All For One, One For All? Common Employer Doctrine Revisited By The Ontario Superior Court Of Justice

Ontario Employers acting within a corporate structure must be aware of King

In King v. 1416088 Ontario Ltd. [1] ("King"), the Ontario Superior Court of Justice found a group of corporate defendants jointly and severally for damages arising from a wrongful dismissal claim amounting to almost $150,000. The twist in this case: many of the defendants never actually employed the plaintiff.

Facts that gave rise to joint and several liability

The defendants all operated under the trade name Danbury. Over the years, various corporate entities had engaged in the Danbury liquidation and auctioneering business. The "current flag-bearer of the Danbury name"[2] carries on business as DSL Commercial ("DSL").

At the time of termination, the plaintiff, Jack King, was employed by 1416088 Ontario Ltd. ("Danbury Industrial"), but had been employed by Danbury-related companies throughout his career. Despite various corporate changes, 38 years later, his job as an accountant and book-keeper remained essentially the same.

In October 2011, King was terminated without cause. Soon after, Danbury Industrial ceased trading. In December, DSL started trading in the same lines of business, at the same premises, using the same phone number, office equipment, and web address as Danbury Industrial; and rehired many former employees of Danbury Industrial. King was not rehired. DSL used the "Danbury" name and logo, which had been used by Danbury Industrial since 2010.

King, who was 73 at the time, brought a wrongful dismissal action against all

the Danbury companies as common employers. However, DSL was the only company that could satisfy the judgment. While King was undisputedly entitled to statutory pay and pay in lieu of notice; the Court was faced with the question of whether any company, other than Danbury Industrial, was liable to compensate King.

Common Employer Doctrine

In Ontario, "an individual can be employed by a number of different companies at the same time."[3] Although employers are entitled to establish complex corporate structures, the courts will be vigilant to protect employees from any resulting injustice.[4] The common employer doctrine was reaffirmed in King: where a sufficient degree of relationship and common control can be established, the entities will be found to be common employers. Determining the nature of this connection will be based on the facts and case-specific.

Decision: Common Employers found jointly and severally liable

In this case, DSL had too many attributes in common with the other companies who have traded under the Danbury name to escape liability. The defendants, including DSL, were found jointly and severally responsible for the damages arising from King's wrongful dismissal.

The plaintiff was entitled to 24 months of pay in lieu of notice, and his net damages for wrongful dismissal are almost $150,000, plus prejudgment interest and retirement compensation.

Key Lessons to Employers

Corporate Structure**:** Employers acting within a corporate network of businesses should be aware that although each business may have its own employees, if sufficient interconnectedness or common control is found, these separate entities may be treated as one employer, and unexpected liability may ensue.

More importantly, if found jointly and severally liable, the corporate defendant with the "deepest pockets" may end up paying significant compensation to an employee that it never hired. It is essential to be aware that the corporate veil is just that, a veil, one that can be pulled back by the Courts when it sees fit.

Arm's Length and Non-Arm's Length Alike**:** Employers should review their corporate structure, whether within an existing "group of businesses" or as a result of an asset purchase of an arm's length business. Courts will look past shell-companies and corporate reorganizations, particularly where non-arm's length entities are involved. However, even bona-fide arm's-length purchasers must be sure to create a real and genuine break upon purchase to avoid the "common employer" designation.

Proper notices and clear contracts are imperative in creating this divide. In particular, purchasers in asset sales transaction may consider including a specific indemnity regarding allegations of "common employment."

All for one and one for all?

Employers cannot rely on the business name alone to distinguish it from any other parent, sister, subsidiary or affiliated company. The injustices perpetrated against an employee by one can be the responsibility of all the businesses in a corporate group.

The common employer doctrine is of particular concern when a business intends to carry on the same or similar business as a related company or a recently dissolved company. A new business name or management team may not be sufficient to shield the one company from the liabilities of the other, as was the case in King.

Employers within in any kind of corporate structure should ensure a clear divide exists and is maintained between it and other companies, whether active or wound up.

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