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Feature

Ontario Court of Appeal Clarifies Common Employer Doctrine

Courts now consider objective intention of the parties involved

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The Ontario Court of Appeal has recently provided useful clarifications regarding the common employer doctrine. Notably, in *O'Reilly v ClearMRI Solutions Ltd.,* 2021 ONCA 385 ("O'Reilly"), the Court confirmed that it will stringently apply the test to ensure that the doctrine is only applied where the evidence demonstrates an intention to create an employment relationship.

What is the common employer doctrine?

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Simply put, the common employer doctrine stipulates that an individual can, in fact, be employed by more than one company at the same time. Practically speaking, when the individual makes an employment-related claim, they can look to related companies, in addition to their primary employer, for indemnification.

Whether or not an employee can invoke the common employer doctrine at common law will depend on a number of facts, namely the nature of the relationship between the related companies, whether there is common control between the entities and to what degree.

The Facts

The plaintiff, William O'Reilly, was the Chief Executive Officer and a director of ClearMRI Solutions Ltd. ("ClearMRI Canada) and its wholly owned subsidiary, ClearMRI Solutions Inc. ("ClearMRI US"). Tornado Medical Systems, Inc. is the majority shareholder of ClearMRI Canada.

Mr. O'Reilly had a written employment agreement with ClearMRI US. That said, he reported to ClearMRI Canada's board of directors and served as CEO of both companies.

Upon the termination of his employment, Mr. O'Reilly claimed he was owed unpaid wages, vacation pay and a loan repayment from ClearMRI Canada, amounts which totalled approximately US$400,000. Mr. O'Reilly commenced an action against ClearMRI Canada, ClearMRI US and Tornado, claiming that they were all his common employers. He also sued the directors of Tornado and ClearMRI Canada for the unpaid wages and vacation pay, pursuant to section 131 of the Ontario Business Corporations Act (OBCA).

Mr. O'Reilly sought and obtained default judgement against ClearMRI Canada and ClearMRI US. Subsequently, Mr. O'Reilly brought a summary judgement motion against Tornado and the individual directors, despite having held no position at Tornado. He was successful in the motion, the judge finding that (i) Tornado was a common employer; and, (ii) that the OBCA made the directors of Tornado and ClearMRI jointly and severally liable.

The motion was appealed by Tornado and one of ClearMRI Canada's directors.

The Appeal

The Court of Appeal unanimously found that while the amounts Mr. O'Reilly claimed could all fall under the common employer doctrine, it could not be applied in this case as between Tornado and the two ClearMRI companies. Specifically, the Court held that Tornado could not be held liable under the

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doctrine as there was no objective intent between Tornado and Mr. O'Reilly to enter into an employment relationship. Consequently, it could not be said that there was an intent for Tornado to provide for the terms upon which Mr. O'Reilly sought damages, namely salary, vacation pay and the loan. Additionally, the Court held that Tornado did not exercise sufficient control over Mr. O'Reilly such that he would be an employee.

On the issue of director's liability, it was argued that neither precondition under section 131 of the OBCA was met such that there could be no liability on the part of the director. The Court of Appeal rejected the argument, and substituted the motion judge's decision on the issue. While neither precondition under section 131 had been met at the time the Court rendered its judgement, the Court found that the OBCA places no time limit on when such preconditions must be fulfilled. As such, judgement against an individual director need not be rendered at the same time as judgement against the corporation. If or when one of the preconditions under section 131 of the OBCA was fulfilled, Mr. O'Reilly could look to the director for recovery.

Takeaway for Employers

In setting out its analysis, the Court of Appeal also provided the following helpful guidelines on the common employer doctrine:

The mere existence of corporate interrelationship does not, on its own, evidence that justifies the application of the doctrine. This is because such a relationship is not itself evidence of intention that the related corporations are party to an employment agreement;

Key to the analysis of whether there was sufficient intention are (i) whether the proposed employer exercises effective control over the employee, and (ii) whether the employment agreement explicitly states that the corporation in question is the employer. Where there is no written agreement, the factual context will inform an objective assessment to determine whether this factor is met; and

There is no time limit on recovery pursuant to section 131 of the OBCA. As such, even if a judgement against the corporation has already been rendered, an employee may have recourse against a director if/when one of the preconditions at section 131 is fulfilled.

Employers can generally find comfort in O'Reilly, knowing that the courts will not apply the common employer doctrine too broadly. Rather, the courts must look beyond the corporate relationship of the entities in question, and take into account the objective intention of the parties. That said, "objective intention" can be demonstrated by the conduct of the parties. As such, corporations should still be mindful of overlap that might suggest an employee is providing services for, or being controlled by, entities other than its primary employer.

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