



26 Months' Notice for a Dependent Contractor

Employers should take notice of the recent decision of the Ontario Court of Appeal in which it was determined that an individual, who had been paid as an independent contractor was, in fact, a dependent contractor and entitled to 26 months' notice upon termination.

In the recently decided case of *Keenan v. Canac Kitchens Ltd.*, 2016 ONCA 79, the Court of Appeal (the "Court") set a new precedent by upholding an award of a 26-month notice period to a dependent contractor. This is a novel decision both because of the length of the notice period awarded, and for its determination that the plaintiffs were not independent contractors, despite there being contracts in place which described them as such.

In this case, the two plaintiffs, who were husband and wife, had worked for Canac Kitchens ("Canac") for 32 and 25 years respectively, installing and later supervising the installation of cabinets. In 1987, Canac advised the plaintiffs they would no longer be employees, but rather independent contractors. The plaintiffs registered as a business as "Keenan Cabinetry" but did not incorporate, and never registered as an employer with the Canada Revenue Agency. They worked exclusively for Canac, save for the occasional job on the weekends which were not invoiced through Keenan Cabinetry. The plaintiffs also wore Canac company clothing with the Canac logo on it, carried Canac business cards, and received company discounts. At the time of termination, the plaintiffs were 61 and 63 respectively.

"The common law in Ontario, relating to dependent contractors, is now well established. Employment relationships exist on a continuum; with the employer/employee relationship, at one end of the continuum, and independent contractors at the other end. Between those two points, lies a third intermediate category of relationship, now termed dependent contractors: McKee v. Reid's Heritage Home Limited, 2009 ONCA 916 (CanLII), at paragraph 30."

The Court determined that the plaintiffs' occasional weekend work did not dilute the exclusivity of their relationship to Canac. It looked beyond the written agreement between the parties which stated that the plaintiffs were independent contractors, and instead gave weight to the true relationship between the parties, as well as how the plaintiffs were perceived by clients. The Court determined that the plaintiffs were in fact dependent upon Canac and as such, should get something more than that which would be awarded to an independent contractor. At the original trial, the presiding judge considered the ages of the plaintiffs and their length of service and assessed the notice period at 26 months. On appeal, the Court determined that the award was justifiable and appropriate.

What does this mean for you?

- Contractors are not necessarily independent just because a written agreement defines them as such. This case reminds us that the courts will look to all of the facts and circumstances in deciding the true relationship of the parties. Employers should be careful to establish a relationship with their independent contractors that allows for enough autonomy that they are in fact truly independent.
- The Court of Appeal has endorsed a notice period in excess of 24 months. There have been a handful of cases in recent years which have suggested that courts are more open, particularly in cases of older employees with very long service, to assessing notice periods in excess of the previously held view regarding a common law "cap" of 24 months. This case assures us that the Court of Appeal agrees with that approach in the appropriate circumstances. Further, in circumstances that require it, dependent contractors will enjoy the same or similar relief. The traditionally held belief that upon termination dependent contractors should enjoy something less than employees, but something more than independent contractors, is becoming less defined.

Kevin Robinson will be speaking at The Osgoode Certificate in HR Law for HR Professionals March 22nd, 2016 on 'Workplace Investigations'

