So You Think You’re Not The Employer…

Many organizations arrange their corporate affairs and relationships to minimize the extent to which they will be viewed as an “employer” of the individuals with whom they have a working relationship. The success of such attempts, however, will depend not only on the details of the arrangement, but also on the forum in which the relationship is being examined. A relationship that might be viewed as employer-employee in one setting might not be seen the same way in another.

**Human Rights**

The Human Rights Tribunal and the Courts have determined that human rights legislation, including the *Human Rights Code*, is to be given a broad, liberal, and purposive interpretation. That interpretive approach has been extended to decisions as to whether a particular relationship is caught by the prohibition against discrimination in “employment”. The result is that many relationships that might not, in other contexts, be considered relationships of employment, fall within the Human Rights Tribunal’s jurisdiction to scrutinize as they are deemed to be “employment” for the purposes of human rights.

“Employment” is defined in the *Code* as including “the relationship of master and servant, master and apprentice and principal and agent, if a substantial part of the agent’s services relate to the affairs of one principal, and ‘employ’ has a corresponding meaning”.

In the recent case involving an equity partner in a law firm who claimed he was in an employment relationship with his law firm for the purposes of the *Human Rights Code*, *McCormick v. Fasken Martineau DuMoulin LLP*, the Court described the four relevant factors for determining whether there exists an “employment” relationship, as follows (at para. 20):

- Utilization involves looking at whether the alleged employer “utilized” or gained some benefit from the person in question.
- Control involves criteria such as determining wages and working conditions, including discipline and discharge.
- Financial burden simply means whether the alleged employer bears responsibility for remunerating the complainant.
- Remedial purpose relates to whether the alleged employer is able to remedy the discrimination alleged by the complainant and whether the complainant invokes the purposes of the *Code*.

Both the Human Rights Tribunal and the Court found that application of those four factors favoured Mr. McCormick, who claimed the Tribunal had jurisdiction over his complaint that the law firm discriminated against him by requiring his retirement at age 65. Although it was not a traditional employment relationship, it was nonetheless captured by section 13. The Court’s decision turned primarily on the extent of control exercised by the firm over Mr. McCormick’s work (at para. 80):

- Mr. McCormick is an equity partner with very little control over his work life, his remuneration, and his work product. The firm, through its board and managing partners, dictates what occurs in the workplace and, to a certain extent, what Mr. McCormick does outside of the office.

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1 2010 BCHRT 347, aff’d. sub nom *Fasken Martineau DuMoulin LLP v. British Columbia (Human Rights Tribunal)*, 2011 BCSC 713 (“Fasken”) (appeal to BCCA filed, but not yet decided)
this partnership an individual equity partner cannot determine his own wages and working conditions. Nor does he have the power, through his voting rights or his bargaining strength, to change the partnership agreement in ways that would be favourable to him. An individual partner is always subject to the wishes of the majority and the control exercised by the managing partners and the executive board. It is by these means that the firm represents a relationship with Mr. McCormick that is more reflective of an employer/employee relationship, favouring an overall finding that Mr. McCormick is “employed” by Fasken for the purposes of the Code.

On that basis the Court concluded that the relationship was sufficiently employment-like that it was within the Human Rights Tribunal’s jurisdiction.

It is apparent from the analysis of the Court that a wide variety of relationships will fall within the scope of “employment” for the purposes of the Human Rights Code. It will likely be a relatively rare exception for a remunerative, working relationship between parties not to be found to fall within the scope of section 13 of the Human Rights Code, and therefore within the jurisdiction of the Human Rights Tribunal to consider.

**Labour**

In *KFCC/Pepsico Holdings Ltd.*, the Labour Relations Board considered when a franchisor will be a common employer with a franchisee. Section 38 of the Labour Relations Code permits the Board to treat associated or related businesses as one employer for the purposes of the Code, thereby binding both employers to the Union certification and collective agreement. The Board considers four factors, including whether there is common control or direction between the entities, and whether there is a labour relations purpose for making the common employer designation.

In *KFCC*, the Board considered whether there could be common control or direction between a franchisor and franchisee since they are separate businesses without common corporate ownership. The Board summarized its conclusions as follows (at paras. 240-243):

(4) The starting point for consideration of common control or direction continues to be the CCAG factors; that is, common ownership, financial control, contractual arrangements, control of labour relations, common management, interrelationship or interdependence of operations, and representation to the public as a single guiding force.

(5) Franchising, unlike double breasting in the construction industry, does not feature common corporate ownership and may not feature a single guiding force or an entity with dominant control. However, common control and direction can be established in circumstances where no one corporate entity or individual has complete or exclusive control and direction.

