Calculation of Reasonable Notice Period When a Contractor Becomes an Employee

Cormier v. 1772887 Ontario Limited (St. Joseph Communications) ("*St. Joseph*"), 2019 ONCA 965, is an appeal from a summary judgment motion[1] arising from the wrongful dismissal claim of a contractor who worked for St. Joseph for 10 years and subsequently became an employee of the company. This recent decision considers important questions about the calculation of reasonable notice in these circumstances. Pursuant to existing common law, only dependent contractors who transition to employees are entitled to have their time spent as contractors considered in the calculation of their reasonable notice upon termination. *St. Joseph* raises the possibility that in the future independent contractors might be similarly entitled.

Background

For 23 years, Ms. Cormier worked for St. Joseph, a marketing and advertising company, first as a freelance wardrobe stylist and ultimately as a fashion studio manager. For the first 10 years, she invoiced St. Joseph weekly and the company paid her invoices without withholding taxes, CPP premiums, or employment insurance premiums. St. Joseph supplied Ms. Cormier with the necessary tools, gave her assignments, and compensated her on an hourly basis or sometimes on a project basis. With the exception of slow periods, Ms. Cormier worked exclusively for St. Joseph approximately 37 to 40 hours per week.

In 2004, Ms. Cormier became an employee of St. Joseph pursuant to a written employment contract. She signed a new agreement each time she was promoted. Her last employment agreement stated that her "original hire date" in 2004 would be recognized as her start date for the calculation of her years of service and also contained a termination clause.

Following termination without cause in 2017, Ms. Cormier rejected the severance package and sought 24 months' pay and benefits in lieu of reasonable notice.

St. Joseph argued that the termination clause should be enforced, and alternatively, that Ms. Cormier's years from 1994 to 2004 as an independent contractor should be

ignored in the determination of the notice period.

Decision of the Ontario Superior Court of Justice

The court determined that the termination clause was void because it contravened the *Employment Standard's Act, 2000* (ESA) by providing Ms. Cormier with less group benefit entitlements than the minimum obligations set out in the ESA.

Justice Perell rejected St. Joseph's argument that from 1994 to 2004 Ms. Cormier was an independent contractor. He conducted a review of the relevant factors differentiating independent contractors from dependent contractors: the extent of the worker's economic dependency, the permanency of the working relationship, and the exclusivity or a high level of exclusivity of the worker's relationship with the enterprise. Justice Perell noted:

> the more permanent and exclusive the contractor relationship, then the less it resembles an independent contractor status and the more it resembles an employee relationship and, therefore, the relationship should be classified as a dependent contractor relationship. (para. 46)

He then concluded that within two years, if not earlier, Ms. Cormier entered a dependent contractor relationship. As dependent contractors are entitled to reasonable notice on termination, Justice Perell determined that Ms. Cormier was entitled to 21 months' notice given her almost 23 years of service.

In passing, Justice Perell observed that even if he had concluded that Ms. Cormier was an independent contractor from 1994 to 2004, he would not have ignored those years in determining the reasonable notice period as to do so would be "wrong in principle." The notion that years of service as an independent contractor will impact the determination of reasonable notice would be a significant change to the common law. Independent contractors are not currently entitled to common law reasonable notice and such service does not impact reasonable notice for an independent contractor turned employee. Since Justice Perell's opinion was shared incidentally and he did not base his decision on it (*i.e.*, "obiter" opinion), it is not binding on a court considering a similar matter in the future.

Decision of the Court of Appeal for Ontario

St. Joseph's appeal of the summary judgment was dismissed by the Court of Appeal. The court noted that Justice Perell used the correct legal test for determining that Ms. Cormier was a dependent contractor. Furthermore, it agreed that the termination clause was unenforceable, and that 21 months constituted reasonable notice. The Court of Appeal did not address Justice Perell's "obiter" opinion.

Bottom Line for Employers

Cormier v. St. Joseph Communications is a cautionary tale for organizations that enter into relationships with contractors. It demonstrates that how a worker is identified in an agreement will not determine how they will be classified by a court; a court's analysis will be based on substance, not form. Accordingly, organizations should not be complacent about the true nature of their relationships with contractors. They should be vigilant in evaluating whether their "independent contractors" are in fact dependent contractors given that the latter status likely results in greater liability. If review of the circumstances suggests that an independent contractor is truly dependent, an organization has three choices: it can stay the course with the contractor but recognize that there may be liability on

termination, end its relationship with the contractor with proper notice and enter into a fresh independent contractor relationship with a different worker (if possible), or convert the contractor's status to that of an employee.

Consistent with the *St. Joseph* decision, employers that elect to transition a dependent contractor to an employee should be aware that the employee's time spent as a dependent contractor will be included in a reasonable notice calculation upon termination. Employers can consider steps to address this by requiring the employee to enter into an employment agreement that contains an enforceable termination clause limiting their entitlement. Employers must pay close attention to the wording of the termination clause to ensure that it expressly complies with the ESA. In drafting such a clause, employers may choose to include a "failsafe" provision that explicitly states that under no circumstances will the employee receive less than their minimum entitlements under the ESA.

The impact of Justice Perell's "obiter" opinion is unclear; the statement is contrary to established common law principles and the Court of Appeal did not address it. Given the comment, however, employers should be cautious and consider requiring independent contractors who become employees to enter into an employment agreement with an enforceable termination clause, as described above.

Finally, as the law relating to termination clauses is evolving rapidly, employers understandably may find it difficult to keep up. For this reason, employers are encouraged to consult with their legal advisors on a regular basis to ensure that the termination provisions in their employment agreements are consistent with the most recent legal developments.

Footnotes

1 *Cormier v. 1772887 Ontario Limited c.o.b. as St. Joseph Communications*, 2019 ONSC 587.

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