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Defining "Employment" Continues to be a Challenge—Even Outside of the Human Rights Process

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Cases commented on: *Van Lent v Place*, 2013 ABQB 494; *Lovely v Prestige Travel Ltd.*, 2013 ABQB 467

Some previous posts on ABlawg (see, for example here) have addressed the narrowing of the definitions of "employee" and "employment", particularly in Alberta human rights cases, and the implications of these decisions. Two recent decisions outside of the human rights realm demonstrate both the importance and implications of finding an "employment" relationship.

In *Van Lent v Place*, 2013 ABQB 494 [*Place*], the defendants applied to set aside a judgment obtained by Van Lent and others for an award of damages of over $333,000. The case involved, among other allegations, violations of cease trading orders given by the Alberta Securities Commission against Locate Technologies, a numbered company, and an individual, Lorne Drever. Both Drever and another defendant, Nason, were stated to be "providing services" to Locate. There were a number of orders pertaining to the same individuals by other provinces' Securities Commissions. Notwithstanding the orders in Alberta, these three parties allegedly induced Van Lent and Wereka to loan money to Locate Technologies, and promised shares of Locate as security for the loans. Van Lent and Wereka advanced $313,000 to Locate but never received the shares. The defendants also promised the plaintiffs security in three properties, one of which was the matrimonial home in which Drever and Place resided. Drever and Place later encumbered these properties with mortgages, and title to one of the properties was transferred to Place alone. In November 2011, a Statement of Claim was filed in the Alberta Court of Queen's Bench alleging that the defendants fraudulently induced the Plaintiffs to make various loans to them in the amount of $313,000. A number of attachment orders were also obtained. In May 2012, Justice Don J. Manderscheid granted Default Judgment against the Defendants. In June 2012, the Alberta Securities Commission released a decision in proceedings against Locate, the numbered company and Drever. The larger issue of the case is whether the Default Judgment of May 2012 could be set aside. The issue that is relevant to this post is whether Nason could argue that he was an employee of Locate rather than an independent contractor, such that he could rely on Drever's advice that he (Drever) was going to take care of filing a defence in the matter if necessary (thus explaining why Nason did not file a defence).

Justice Manderscheid indicated that the evidence available before him did not satisfactorily clarify whether Nason was an employee or an independent contractor or subcontractor of Locate and Drever. This was a triable issue because it had "significant ramifications…for the nature of his legal duties, rights, responsibilities and the consequences attached to them" (*Place* at para 50). The court noted that the caselaw authorities suggest that where an employee-employer

relationship is clearly established, it may be a valid excuse for an inaction or action of the employee that he relied on the representations of the employer or someone 'higher up' in the business relationship (*Place* at para 51, citations omitted). With regard to the issue of whether he was an employee, the court was prepared to give Nason the benefit of the doubt, and thus Nason was entitled to rely on the information provided to him by Drever that Drever was going to file a defence as necessary. The court then set aside the Default Judgment against Nason.

In a very different case, *Lovely v Prestige Travel Ltd.*, 2013 ABQB 467 [*Lovely*], claimed that Prestige Travel and McDonald & Bychkowski Ltd., carrying on business as CMB Insurance Brokers, owed him one year's base salary as termination pay under an employment agreement entered into on March 20, 2008. The court (per Justice Thomas Wakeling) concluded he was so entitled (based on either the terms of the contract, or the appropriate reasonable notice period of twelve months). Among the issues addressed was who was Lovely's employer? Following general employment principles, the court concluded that McDonald & Bychkowski Ltd. was an employer of Lovely. The factors taken into account by the court included that its four shareholders had selected Lovely to lead a project to make the travel business profitable. The same people discussed the contract terms with Lovely and the nature of the business plan. They also decided to dismiss Lovely. In addition, McDonald & Bychkowski Ltd. paid Lovely's salary, provided his benefits, issued his T4 slips identifying itself as his employer and claimed that it was his employer when it dismissed him. All aspects of Lovely's work were subject to the direction and control of McDonald & Bychkowski Ltd. (*Lovely* at paras 86-7). Prestige Travel Ltd. admitted that it was Lovely's employer and the court found that McDonald & Bychkowski Ltd. was also his employer. The court then concluded that the common law principles governing the termination of employment applied.

It is interesting to note that in both cases it was to the benefit of the party involved (whether plaintiff or defendant) that he be found to be an employee. Likewise, in human rights cases (where the remedies are arguably much less onerous to the respondent employer) it is actually necessary to find that the respondent is an employer because the *Alberta Human Rights Act*, RSA 2000, c A-25.5 only protects people from discrimination based on certain listed grounds (e.g., race) in listed areas, such as employment. In the recent human rights caselaw, parties were able to avoid responsibility based on a fairly restrictive definition of "employment" (see e.g. *Lockerbie & Hole Industrial Inc v Alberta (Human Rights and Citizenship Commission, Director)*, 2011 ABCA 3). Because it is remedial in nature, human rights law is supposed to be given a "large and liberal" interpretation (see *Canadian National Railway Co v Canada (Canadian Human Rights Commission)*, [1987] 1 SCR 1114 at p 1134). Yet, recent human rights cases seem to going against this grain with respect to the definition of "employment". Ironically, at the same time, in cases occurring in settings where a finding of an employment relationship arguably results in much more significant impacts on the parties, judges seem more willing to find that an employment relationship exists.