion was based on the motion judge's findings that the plaintiff had a long uninterrupted relationship with the OCL, performed work that was vital to the OCL, and was viewed by the public to be an employee of the OCL. The motion judge found that these elements outweighed the fact that the proportion of the plaintiff's annual billings stemming from OCL work was consistently below 50 per cent.

In June 2019, the Court of Appeal overturned the motion judge's decision and dismissed the respondent's action. Justice Huscroft, on behalf of the Court, reaffirmed the legal standard set out in *McKee v Reid's Heritage Home Ltd.*: "a certain minimum economic dependency, which may be demonstrated by complete or near-complete exclusivity."[1] Keeping in mind the purpose of dependent contractor status, namely the "extension of the common law entitlement to notice of termination from employees to dependent contractors," the Court emphasized that exclusivity was determinative in distinguishing dependent from independent contractors. This builds on the Court of Appeal's statement in *Keenan v Canac Kitchens Ltd.*, 2016 ONCA 79, that exclusivity, and therefore economic dependency, must be considered in the context of the entire span of the relationship.

Applying this legal standard to the respondent's relationship with the OCL, the Court of Appeal found that the average 39.9 per cent of annual billings derived from the OCL over the 13-year period did not meet the threshold of exclusivity or "near-complete exclusivity." Though "near-complete exclusivity" is an ambiguous concept and supplementary factors may play a role in assessing economic dependency, the Court in *Thurston* clarified that "'near-exclusivity' necessarily requires substantially more than 50 per cent of billings." Therefore, the respondent failed to satisfy the key requirement for dependent contractor status and the Court held that she did not fall within this category.

The Court of Appeal found that "the motion judge misapprehended the nature of the legal standard and failed to give effect to several relevant considerations." In addition to the insufficient average yearly billings from the OCL, the lower court did not take into account the following factors, which the Court of Appeal affirmed indicate an independent contractor relationship:

> (i) the respondent operated a parallel independent practice during the entire retainer, which constituted the majority of her total earnings;
>
> (ii) the contracts stated that the respondent did not work exclusively for the OCL and was not guaranteed a minimum value or volume of work from the OCL;
>
> (iii) the respondent had her own office, supplies, and staff; and
>
> (iv) the OCL reserved the right, at its sole discretion, to terminate the retainer at any time, without fault and without liability.

The court in *Thurston* further noted that while the loss of a client under a retainer agreement may represent a significant reduction in a contractor's billings, this loss does

not necessarily rise to the requisite level of economic dependency for dependent contractor status.

Takeaway

Thurston therefore affirms that the independent contractor inquiry is very fact-specific and dependent on the practical realities of the individual's working relationship with the employer. It also presents significant and helpful guidance in assessing the risk that an individual retained as an independent contractor may later be found to have dependent contractor status.

[1] *McKee v Reid's Heritage Home Ltd*,. 2009 ONCA 916 at para 30.

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