

COURT OF APPEAL SERVES REMINDER THAT CONTRACTORS MAY BE ENTITLED TO REASONABLE NOTICE

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Cormier v. 1772887 Ontario Limited c.o.b. as St. Joseph Communications [1] – a recent decision from Ontario’s Court of Appeal – is an important reminder that contractors may be entitled to reasonable notice upon termination without cause. The Court of Appeal’s decision also underscores the importance of careful drafting when it comes to termination clauses in employment contracts.

Background

Between 1994 and 2004, Ms. Cormier worked for St. Joseph Communications (“SJC”) as a contractor. During this time, Ms. Cormier worked exclusively for SJC (approximately 37 to 40 hours per week) for 10 months of the year. SJC dictated Ms. Cormier’s work assignments and provided her with the tools needed to perform the job. Ms. Cormier was compensated primarily on an hourly basis, and she invoiced SJC as if she was a sole proprietor. SJC did not withhold any amounts for taxes, nor did it provide Ms. Cormier with any employment-related benefits.

In June 2004, Ms. Cormier ceased being a contractor when she entered into a written employment contract with SJC. She started receiving an annual salary and later enrolled in SJC’s benefits plan. However, Ms. Cormier’s employment was terminated without cause in 2017 due to the liquidation of one of SJC’s major clients.

Ms. Cormier then sued SJC for wrongful dismissal, claiming that she was entitled to reasonable notice based on 23 years of service dating back to 1994. In its defence, SJC argued that Ms. Cormier had only been an employee since 2004 and she was not entitled to damages based on her prior service as an “independent contractor”. SJC also relied on the following termination clause in Ms. Cormier’s employment contract, which purported to limit her entitlements to those required by the *Employment Standards Act, 2000* (“ESA”):

(a) The Company may terminate your employment at its sole discretion, at any time for any reason, without cause, upon providing you the minimum notice, pay in lieu of notice and/or severance pay required by the [ESA], as amended from time to time. You will have no other entitlement to notice of termination, pay in lieu of such notice, and/or severance pay.

(b) In addition to the foregoing and subject to the consent of the Company's insurers, you will be entitled to continue to receive Company benefits (excluding STD and LTD benefits) during the notice period specified above. [Emphasis added.]

Decision

Independent or Dependent Contractor?

The motion judge held that Ms. Cormier was a “dependent contractor” (an intermediate classification between employees and independent contractors where an agreement to terminate the arrangement upon reasonable notice is implied) between 1994 and 2004.^[2]

In arriving at this decision, the motion judge considered (1) Ms. Cormier’s economic dependence on SJC; (2) the permanence of the relationship; and (3) the exclusivity of the relationship. His Honour found that although there were factors supporting a genuine independent contractor relationship (such as the issuance of invoices), Ms. Cormier was economically dependent on SJC because she had worked almost exclusively for the company since 1994. In the result, the motion judge held that Ms. Cormier was entitled to 21 months of reasonable notice based on her 23 years of service with SJC. This finding was subsequently upheld by the Court of Appeal.

Interestingly, the motion judge commented (in obiter) that even if he had found that Ms. Cormier was an independent contractor between 1994 and 2004, it would have been “wrong in principle to ignore these years of their relationship in determining the reasonable notice period”. According to the motion judge: “[t]he court should take all of the circumstances into account and in the immediate case even if I had found Ms. Cormier to be an independent contractor, I would not have ignored those years of their relationship”.

Termination Clause Unenforceable

The motion judge also rejected SJC’s argument for a lesser notice period based on the termination clause in Ms. Cormier’s employment contract.

According to the motion judge, the termination clause was unenforceable because the treatment of Ms. Cormier’s benefits during the notice period was contrary to section 61(1)(b) of the ESA (which requires an employer “to make whatever benefit plan contributions would be required to be made in order to maintain the benefits to which the employee would have been entitled had he or she continued to be employed during the [ESA notice period]”).

In particular, the motion judge held that the termination clause unlawfully allowed SJC to provide Ms. Cormier with only some of the benefits that she received prior to her termination (e.g., it excluded short-term and long-

term disability benefits) and, even then, only subject to the consent of SJC’s insurers. Because SJC had unlawfully attempted to contract-out of the ESA, the entire termination clause was void. This finding was also upheld by the Court of Appeal.

Conclusion

Unfortunately, the Court of Appeal did not consider the motion judge’s comment that even if he had found that Ms. Cormier was an independent contractor between 1994 and 2004, this period of service should be recognized for purposes of calculating reasonable notice. For now, the motion judge’s (non-binding) comments represent a significant departure from the long-established principle that properly classified independent contractors are not entitled to reasonable notice. However, it remains to be seen whether other judges will take a similar approach in future cases.

Notwithstanding this apparent anomaly, this case confirms that (1) service as a dependent contractor before a worker is hired as an employee may be used to calculate reasonable notice; and (2) termination clauses must be carefully drafted in order to comply with the ESA. Employers should ensure that employment contracts contain “failsafe” clauses which specifically provide that in no event will an employee receive less than his or her minimum statutory entitlements.

by Paul Boshyk and Chiedza Museredza

[1] [2019 ONCA 965](#). [ps2id id='1' target='']

[2] [2019 ONSC 587](#). [ps2id id='2' target='']

A Cautionary Note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

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