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How temporary and contractual workers are changing the legal landscape
By Cherolyn R. Knapp

An administrative assistant supplied by a personnel agency to the company where she has worked for the last four years is terminated by a supervisor who is no longer satisfied with her work. Can the worker sue for wrongful dismissal? If so, who is the defendant?

In the last two decades, the private and public sectors have increased their use of temporary and contractual workers to supplement full time staff. While this type of arrangement responds to needs for a flexible workforce, numerous legal and practical questions are raised by this business reality.

The common law of employment and modern statutory employment schemes are built upon the underlying idea that the employment relationship has special characteristics that are distinct from commercial contractual arrangements. Courts and legislatures have fashioned various entitlements and obligations for employees and employers which are not found in regular commercial contractual relationships. The availability of these entitlements and obligations are premised upon parties being found to be in an employee-employer relationship.

In determining whether parties are in a relationship that the law labels "employment" as opposed to a strictly contractual relationship between two parties who are considered to be equals, the court or tribunal will examine the factual context and the parties' conduct rather than accept at face value the financial and contractual arrangements implemented by the parties. In 67122 Ontario Inc. v Sagaz Industries Canda Inc., [2001] 2 S.C.R. 983, the Supreme Court of Canada held that the question to be considered is whether the person who has been engaged to perform the services is "performing them as a person in business on his or her own account." The answer is determined after considering a number of factors including control, ownership of tools, chance of profit and risk of loss (i.e. the Montreal Locomotive test).

As if advising clients about the typical two-party employee or independent contractor dynamic were not problematic enough, there are further difficulties with regard to the triangular relationship between personnel agencies, their clients and the workers whom they supply to those clients. In the three-party relationship that exists when a personnel agency is involved, the agency has two separate contracts: a commercial contract with its client to provide personnel, and an employment contract with the worker whose services it supplies. In this scenario, the usual roles of the employer are shared between the personnel agency and its client, the end-user of the employee's services. The party found to be the "employer" will be the party who must discharge the legal obligations inherent in that role.

With respect to the question of "who is the employer?", the Supreme Court of Canada has adopted a "comprehensive approach" which looks at numerous factors such as the selection process, hiring, training, discipline, evaluation, supervision, assignment of duties, remuneration and integration into the business. Pointe Claire (City) v Quebec (Labour Court), [1997] 1 SCR 1015.

In Pointe Claire, the Court found that a temporary employee hired by the City through an agency was a member of the union bargaining unit that had a collective agreement with the City. The case raises the difficult question of whether a party can be found to be the employer for certain reasons but not others. The Pointe Claire decision is also relevant outside Quebec as the Court found that the "comprehensive approach" basically mirrored the "fundamental control" test which has been employed by the Ontario Labour Relations Board

and the Canadian Industrial Relations Board for years.

In many cases, despite there being no privity of contract between the individual who performs the work and that person's real workplace, the court and other tribunals have employed the comprehensive approach or the fundamental control test and have found that the end user of the individual's services, and not the placement agency, is the real employer.

For example, in Teamsters Union, Local 419 v Lantic Sugar Ltd., [2004] OLRB Rep. 69, the Board certified a bargaining unit of truck drivers who had been supplied to the company by a personnel agency, and found the company to be the employer despite the fact that the personnel agency was heavily involved in the supervision, training and compensation of the workers.

In Decision No. 608/02 2003 ONWSIAT 260, the Workplace Safety and Insurance Appeals Tribunal found that that the company that hired a worker through a personnel agency was the "real employer" when that worker was injured on the job. The Tribunal held that the personnel agency was only a "fictional vehicle" despite the fact that the personnel agency actually paid the worker's wages.

By contrast, in Ferdinandusz v Global Driver Services Inc., (1998), 5 CCEL (3d) 248 (Ont. Gen. Div) aff'd (2000) 5 CCEL (3d) 264 (Ont. CA) the Court ruled that a driver that had been supplied by a personnel agency could not sue the end-user company for wrongful dismissal and that the "real employer" was the personnel agency. It may be argued that on different facts, the outcome may have been otherwise, as the Court dismissed the plaintiff's case against the personnel agency as well.

Therefore, counsel to individuals, personnel agencies, governments and businesses would be well advised to take care of the manner in which their clients choose to organize their contractual relationships with their workers, as it appears that the actual day to day operation of such relationships may be open to judicial scrutiny in the search for the "real employer."

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