McCormick v. Fasken Martineau DuMoulin LLP



In the much anticipated decision of *McCormick v. Fasken Martineau DuMoulin LLP* issued today, the Supreme Court of Canada ruled that Mr. McCormick, previously an equity partner of Fasken Martineau DuMoulin LLP ("Fasken"), could not avail himself of the protection afforded to employees pursuant to s. 13 of the British Columbia *Human Rights Code* (the "*Code*"), as his relationship with the firm was not that of an employee.

Background

The appellant, John McCormick, was a lawyer who became an equity partner of Fasken in 1979. Sometime in the 1980s, the equity partners of Fasken (the "Partnership"), including Mr. McCormick, voted to adopt a provision in their Partnership Agreement that equity partners would retire from the Partnership and divest their ownership shares in the Partnership at the end of the year in which they turned 65.

On January 1, 2008, pursuant to changes made to the *Code*, the province of British Columbia eliminated mandatory retirement at age 65. Consequently, in 2009, when he was 64 years old, Mr. McCormick filed a complaint with the BC Human Rights Tribunal (the "Tribunal") alleging that the provision in the Partnership Agreement, which required equity partners to retire from the Partnership at age 65, constituted age discrimination in employment under s. 13 of the *Code*.

Fasken brought an application to dismiss the complaint on the ground that the Tribunal did not have jurisdiction to hear the complaint, because Mr. McCormick, as an equity partner, was not an employee of Fasken. The Tribunal disagreed with Fasken and concluded that Mr. McCormick was in an employment relationship with Fasken, for the purposes of s. 13 of the *Code*.

After an unsuccessful application to the BC Supreme Court for judicial review of the Tribunal's decision, Fasken appealed to the BC Court of Appeal. The Court of Appeal held that Mr. McCormick was not in an employment relationship with Fasken because it was legally impossible for a partner to be "employed" by a partnership of which he or she is a member. Mr. McCormick appealed to the Supreme Court of Canada.

Supreme Court's decision

On appeal, the issue before the Court was how to characterize Mr. McCormick's relationship with Fasken in order to determine whether the relationship fell within the jurisdiction of the *Code* in the context of employment.

The Court stated that, in essence, to determine whether an employment relationship exists for the purposes of the *Code*, it is necessary to "examine the control exercised by the employer over working conditions and remuneration, and corresponding dependency on the part of the worker". In this control/dependency test, the questions to be asked are, who is responsible for determining working conditions and financial benefits of the worker and to what extent does the worker have an influential say in those determinations?

The Court noted that, generally, when the control/dependency test is applied in the context of an equity partnership, control over workplace conditions and remuneration is with the partners who form the partnership and that, in most cases, equity partners would not be employees of the partnership, because:

- a partnership is a collection of partners, rather than a distinct legal entity separate from the parties who are its members;
- partners generally have a right to participate meaningfully in decision making processes that determine their conditions of work and remuneration;
- partnership agreements typically create a high threshold for expulsion from the partnership; and
- when partners leave a partnership, they are entitled to their share of the partnership capital account.

Applying the control/dependency test to Mr. McCormick's particular situation, the Court found that Mr. McCormick was someone in "control of, rather than subject to" decisions about workplace conditions and that, as an equity partner, he was part of the group that controlled the Partnership, not a person vulnerable to its control and that, accordingly, he was not in an employment relationship with Fasken for the purposes of the *Code*.

In arriving at its decision that Mr. McCormick was not in an employment relationship with Fasken and that Fasken did not have "genuine control" over Mr. McCormick in the significant decisions affecting the workplace, the Court noted the following:

- Mr. McCormick had the right to participate in the management of the Partnership;
- Mr. McCormick had benefitted financially for over 30 years, from the retirement of other partners;
- as an equity partner, Mr. McCormick benefitted from control mechanisms including the right to vote for, and stand for election to, the firm's board;
- the other partners owed Mr. McCormick a duty to render accounts;
- Mr. McCormick had the right not to be subject to discipline or dismissal;
- Mr. McCormick had the right to his share of the firm's capital account when he left the firm;
- Mr. McCormick enjoyed a form of "tenure" because he could not be expelled from the Partnership without a special resolution passed by a meeting of all the equity partners;
- while Mr. McCormick's remuneration came exclusively from the Partnership, this remuneration represented his share of the profits in accordance with his ownership interest;
- the Partnership was run for the economic benefit of the partners, including Mr. McCormick;
- Mr. McCormick drew his income from the profits of the Partnership and was liable for its debts and losses; and
- Mr. McCormick was entitled to share in the Partnership's assets if the Partnership was dissolved.

While the Court concluded that Mr. McCormick was not an employee for the purposes of the *Code*, it disagreed unequivocally with the Court of Appeal's reasoning that a

partner could never be an employee for the purposes of the *Code*.

Bottom Line

In the most situations, it is unlikely that an equity partner in a partnership arrangement will be found to be an employee for the purposes of the *Code*. However, the Supreme Court cautions against form trumping substance and against focusing exclusively on partnership as a legal concept. The approach that must be taken is to determine the substance of the actual relationship in each situation by applying the control/dependency test to the facts. Ultimately, whether there is an employment relationship or not, will depend on the extent to which the worker is subject and subordinate to some else’s decision making over his or her working conditions and remuneration.

By Heather Hettiarachchi