A "Dependent Contractor" got what…??

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Keenan v Canac Kitchens sheds some light on factors leading to the characterization of a 'dependent contractor' relationship as well as a review of characteristics that justify an award greater than 24 months.

A recent decision of the Ontario Court of Appeal upheld a lower court decision awarding 26 months of notice to two individuals deemed dependent contractors. Specifically, *Keenan v Canac Kitchens* sheds some light on factors leading to the characterization of a 'dependent contractor' relationship as well as a review of characteristics that justify an award greater than 24 months.

Summary of Factual Context

The two plaintiffs, Lawrence and Marilyn Keenan, had very lengthy periods of service (32 and 25 years), were 63 and 61 at the time of termination, held supervisory positions and up until the final 2 years of the relationship, worked exclusively for the defendant, Canac Kitchens.[1] Initially the plaintiffs were employees but in 1987 were told that they would carry on their work as independent contractors. At that time they were given new job titles, told to obtain insurance coverage, were provided with records of employment and draft agreements indicating the end of the prior employment relationship and the start of the new arrangement.[2]

The Keenans were not provided with independent legal advice or advised to obtain any. Only Mrs. Keenan signed the agreement. Neither paid attention to the records of employment, as the working relationship with Canac was continuing. Despite this change in 1987, the working relationship with Canac and related duties remained the same.[3]

At termination Canac's position was that the Keenans were independent contractors and therefore not entitled to notice of termination.[4]

Which One Is It? — Employment vs. Independent and Dependent Contractor Relationships

The concept of a 'dependent contractor' relationship was recognized previously by the Ontario Court of Appeal in *McKee v Reid 's Heritage Homes Ltd*.[5] and to determine the relationship, 5 principles are applied, which derive from *Belton v Liberty Insurance Co of Canada*.[6] One of the most significant principles identified in *Belton* is that of "exclusivity" — whether or not an agent is limited exclusively to the service of the principal.[7] The more exclusive the relationship, the more likely a contractor will be found to be a "dependent contractor".[8]

Looking at the full history of the relationship between the Keenans and Canac, the Court upheld the Trial judge's finding of exclusivity on the basis that over 30 years the Keenans were economically dependent on Canac and despite Canac turning a 'blind eye' to non-exclusive work the Keenans carried out for a competitor during the last two years of their relationship, the substantial majority of the work done by the Keenans continued to be performed for Canac.[9]

Extraordinary Notice Periods for Dependent Contractors?

At trial the plaintiffs were found to be dependent contractors and were awarded compensation for 26 months of notice.[10] On appeal the award was upheld despite the defendant's objection that the trial judge did not find exceptional circumstances supporting a notice period in excess of 24 months as required by the Ontario Court of Appeal's decision in *Lowndes v Summit Ford Sales Ltd*.[11] The Court did not find the lack of an explicit finding of "exceptional circumstances" fatal to the award, but considered the length of service, ages at termination, supervisory status and exclusivity as all factors justifying an award in excess of 24 months.[12]

Employer Considerations

This decision serves as a reminder for employers to carefully evaluate working relationships with contractors and to be cautious when considering a switch from an employer-employee relationship to an employer-contractor relationship. It is advisable to weigh the risks and benefits of doing so and implement procedures to effect the change in relationship. Independent legal advice for all parties is recommended.

Where employers are in long-term relationships with contractors, the history of their relationships will be taken into consideration when determining whether or not a dependent contractor or employment relationship exists. A non-exclusive relationship for a period of time is not necessarily fatal to the finding of a dependent contractor relationship and awards of lengthy notice periods are a real possibility.

[1] *Keenan (cob Keenan Cabinetry) v Canac Kitchens Ltd, a Division of Kohler Ltd*, 2016 ONCA 79, at para 32, [2016] OJ No 455 [*Keenan*].

[2] *Ibid* at paras 7-10.

[3] *Ibid* at paras 9-11.

[4] *Ibid* at para 15.

[5] *McKee v Reid's Heritage Homes Ltd*, 2009 ONCA 916, at para 22, 256 OAC 376 [*McKee*].

[6] *Belton v Liberty Insurance Co of Canada* (2004), 72 OR (3d) 81, at paras 11, 15 (CA) [*Belton*].

[7] *Ibid; Keenan, supra* note 1 at para 24.

[8] *Keenan*, supra note 1 at paras 24-25.

[9] *Ibid* at para 26.

[10] Ibid at para 19.

[11] *Ibid* at para 30; *Lowndes v Summit Ford Sales Ltd*, [2006] OJ No 13, at para 11 (CA).

[12] *Keenan*, supra note 1 at paras 31-32.

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