Worker’s Independence, Duties & Risks Decide Employment Status



Your liability with regard to a worker can vary depending on whether they are an independent contractor or an employee. If the worker is an employee, you must follow employment standards laws when terminating that worker and provide notice or payment in lieu of notice. But, if the worker is an independent contractor, you don’t need to give notice. Just because you say a worker isn’t an employee, though, doesn’t make it so. Here’s an example of how actions spoke louder than words.

THE CASE

What Happened: A motel housekeeper claimed her employer constructively dismissed her without notice or pay in lieu of notice when it reduced her work hours. The employer argued the worker wasn’t an employee but an independent contractor and even if she was an employee, she quit and wasn’t constructively dismissed. The housekeeper worked year round but worked more hours in the summer months when it was busier. She was paid hourly based on her reported hours worked. There was no employment contract and the housekeeper didn’t work for any other business, didn’t bring supplies or equipment with her, instead using those the motel provided. The hotel management told her which rooms to clean each day. While her payment arrangements varied over the years she worked for the motel, most of the time she was listed on the motel payroll records and statutory deductions were made and T-4 slips issued. On occasion, including the summer of 2012, she was paid by the owner personally as an independent contractor rather than through the motel payroll. In those instances, no statutory deductions were made and T-4 slips weren’t issued. In the summer of 2012, the housekeeper took some vacation time and the motel hired an additional worker to help with a summer busy season. When the housekeeper returned from vacation, her hours of work decreased. She complained and asked for a guarantee of 15 hours of work per week but the motel refused and the housekeeper didn’t return to work even though she was called to work.

What the Tribunal Decided: The tribunal found the housekeeper was an employee and she wasn’t constructively dismissed, but voluntarily quit.

The Tribunal’s Reasoning: The Board found the housekeeper was an employee regardless of how the parties defined the relationship and that she wasn’t constructively dismissed but quit:

Employee status: The Board ruled the housekeeper was an employee regardless of

whether she was paid on company payroll or personally by the owner. That's because throughout the time she worked, she didn't control her hours or her duties, she used supplies the motel provided to her, she didn't work for anyone else and wasn't in a position to hire others to help her. The Labour Board said the housekeeper didn't have any financial risk in the working relationship as an independent contractor running a business would have risks of profit and loss. The fact that the motel didn't make statutory deductions or issue T-4 slips was considered but didn't outweigh the other facts.

Constructive Dismissal: The Board said she quit her employment when she failed to return to work after being denied the guaranteed hour commitment she requested. The board noted she never had a contract specifying hours of work per week but rather worked on an as needed basis. So, the board determined she had no security in her job. That meant the motel was under no obligation to give her any guaranteed number of hours to work and she was free to quit if she didn't like the hours she was getting. Thus, while she was an employee, the board found when she didn't return to work after being denied the guaranteed hours, she had quit and wasn't constructively dismissed.

[*Spence v. Rainbow Motel Limited*, [2014] NSLB 25 (CanLII), Feb. 25, 2014].

ANALYSIS

This is a reminder that no matter what the parties want to call the relationship, it's not just what you say or how you pay but how the relationship works that determines if a worker is an employee or a contractor. You can't escape your obligations under employment standards laws just by calling a worker an independent contractor and paying them off the payroll. If you say someone is an independent contractor but you control the hours and duties and the individual has no risk, the individual is an employee. Rather than whether you made statutory deductions, what's critical is how the employment relationship operated and the financial risk borne by the worker.