Clothes make the man

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When an individual chooses to enter into an agreement via a management company, he has to accept all of the consequences of that decision, the good and the bad. This principle applies in particular to working relationships.

In the Kucer case,[1] the Superior Court recently confirmed that, barring extraordinary circumstances, an employee hired and paid through their own management company is not entitled to termination notice or pay in lieu thereof.

For tax purposes, the employee in question decided to proceed this way. Consequently, he was unable to demonstrate that the agreements entered into had been imposed by the employer.

An individual seeking to avail himself of the tax benefits connected to a contract for services may as a consequence lose the protections applicable to employment contracts.

The context

In 2007, Stephen Kucer started a company, which went bankrupt in 2012; its assets were acquired by 8237514 Canada inc. ("Canada Inc."), a wholly-owned subsidiary of 9265-0597 Québec inc. ("Québec Inc."), with Stephen Kucer as one of the shareholders.

The shareholders of Québec Inc. wanted Stephen Kucer to become the chairman of Canada Inc., but Kucer insisted that he render his services via his own management company, Harland Tech Group inc. ("Harland").

Canada Inc. therefore entered into a contract for services with Harland, according to which Harland would provide Canada Inc. with Stephen Kucer's services as chairman, with Harland assuming responsibility for Kucer’s remuneration.

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Stephen Kucer lost his position as chairman of Canada Inc. when the latter terminated Harland's contract for services. Kucer then initiated proceedings seeking pay in lieu of notice of termination.

The parties' positions

Stephen Kucer argued he was dismissed without cause, and that as an employee of Canada Inc., he was entitled to pay in lieu of notice.

In contrast, Canada Inc. argued that Stephen Kucer was not an employee, but rather an independent worker whose services were retained by Harland, and therefore, the agreement with Harland could be terminated for any reason and without providing Stephen Kucer with any notice.

The outcome of the dispute

The Superior Court reviewed several rulings by the Court of Appeal and endorsed, among others, remark made by Justice Chamberland[2] who stated that workers who seek to avail themselves of the benefits associated with a management company when rendering services cannot avoid the disadvantages associated with such an approach, unless the arrangement is the result of a subterfuge or smokescreen imposed by the employer.

In this matter, Stephen Kucer made the well-informed decision to sign a contract through his own management company. In the absence of any evidence that the employer imposed this way of operating, one cannot conclude that there were any extraordinary circumstances which would allow the Court to pierce the corporate veil and to provide Mr. Kucer with the status of an employee.

In the absence of a direct contractual relationship between Canada Inc. and Stephen Kucer, the Court refused to recognize he had any entitlement to pay in lieu of notice.

This dispute is also demonstrative of the principle, underlined by the Court, , whereby economic dependence does not amount to an employer-employee relationship of subordination which would make it possible to conclude an employment contract, rather than a contract for services, existed between the parties.

Conclusion

A person rendering services to an employer via his management company cannot be considered to be an employee, unless he has demonstrated the existence of extraordinary circumstances.

Given that such an individual is not a party to the agreement entered into with the company to whom services are being rendered, he cannot claim that the company is his employer, nor can he claim the legal protections afforded to employees.

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1. *8237514 Canada inc. v. Kucer,* 2018 QCCS 12
2. *Conseillers en informatique d'affaires CIA inc. v. 4108647 Canada inc.,* 2012 QCCA 535

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