

EMPLOYMENT & LABOUR LAW ALERT –
INTENTION TO CREATE INDEPENDENT CONTRACTOR
RELATIONSHIP NOT ENOUGH ACCORDING TO ONTARIO
COURT

(SEPTEMBER 2010)

Independent Contractor or Employee: The intention of the contracting parties does not necessarily determine the legal character of the relationship.

One issue we encounter quite frequently in our practice is the difference between an employee and an independent contractor. Often times, companies seek to enter into an independent contractor relationship because there are potential benefits not available in an employment relationship. Balanced against those benefits however, are the potential liabilities that may arise if the relationship is determined to be an employment relationship, including liability in relation to CPP/EI, Income Tax, employment standards, common law reasonable notice, Workplace Safety and Insurance, amongst other things. Unfortunately, the intention of the parties to create an independent relationship does not trump the actual character of the relationship.

A recent case from the Ontario Superior Court of Justice, *Ligocki v. Allianz Insurance Company of Canada*, reinforces the notion that the intention to create an independent contractor relationship will not be enough to trump the actual substance of the relationship, even if the employee benefited from being treated as an independent contractor.

In *Ligocki*, the Plaintiff provided home-care as a personal support worker to an

elderly disabled man who lived with his son. Originally, the Plaintiff was employed and placed in the household by a service provider who paid him an hourly wage. At some point the service provider stopped providing services to the household in which the Plaintiff worked and without interruption the Plaintiff began servicing the household directly. At that time, the Plaintiff entered into a verbal agreement with the son whereby he would invoice for his services and be paid a gross amount with no source deductions or remittances. While working directly for the household, the Plaintiff was not provided any employment benefits.

During this period of time the Plaintiff conducted himself as an independent contractor. He issued invoices for hours worked and was paid a gross amount by cheque. On his 1999, 2000 and 2001 income tax returns, the Plaintiff reported he earned business income (not employment income), claimed business deductions and remitted his own CPP payments.

Unfortunately, the Plaintiff was in an automobile accident and sought income replacement benefits from the Defendant's insurance company. Given the Plaintiff had self-identified himself to be an independent contractor, the insurance

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company provided him with benefits in line with such a designation. These benefits were significantly lower than the benefits he would have received had he fallen under the employee designation. The Plaintiff requested that his designation be changed and the Defendant refused. The Defendant then brought a motion asking the court to rule on the Plaintiff's status as an employee/independent contractor.

In concluding that the Plaintiff was an employee of the household, the Court noted that the Plaintiff did not have control over the way he provided his services, did not provide his own equipment, did not have the authority to hire others, did not take any financial risk to perform the work and had no opportunity for profit or risk. Essentially, the Court concluded that the Plaintiff had no business of his own and was not in business on his own account.

Lastly, the Court addressed the importance to be placed on the parties intention to

create an independent contractor relationship on the character of the relationship, including the Plaintiff holding himself out to be an independent contractor: "The plaintiff initially sought the consequences, or benefits of identifying himself as an independent contractor. It was financially advantageous for him to do so at the time. But the legal consequences of a contract for the supply of services is not proof of its existence, nor does it assist in determining whether the parties have adopted the legal means of achieving these consequences...When the plaintiff sought to identify himself first as an independent contractor and more recently, after the fact as an employee, he was simply trying to take advantage of the benefits that each of those classifications had for him. This is the perfect example of Evans J.A.'s prediction and the reason why ultimately the intention of the parties does not assist in determining the legal character of the relationship."

What does this mean?

Unfortunately, there may be instances where an individual is engaged as an independent contractor, reaps the benefit of that relationship and then turns around and argues against that relationship to obtain further benefits. In the employment context, we have seen independent contractors claim that they are employees when it suits their purposes to obtain employment standards entitlements, employment insurance and reasonable notice of termination. Unfortunately, the intention of the parties and the conduct of the 'contractor' will not determine the character of the relationship and companies may be on the hook for employment related entitlements.

Without question it is best for companies to properly assess whether the working relationship under consideration is truly an employment relationship or an independent contractor relationship and then, as appropriate, capture the expectations and obligations arising out of that relationship in a binding agreement.

As mentioned, even though the intention of the contracting parties does not determine the issue, if a Company decides to enter into an independent contractor relationship, a written agreement should be prepared that characterizes it as such. Within that agreement the company should include specific clauses that limit the company's liability regardless of whether ultimately it is determined that the relationship is that of an employer-employee or independent contractor. Key considerations include:

1. Engage a contractor through his personal services corporation as opposed to engaging the individual directly to reduce CPP/EI and Income Tax exposure.
2. Include indemnity language with respect to CPP/EI, Income Tax, WSIB, etc.
3. Where applicable, require the contractor to obtain a WSIB clearance certificate.
4. Draft notice provisions that may be enforceable regardless of the relationship determination.
5. Consider entering into a fixed-term employment relationship as opposed to an independent contractor relationship where the actual character of the relationship suggests one of employment.

Independent contractor agreements should be drafted with care, and reliance on precedents can lead to consistency and enforceability issues. Therefore, it is highly recommended that contracts be revisited when contemplating the engagement of an independent contractor.

To contact our Employment & Labour Practice Group about this Alert or any other employment or labour matter please call 416.943.0288 or email employmentlaw@gt-hrlaw.com.

Note: The material that is contained in this Employment & Labour Law Alert is meant to provide a general update with respect to certain areas of employment law. The material is not meant as a substitute for legal advice or other such professional advice. Each possible employment issue will be driven by its own unique facts and therefore, specific legal advice should be obtained. In addition, although the material sets out the law as it currently stands, law and statutes change and what is the law today may be different or differently interpreted tomorrow.

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