

April 6, 2010

*McKee v. Reid's Heritage Homes Limited:
Employee vs. Dependent Contractor vs.
Independent Contractor*

By Malcolm MacKillop and Heather Wood London

In its recent decision *McKee v. Reid's Heritage Homes Limited*, [2009 ONCA 916 \(CanLII\)](#), the Ontario Court of Appeal has confirmed that somewhere between employee status and independent contractor status exists the category of "dependent contractor". This decision has important implications for employers, as dependent contractors will be entitled to reasonable notice of the termination of their services in the same way as an employee. By contrast, employers are not required to provide notice to independent contractors.

The Facts

In 1987, Elizabeth McKee signed a sales and advertising agreement on behalf of her business, Nu Homes, with the defendant Reid's Heritage Homes Limited ("RHH"). Pursuant to the agreement, McKee was to advertise and sell 69 homes for which she would charge RHH a fee of \$2,500 per home sold. The agreement provided that RHH would have almost exclusive use of Nu Home services, and further provided that either party could terminate the agreement for any reason upon 30 days notice.

After the first 69 homes were sold, McKee continued to sell homes for RHH without a new agreement in place. RHH supplied stationary and forms for selling homes, and McKee was given the title of "Sales Manager". RHH paid McKee through Nu Homes. McKee hired, trained and managed her own subagents with whom she split her commissions on their sales, without intervention, direction, or interference from RHH. McKee invoiced RHH and paid her subagents through her corporation.

In 2004, RHH's sales force was restructured and in 2005, McKee was told her subagents would have to work for RHH as "direct employees". Negotiations regarding the terms of McKee's own relationship with RHH broke down. McKee, who was 64 years old at the time, sued RHH for wrongful dismissal. RHH maintained that she was an independent contractor, and therefore not entitled to notice of dismissal.

April 6, 2010

The trial judge found that McKee was an employee of RHH, as her activity of selling homes was an integral part of the defendant's business. Given her position, years of service and age, in light of the limited availability of comparable employment for someone of her experience, training and qualifications, she was awarded 18 months severance in lieu of notice. This decision was appealed by RHH.

Dependent Contractors

In the course of the appeal, the Court addressed whether there exists an intermediate position of "dependent contractor" between employee status and independent contractor status. The Court confirmed such a category exists, and took this opportunity to define what it means.

The Court found that dependant contractor status may be present where the person is not an employee, but a relationship of economic dependency is present. This will usually occur where the contractor works exclusively, or nearly exclusively, for the company. Importantly, the Court confirmed that workers classified as dependent contractors will be owed reasonable notice upon termination.

Determining whether someone is a "dependant contractor" is a two-step analysis. First, it must be determined whether a person is an employee or a contractor. To make this determination, the following questions will be asked:

1. Whether or not the agent was limited exclusively to the service of the principal (if so, the agent is more likely to be an employee);
2. Whether or not the agent is subject to the control of the principal, not only as to the product sold, but also as to when, where and how it is sold (if so, the agent is more likely to be an employee);
3. Whether or not the agent has an investment or interest in what are characterized as the "tools" relating to his service (if so, the agent is more likely to be a contractor);
4. Whether or not the agent has undertaken any risk in the business sense or, alternatively, has any expectation of profit associated with the delivery of his service as distinct from a fixed commission (if so, the agent is more likely to be a contractor);

**SHIELDS
O'DONNELL
MACKILLOP LLP**

65 QUEEN STREET W
SUITE 1800
TORONTO, ON
M5H 2M5
T 416 304.6400
F 416 304.6406
www.djmlaw.ca

April 6, 2010

5. Whether or not the activity of the agent is part of the business organization of the principal for which he works. In other words, whose business is it? (the more the agent is part of the business organization, the more likely he or she is an employee)

If the agent is found to be an employee, the analysis is complete.

If the agent is deemed to be a contractor, the next question is whether the contractor is dependent or independent. If a contractor works exclusively for the company, and/or is economically dependent on the company, the contractor will be considered "dependent". Because there is a relationship of dependency, the Court stated that dependent contractors are owed reasonable notice upon termination, akin to an employee.

Findings

Based on the particular facts of this case, the Court did not disturb the lower court's finding that McKee was an employee. The Court acknowledged she worked for RHH exclusively, was subject RHH's control as to where she sold homes, what promotional methods to use, what to sell and how much to sell it for. Additionally, she performed her sales function in model homes provided by RHH, used stationary and forms supplied by RHH, she was financially dependent on RHH in that she relied on fixed commissions without any further chance for profit, and she did not risk any significant capital in her sales operation. Finally, the sales force of which McKee was a member was a crucial element of RHH's business. The fact that McKee operated through her own business and that she hired subagents who reported to her did not outweigh the other factors.

What Employers Should Know

This case encompasses important issues for employers. The Court has clearly stated that workers who are not employees may be dependent contractors or independent contractors. Where a contractor works exclusively for the employer, or is otherwise financially dependent on an employer, the employer may be obligated to provide reasonable notice upon termination of the working relationship. Where the contractor's status is independent, no notice is owed.

**SHIELDS
O'DONNELL
MACKILLOP LLP**

65 QUEEN STREET W
SUITE 1800
TORONTO, ON
M5H 2M5
T 416 304.6400
F 416 304.6406
www.djmlaw.ca

April 6, 2010

This has potentially significant financial ramifications for employers who engage contractors. However, there are certain steps that can be taken to minimize risk, including the following:

1. Take care to outline the roles of the parties at the beginning of the relationship in a governing contract;
2. Provide for reasonable notice in the contract if appropriate;
3. Do not allow the contract to expire. Rather, be sure to renew or replace in a timely fashion so that the terms of the relationship are always in writing.

If you have any questions about how this decision may affect your workplace or how to prepare appropriate contracts for dependant contractors, a Shields O'Donnell MacKillop lawyer will be pleased to assist.

Malcolm MacKillop and Heather Wood London practise employment law with the firm Shields O'Donnell MacKillop LLP of Toronto. For more information visit www.djmlaw.ca

**SHIELDS
O'DONNELL
MACKILLOP** LLP

65 QUEEN STREET W
SUITE 1800
TORONTO, ON
M5H 2M5
T 416 304.6400
F 416 304.6406
www.djmlaw.ca