Changing Workplaces, Changing Classifications: Increasing Relevance Of The Dependent Contractor

The classification of workers has become an increasingly relevant consideration for both hirers and workers in today's rapidly changing economy. Traditionally, workers have fallen into one of two distinct categories for payment in exchange for their labour: employees or independent contractors. These categories are strongly fact-driven and have important legal ramifications for both the hirer and worker, especially with regards to issues such as worker protections, dismissal, human rights, vacation pay, reasonable notice, worker accommodations, and even tax treatment.

A key difference between employees and independent contractors is the fact that employees have less control over their work and the employment relationship than independent contractors. In exchange, employees receive certain workplace protections under both statutory and common law. On the other hand, independent contractors are not entitled to the same legal benefits and protections but have greater latitude over the performance of their duties.

A third subcategory of worker, the dependent contractor, has gained increasing traction in recent years as workplaces continue to evolve. The dependent contractor is another layer of nuance in worker classification, and it's one that employers should be aware of. Unlike independent contractors, dependent contractors are owed reasonable notice upon termination without cause.

The Changing Workplace

While the dividing line between the two worker categories has always presented classification challenges, technological changes and market drivers have significantly shifted the classification landscape. This tension has played out south of the border in the form of legislative changes such as the passage of California's new bill that categorizes gig economy workers as employees and judicial decisions such as a recent ruling in the US Courts that UberBLACK drivers are independent contractors, which is currently the subject of a Third

Circuit Appeal. Some have even argued that the binary classification system is not well-suited to the economic realities of the modern workplace in recognition of the fact that some Canadian provinces have already adopted a third category of workers.

In May 2017, the Ontario government released a 419-page report that studied the changing workplace (the "Report"). The Report identified globalization, technological change, and the move to a service-based economy as pressures affecting employers and the demand for labour. This Report led to the passage of Ontario's Bill 148 *Fair Workplaces, Better Jobs Act*, 2017, which significantly amended the *Employment Standards* Act, 2000. However, Bill 47, which was subsequently introduced by the new Conservative Ontario Government, reversed many of the changes brought in by Bill 148, including the onus placed on employers to accurately classify workers.

Contractors, but… not Independent?

In recent years, changes in the workplace have led to an increasing prevalence of roles that do not fit neatly in the binary classification system. Indeed, in many provinces, including Ontario, there appears to be a rise in a third category of workers: the dependent contractor. The Ontario Court of Appeal has recognized the existence of some intermediate status between employee and independent contractor as early as *Carter v. Bell & Son*s, [1936] O.R. 290.

This intermediate status was explicitly referenced in *McKee v. Reid Heritage Homes Ltd.,* 2009 ONCA 916. MacPherson J.A. concluded that an intermediate category known as "dependent contractors" exists where non-employment work relationships exhibit a "certain minimum economic dependency", which may be demonstrated by "complete or near-complete exclusivity" on the hirer. The legal consequence of a dependent contractor classification is that workers in this category are owed reasonable notice upon termination.

Since *McKee, Keenan v. Canac Kitchens Ltd.,* 2016 ONCA 79. confirmed that the classification of the worker is essential in determining an employer's notice obligations upon termination and affirmed the exclusivity requirement in the economic dependency analysis. Most recently, in *Thurston v. Ontario (Children's Lawyer),* 2019 ONCA 640 ("*Thurston*"), the Ontario Court of Appeal held that the exclusivity requirement is the *hallmark* of the "dependent contractor" status, and thus, contractors who do not source substantially more than 50% billings from a single hirer cannot be considered dependent on that hirer.

Thurston Affirms Exclusivity Requirement Represented by Substantial Majority of Billings

Thurston involved a sole practitioner lawyer who provided legal services to the Office of the Children's Lawyer (the "OCL") pursuant to a series of 13 successive one-year agreements. The OCL did not renew her contract following the expiry of the last agreement. Thurston argued that she was a dependent contractor entitled to 20 months' notice of termination. In reversing the Superior Court's decision, the Court of Appeal held that the motions judge did not take into account the following considerations:

- the lawyer's contracts with the OCL contemplated that she would continue her private practice and required her to confirm that she did not work

exclusively for the OCL;
- the lawyer continued to operate her private legal practice during the entire period of her retainer;
- the lawyer was not guaranteed a minimum number of files or amount of work with the OCL;
- the OCL reserved the right, at its sole discretion, to terminate the lawyer's retainer agreement at any time, without fault and without liability;
- the lawyer had her own office, supplies, and staff; and
- the lawyer's private practice constituted the main source of her total income throughout the period.

Relevant to the Court of Appeal's finding was the fact that the agreement explicitly stated that the OCL makes no guarantee of the total value or volume of work assigned to the lawyer. Significantly, they also held that exclusivity determinatively demonstrates economic dependence and that economic dependence must represent substantially more than 50% of a worker's billings. Although the motions judge acknowledged that less than 50% of the lawyer's billings came from the OCL over the 13-year period, the motions judge also considered the fact her income from the OCL grew to 50% of her practice and had reached that level in the last year of their relationship. On the other hand, the Court of Appeal focused on the fact that only 39.9% of the respondent's billings, on average, came from the OCL over the entire 13-year period which the Court found to fall significantly short of the exclusivity requirement.

The case is significant because, while the Court of Appeal declined to demarcate a percentage cut-off for billings to establish economic dependency, it found that the percentage would have to be substantially more than 50% of the worker's income. Although the case also considered the qualitative aspects of exclusivity by examining any restrictions on the worker's ability to work for others, it seems the percentage of billings was determinative in the exclusivity analysis.

Data-Driven Predictive Analytics

Employment Foresight predicts the category a worker is likely to be classified as based on 26 factors including the proportion of a worker's income from the hirer, whether the hirer guaranteed work, and restrictions preventing the worker from performing services for other parties. On the facts of *Thurston,* Employment Foresight's Worker Classification tool correctly predicted an Independent Contractor classification which is precisely what the Court of Appeal found.

Moreover, the legal implications of a dependent contractor determination may entitle a worker to reasonable notice periods comparable to an employee's entitlement under the common law. Although there remains some debate across different courts on whether being a dependent contractor justifies a lesser notice period than an employee, the data suggests that dependent contractor status does, in fact, make a difference, whether or not courts explicitly reference this factor. Reasonable notice is another area of employment law that remains in flux, lending itself well to machine learning's predictive capabilities.

Finally, the question of how to properly characterize novel employment arrangements (e.g., gig economy workers) has only recently surfaced in litigation. The status of these unique arrangements cannot be ascertained by

drawing upon any identical precedents. Machine learning and predictive modeling are particularly well-suited to predicting previously unseen combinations of grey area situations. Employment Foresight achieves this by matching disparate factors from thousands of prior cases in order to arrive at a prediction.

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