

Are You Sure Your Independent Contractor Is “Independent”?



A truly independent contractor arrangement provides parties with the freedom to contract without many of the constraints applicable to employment relationships. However, not all contractor relationships are the same. While some contractors are truly “independent”, others are “dependent” on their relationship for livelihood. In the latter case, the freedom to contract can be limited by implied obligations such as notice of termination requirements, and by express obligations, such as the statutory right to form and be part of unions.

This raises an important question: How does one determine if an individual providing services is an independent contractor or a dependent contractor?

While the answer is neither new nor simple, the recent decision of *Dibble v Creative Music Therapy Solutions Inc.*, 2024 BCSC 1066 (“**Dibble**”), from the British Columbia Supreme Court provides a modern and fairly comprehensive answer to that question.

Facts

In 2010, Christine Dibble started working as a music therapist for Creative Music Therapy Solutions Inc. (“**CMTS**”). She was engaged by CMTS under a written agreement (the “**Agreement**”).

On October 21, 2022, CMTS terminated the Agreement. CMTS did not provide notice of termination (or pay in lieu of notice) to Ms. Dibble.

Issue

CMTS argued that since Ms. Dibble was not an employee and was an independent contractor she was not entitled to notice of termination (or pay in lieu of such notice).

The Decision

The Court accepted that Ms. Dibble was not an employee of CMTS. Some of the relevant considerations leading to its conclusion were that:

- She did not receive a T4 “Statement of Remuneration Paid” slip from CMTS.
- CMTS did not pay benefits to Ms. Dibble, and it did not deduct statutory amounts

from her pay for employment insurance premiums or tax.

- She was able to deduct business expenses on her income tax return.
- She was also responsible for her own workers' compensation premiums.¹

However, determining whether or not Ms. Dibble was an employee did not fully resolve the issue of whether Ms. Dibble was entitled to notice of dismissal. The Court confirmed that certain non-employees (i.e. dependent contractors) have an implied right to reasonable notice of dismissal.² As a result, the Court had to determine whether or not Ms. Dibble was an "independent" (or dependent) contractor.

The Court highlighted the seven indicia used by courts across Canada to determine whether the relationship is that of a dependent contractor or an independent contractor. Those factors are:

1. Whether the contractor was largely limited **exclusively** to the service of the principal;
2. Whether the contractor was subject to the **control** of the principal, not only as to the product sold but also as to when, where and how it was sold;
3. Whether the contractor had an **investment in or interest in the tools** necessary to perform his service for the principal;
4. Whether by performing duties the **contractor undertook risk of loss or possibility of profit** apart from their fixed rate remuneration;
5. Whether the **contractor's activity was part of the principal's business organization** – in other words "whose business was it?";
6. Whether the **relationship was long standing** – the more permanent the term of service the more dependent the contractor; and
7. Whether the parties **relied on one another and closely coordinated** their conduct.³

The Court confirmed that the foregoing indicia are not necessarily exclusive and that they should be considered holistically, rather than independent elements of a test. Assessing the seven indicia as a whole, the Court noted:

- **Exclusivity:** Ms. Dibble earned 92% of her previous year's income from CMTS. This indicated a high degree of exclusivity (pointing towards dependency).
- **Control:** Control rested largely with CMTS. The Agreement allowed CMTS to restrict and control Ms. Dibble's ability to work in several ways. In particular, the Agreement required music therapists to: "always be a few minutes early for contract positions"; "provide CMTS with relevant information which comes up at contracted placements"; "provide CMTS with changes in schedule as they occur"; and "respond to emails or phone calls from CMTS immediately." This degree of control favoured a dependent contractor characterization.
- **Interest in Tools:** Music therapists who worked with CMTS, including Ms. Dibble, either supplied their own instruments or used instruments and other equipment supplied by the facilities at which they worked. The ownership of equipment by the contractor favoured an independent characterization.
- **Profit/Loss:** CMTS carried the risk of loss and opportunity for profit. CMTS paid music therapists even if the scheduled client did not pay for the session. CMTS also paid its music therapists almost immediately after the work was provided. The absence of any overhead for Ms. Dibble and the fact that CMTS carried the risk of loss favoured a dependent contractor characterization.
- **Business Integration:** CMTS obtained Ms. Dibble's biography and photograph to publish on their website. CMTS maintained this information on their website throughout Ms. Dibble's 12 years with CMTS. Additionally, CMTS conducted staff reviews annually, and provided name tags (with the CMTS logo) to music therapists who were to wear them when providing music therapy services. Moreover, the Agreement's terms required music therapists to "always be

professional” and “dress professionally. Such a representation to the public, clientele, and staff that music therapists were integrated into CMTS favoured a dependent contractor characterization.

- **Service:** The contractual relationship between the parties was 12 years in duration. This favoured a dependent contractor characterization.
- **Reliance:** In this case, there was little evidence of reliance or freedom in coordination to rely on. The Court noted that this factor slightly favoured an independent contractor characterization given some of the flexibility available to Ms. Dibble.⁴

Weighing the indicia together, the Court found that Ms. Dibble was a dependent contractor. As a result, she was entitled to reasonable notice of termination. Given the lack of just cause, the Court awarded Ms. Dibble 12 months’ reasonable notice.⁵

What does this mean?

The main takeaway from *Dibble* is that, when it comes to justifying an independent contractor relationship, the **substance** is at least as important as the contract.

Agreement between the parties is insufficient to establish an independent contractor relationship. Instead, the relationship must be managed on an ongoing basis to limit the indicia of integration of the individual into the business, and to grant the individual sufficient control over their work and flexibility to work elsewhere. Organizations must be careful about how compensation is structured to ensure that individuals bear the risk of the marketplace and have the opportunity to succeed (in terms of profit/loss) without the protection or stability offered by a stable or steady income. Organizations also must consider who will be responsible for providing (or leasing/licensing) equipment, software and tools.

The recognized indicia must paint a comprehensive picture of an independent business, if the goal is to establish an independent contractor relationship.

While this case focused on the obligation to provide reasonable notice, the same indicia can also weigh towards an employment relationship, in which case tax obligations and employment standards legislation (and its corresponding entitlements) can engage. This, in turn, will affect the obligations of a company who wishes to terminate the services relationship at issue.

Footnotes

1. *Dibble* at para 12.

2. *Dibble* at para 14.

3. *Dibble* at para 15.

4. *Dibble* at paras 17-31.

5. *Dibble* at para 127.

The content of this article is intended to provide a general guide to the subject matter. Specialist advice should be sought about your specific circumstances.

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