

EMPLOYEE VS. CONTRACTOR: COURT WILLING TO DECLARE STATUS IN SOCK WAR

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With the proliferation of contractors in the modern economy, the number of debates about employee status - is this an employee or a contractor? - continues to increase. The recent decision in *Howard and Associates Inc. v. Tomasek Agencies Inc.* 2017 ONSC 4291 provides helpful procedural guidance, confirming that, in appropriate cases, judges will issue a declaration about the status of workers.

Howard and Associates Inc. (“**HAI**”) is the Canadian distributor of the Wigwam brand of socks. Tomasek Agencies Inc. (“**Tomasek**”) was a regional sales agent in Alberta. The parties did not have a written agreement but had done business together for many years.

HAI claimed that one of the terms of their agreement with Tomasek was mutual exclusivity. This was explained by HAI as a commitment by HAI not to sell Wigwam socks to anyone else in Alberta except Tomasek, together with an obligation by Tomasek not to sell socks that were competitive with the Wigwam line of products.

Tomasek disagreed and claimed that it was not restricted to only selling the Wigwam brand of socks.

In 2015, HAI terminated the agreement to supply Wigwam sock to Tomasek on the grounds that Tomasek continued to sell competitive products despite prior warnings.

After receiving notice of termination, Tomasek advised through counsel that although Tomasek was not an employee of HAI, there was a dependent contractor relationship. As a result, Tomasek sought compensation based on HAI’s failure to provide reasonable notice of termination.

In litigation which ensued, HAI sought a declaration that Tomasek was not a dependent contractor of HAI. This was based on the admission that the parties had been in a commercial relationship.

The judge agreed with HAI and noted that relationship of economic dependency as understood in the employment context was not claimed by Tomasek. As a result, there was no genuine issue for trial about the possibility of the relationship being one of dependent contractor. In other words, the status was “contractor” based on admitted facts, so HAI was entitled to the declaration sought.

Takeaway for Employers

This brief decision confirms the importance of properly assessing worker status at the outset of any relationship as well as in the context of a dispute. While the outcome in the case very much turned on specific facts, the procedural step followed is potentially available in many cases, including those decided in the courts and tribunals. Narrowing the legal issues through a declaration can be very useful. One particularly notable aspect of the case is that it involved an unwritten agreement which the parties recognized was not employment. This may well be the rare exception, but many contractor arrangements also involve “non-employees”. Companies who engage workers should also note that these types of proceedings may well have been entirely unnecessary if a proper agreement and termination provision is in place.

by George Waggott

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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