

Supreme Court of Canada Dismisses Appeal and Concludes That a Partner is Not an Employee of a Partnership



On May 22, 2014, the Supreme Court of Canada **upheld** the British Columbia Court of Appeal's decision that an equity law firm partner is not an employee for the purposes of the B.C.'s *Human Rights Code* (the *Code*).

In 2009, Mr. McCormick filed a complaint with the B.C. Human Rights Tribunal alleging that the law firm in which he was an equity partner, Fasken Martineau DuMoulin LLP, discriminated him based on his age by requiring him to retire at 65.

For more background regarding the case, please see our previous blog posts where we wrote about the **Court of Appeal's decision** and the decision of the **Supreme Court**.

The Supreme Court of Canada Decision

The issue before the Supreme Court of Canada was to determine if Mr. McCormick's relationship with his firm, as an equity partner, was an employment relationship. The *Code* prohibits discrimination on certain prohibited grounds (including age) in respect of employment.

The Court upheld the Court of Appeal's finding that Mr. McCormick was not an employee of his firm. However, it disagreed with its conclusion that a partner could never be an employee for the purposes of the *Code*.

In its analysis, the Court considered the *Code* and the common law to determine the definition of employment and concluded that both support an expansive and broad interpretation of the meaning of employment for the purposes of the *Code*. However, the Court narrowed the test for an employment relationship to two key factors: (i) the control exercised by an employer over working conditions and remuneration, and (ii) the corresponding dependency on the part of a worker. It also emphasized that while various factors and tests exist to determine if a worker is an employee, such assessments must be done with the particular legislation in mind and focus on the control and dependency of the worker.

In its review of partnerships, the Court noted that partners generally have a right to participate meaningfully in the decision making process that determines their workplace conditions and remuneration. The Court stated in most cases "partners are

not employees of the partnership, they are, collectively, the employer". It was also noted that in other jurisdictions such as the United Kingdom, human rights legislation expressly applies to partnerships as well as employment relationships, but that was not the case here.

An underlying theme of the decision is that the form of the relationship should not trump its substance. The Court held that the Court of Appeal's decision focused too narrowly on the concept of the partnership in law, rather than looking at the factual circumstances of Mr. McCormick's relationship with the firm. Although Mr. McCormick had to follow certain administrative rules of the firm, these did not create a relationship of dependency and vulnerability. Rather, the Court highlighted that the firm's policies were controlled by the partnership, of which Mr. McCormick was a member, including those relating to mandatory retirement. In fact, the mandatory retirement policy was voted on by Mr. McCormick and other equity partners at the time of its implementation. The Court noted that equity partners at his firm essentially have tenure because of the high threshold that exists to be expelled from the partnership. In addition, Mr. McCormick was not found to be dependent on the firm, because he was working for his own benefit, where his remuneration represented his share of the firm's profits.

Some of the key features that militated against a finding of an employment relationship in this case included:

- a right to meaningfully participate in the decision making processes that determine workplace conditions and remuneration;
- a high threshold for expulsion;
- a ownership share;
- a right to his or her share of the profits and liability for debts and losses;
- a right to participate and be involved in management;
- a role in controlling and managing the partnership;
- a involvement in major decisions and policies (such as voting powers);
- a right to have other partners render accounts;
- a right not to be subject to discipline or dismissal;
- a right, upon leaving the firm, to his or her share of the capital; and
- right, upon dissolution, to a share in the assets.

As an aside, the Court noted that some protection from discrimination may be available for partners under the duty of utmost fairness and good faith set out in the **Partnership Act** but that it was unlikely that such a duty would apply to a mandatory retirement policy that was designed to benefit all partners.

Just one day before the release of the Court's decision, the Supreme Court of the United Kingdom considered a similar issue in **Clyde & Co LLP and another v. Bates van Winklehof**. In that case an equity partner, albeit a junior partner, in a London law firm was found to be a "worker" and protected by the whistle-blowing protections of the U.K. statute, the *Employment Rights Act 1996*. The partner was seeking protection when she was suspended for making an internal disclosure regarding corrupt activities in the firm's Tanzania associate firm. The U.K. decision turned on the interpretation of the applicable statute and partnership law. It is noteworthy that the Court stated that subordination of a worker, a derivative of the control/dependency test, is not a freestanding and universal characteristic of being a worker. This case provides a useful reminder that the determination of a partner's status must be done in the context of the applicable legislation and factual circumstances.

Our Views

This decision provides some good guidance to partnerships interested in ensuring that

its members are not characterized as employees for the purposes of human rights legislation. It also helps by boiling down the many iterations of the test for determining whether an individual is, or is not, in an employment relationship by placing the emphasis of the test on the degree of control and the dependency of the individual on the employer.

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