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Feature

Court Awards 26 Months' Notice to Dependent Contractors

Remuneration for this new category of contractors



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Most organizations are aware that individuals who perform services for them generally fall into the categories of employees or contractors. They are also generally aware that there are different rights and obligations depending on the nature of the relationship. For instance, independent contractors are not entitled to notice or payments in lieu of notice at common law when the relationship is terminated; and, employees, on the other hand, are entitled to notice under an employment agreement or at common law. Recently, however, our courts have recognized a third category of dependent contractors. This category falls somewhere between an employee and an independent contractor.

Dependent contractors, like independent contractors, are not covered by the employment standards legislation; but, unlike independent contractors, are entitled to notice of termination, whether they operate as an individual or through a corporation. From a notice perspective, our courts treat dependent contractors like employees, and, in the absence of a valid agreement limiting entitlements upon termination, dependent contractors will receive reasonable notice based on the same factors as an employee: age, length of service, position and the availability of alternative employment. Courts have also awarded some long notice periods in the event of terminations, and have expressly rejected the argument that the dependent contractor category should arbitrarily have a reduced reasonable notice period.

The entitlement to reasonable notice for dependent contractors was discussed by the Ontario Court of Appeal in the recent decision of *Keenan v. Canac Kitchens Ltd.*, 2016 ONCA 79, released on January 27, 2016. In this case, Mr. Keenan and Ms. Keenan worked full-time for Canac beginning in 1976 and 1983 respectively. They continued as full-time Canac employees until October 1987, when they were called into a meeting and told that they would carry on their work as contractors. Shortly after the 1987 meeting, Canac presented the Keenans with an agreement which reflected the new arrangements and which had already been signed by Canac. Only Ms. Keenan signed the agreement, but she did not obtain legal advice in advance. The agreements also required the Keenans, as "sub-contractors", to devote their "full-time and attention" to Canac. Canac also changed their job titles from foreman to "Delivery and Installation Leader".

The Keenans were paid as before on a piece work basis for each box or unit installed but the amount was increased to reflect the fact that they were paid in gross, without deductions for income taxes, employment insurance and CPP. With the exception of some weekend jobs and work for friends and family, the Keenans continued to work exclusively for Canac until the end of 2006. Beginning in 2007, as the work from Canac had slowed down, the Keenans started to do some work for Cartier Kitchens, a direct competitor of Canac. A "substantial majority" of the Keenans' work continued to be done for Canac. In 2009, for instance, the split was 72.6% and 27.4% for Canac and Cartier respectively. Canac did not take issue with the Keenans performing services for Cartier.

The Keenans' relationship with Canac came to an end on March 15, 2009 when they were called to a meeting and told that Canac was closing its operations and their services were no longer needed. At that time, Mr. Keenan was 63 years old and Ms. Keenan was 61 years old. They were not provided with any notice of termination, as in Canac's view, the Keenans were independent contractors. The Keenans commenced an action for damages in lieu of reasonable notice. The lower Court awarded the Keenans 26 months' notice and Canac appealed. In upholding the lower Court's decision, the Ontario Court of Appeal

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upheld the finding that the Keenans were economically dependent on Canac due to the fact that they worked exclusively for Canac or at a high level of exclusivity, and on that basis were dependent contractors.

So, what are some practical considerations for companies in light of this emerging category of dependent contractor? First, regardless of the individual's status, companies should almost always enter into written agreements with a stipulated termination clause which deals with the amount of notice the individual is entitled to on termination of the agreement by the company. If there is a possibility that the individual may be deemed an employee, then the company should consider ensuring that the notice period is at least equal to the minimum statutory entitlements an employee would be entitled to under the relevant employment standards legislation. Companies must also ensure that the agreements are signed prior to engaging the individual. It is also important to renew any expired agreements. If an agreement is for a fixed period or specific project, a new agreement should be signed before the end of that period or project, in the event that the parties wish to extend the relationship.

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