(6) In the franchise context, the application of the CCAG factors is aimed at revealing the distribution of power in the operation of the related businesses and whether sufficient control exists for a finding of common control or direction. Sufficient control will be found if the franchisor enjoys substantial control over the franchise business. Substantial control is control “of real importance or value, of considerable amount”. It is both a qualitative and quantitative test.

(7) The common control and direction analysis must reflect the actual behaviour of the parties as well as the formal contractual

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arrangements. It is a factual determination based on the totality of the evidence.

After outlining its approach to “labour relations purpose” in the franchise context, the Board concluded that, in certain circumstances, a franchisor might be a common employer with a franchisee for the purposes of the Code. Such a declaration would permit the Board to treat the franchisor and franchisee as a single employer, although in other contexts, outside of the Code, the franchisor might not be considered to be an employer.

Workers Compensation

In Petro-Canada v. British Columbia (Workers’ Compensation Board), the BC Court of Appeal considered the extent to which orders under the Workers Compensation Act could be made against a franchisor.

Petro-Canada was the franchisor for two gas stations against which workers’ compensation orders had been made following violent incidents at each. At a Langley gas station, an armed robber was able to gain access to the area behind the service counter after kicking down a small swinging door. At a Surrey gas station, an attendant was hit by a car after the attendant tried to stop the car from driving away without paying for gas.

A Prevention Officer issued orders against Petro-Canada under section 115(1) of the Workers Compensation Act on the basis that Petro-Canada was “an employer” that had not ensured the health and safety of “workers present at a workplace at which that employer’s work [was] being carried out”.

“Employer” is defined in the Act. Section 1 defines employer as including “every person having in their service under a contract of hiring or apprenticeship, written or oral, express or implied, a person engaged in work in or about an industry.”

Petro-Canada acknowledged that it was an employer (of its own employees) under the Act, but argued that, as franchisor of the gas stations at which the incidents occurred, it was not an employer with respect to those incidents for the purposes of section 115(1) of the Act.

The Court held that since it was “an employer” under section 1 of the Act, it was also an employer for the purposes of section 115(1) of the Act.

The Court of Appeal was “untroubled” by the prospect that applying such a broad definition of employer to section 115(1) would “open floodgates, and fix entities that have limited control over a workplace with obligations that they cannot reasonably fulfill” (at para. 47). The Court explained (at para. 47):

As I read s. 115, the “floodgates” are controlled not by the use of the word “employer” but by the requirement that the employer’s work be carried on at the workplace, and by the appropriate interpretation of what it means to “ensure the health and safety of workers”. While the interpretation of this latter phrase is primarily one for the Board rather than for the Court, it is my tentative view that the degree to which an employer can “ensure” health and safety will, of necessity, be dependent on the degree of control that the employer has over the workplace.

The Court of Appeal found that the Workers Compensation Review Officer’s findings with

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3 2009 BCCA 396
respect to the control Petro-Canada exercised over the gas stations were not unreasonable, and supported a determination that Petro-Canada was sufficiently connected to the workplaces to “ensure the health and safety” of workers.

The Officer made such findings of control based on the agreements between Petro-Canada and its franchisees (reproduced at para. 28 of BCCA decision):

First, the Retail License Agreement makes it clear that the licensee is simply an agent of the employer, for the purposes of sales. All title to the petroleum products remains with the employer until the point of sale. In addition, the employer dictates the type and quality of product that the licensee must sell and provides it. The employer also dictates the price and the manner of payment, which may include coupons. The licensee holds all monies earned from sales transactions in trust for the employer, who then pays the licensee a commission. In addition, the employer dictates the hours of operation, and retains the right to authorize others to access or use the control room containing the console.

Second, it is clear that the employer has specifically retained the right to inspect the service stations for safety concerns and the right to dictate safety policy, to a certain extent. Both the Retail License Agreement and the Site Operating Procedure discuss the employer’s expectations in the realm of safety and empower the employer with the authority to conduct inspections and demand remedies if deficiencies are found.

Overall, I have found the relationship between this employer and its licensees to be sufficiently close that it would not be unreasonable to conclude that the licensee is simply an agent of the employer. Indeed, this is what the contract between the parties state.

The result of the control exercised by Petro-Canada was that it was found to have obligations under the Act as an employer. Although it was not the employer of the employees at the gas stations affected by the violent incidents, it was determined to have an obligation to take steps to ensure the health and safety of the workers at those locations.

Conclusion

There are, of course, many other settings in which the question of whether an organization is an employer may arise, including employment issues and taxation. In those settings, as in those described here, the answer will depend not only on the facts of the particular situation, but also on the context: what might constitute employment in one context might not constitute employment in another context. Before organizations conclude that they are not employers simply because individuals are paid as contractors or partners, or because they are franchisors, they would be wise to consider the details of their arrangements and the context of the inquiry.

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