May 17, 2011

Issue of "Employment" in Human Rights Cases Arises Yet Again

By Linda McKay-Panos

Cases commented on:

375850 Alberta Ltd. v Noel, 2011 ABQB 218

Recently, in the decision of *Lockerbie & Hole Industrial Inc. v Alberta (Human Rights and Citizenship, Director*), 2011 ABCA 3 ("*Lockerbie*") the Alberta Court of Appeal changed the direction of human rights law in Alberta by providing a narrow definition of "employer" and "employment" for the purposes of the application of the employment discrimination provision in section 7 of the *Alberta Human Rights Act*, RSA 2000, c A-25.5 ("*AHRA*"). See my earlier blog on that case here.

The Court of Queen's Bench in the *Noel* case applies the *Lockerbie* analysis for determining whether the alleged discrimination occurred in the area of employment. Beverly Noel worked for Dy-Kel Services Ltd., a company involved in well testing. The company arranged and paid for Noel's accommodation at Hamburg Open Camp ["the Camp"], owned by 375850 Alberta Ltd. The evidence at the Human Rights Tribunal indicates that Noel worked a shift on February 21, 2006, and returned to her room. She emerged from her shower unclothed to discover a camp maintenance employee, Jacob Chernish, standing in the doorway watching her. She told him to leave her room, and he did not, and replied that she had left her keys in the door. He also accused her of smoking marijuana in the room. The next day, Noel awoke in her bed to find Chernish standing in her room. He again accused her of smoking marijuana in her room. Noel informed her immediate supervisor at Dy-Kel what had occurred, and then the Camp manager, who told her that he would speak to Chernish. The Camp manager also referred her to Edwin Wiebe, a Director of 375850 Alberta Ltd., who was in Edmonton. She spoke to Wiebe on two occasions, but he hung up on her when she asked him to wait while she went to retrieve a letter of apology written to her on February 27, 2006 by Chernish. Noel was not able to contact Wiebe again (*Noel* at paras 3 to 4).

Noel began to keep a steak knife under her pillow for self defence, but found the knife blade broken when she returned to her room. She started sleeping in her truck and eventually quit her job and left the Camp.

The RCMP laid charges against Chernish, and on January 25, 2007, he was convicted of one count of entering a dwelling house with intent to commit an indictable offence (*Noel* at para 6).

Noel filed a complaint against the Camp and 375850 Alberta Ltd. ["the Appellants"] under section 7(1) of the then *Human Rights, Citizenship and Multiculturalism Act*, RSA 2000, c H-14 (now *AHRA*), alleging gender discrimination in employment (sexual harassment). The Human Rights Tribunal upheld Noel's complaint, finding that the Appellants had discriminated against Noel on the basis of gender (sexual harassment) in the area of employment.

With respect to the issue of employment, the Tribunal considered that living at the Camp fell under the wording of section 7(1)(b), which provides protection from discrimination (in part) "with regard to employment, or any term or condition of employment." The Tribunal rejected the argument that because Noel was not an employee of the Camp, it was not required to take action. The Tribunal noted that Chernish was an employee of the Camp, and the Camp should have taken action to rectify the situation (*Noel* at paras 12 and 13). The Tribunal awarded Noel $5,000 for the trauma, pain and suffering she experienced by virtue of the sexual harassment, and 12 months of lost wages, together with interest on these awards.

375850 Alberta Ltd. appealed the Tribunal's decision to the Alberta Court of Queen's Bench on the basis that it was not Noel's employer for the purposes of the *AHRA*. The Director of the Alberta Human Rights Commission cross-appealed based on the remedy granted by the Tribunal.

Justice Sheila Greckol determined that whether the Camp was an employer was a question of law, and thus was subject to the correctness standard of review (*Noel* at para 22). First, she concluded that the Tribunal's failure to consider whether Noel was employed by the Camp was an error of law (*Noel* at para 26). Next, Justice Greckol determined that she would consider the issue of employment rather than send the matter back to the Tribunal for re-consideration (*Noel* at para 28).

Justice Greckol applied the *Lockerbie* factors for whether a relationship is "employment" under the *AHRA* (*Lockerbie* at para 25, cited in *Noel* at para. 29):

- whether there is another more obvious employer involved;
- the source of the employee's remuneration, and where the financial burden falls;
- normal indicia of employment, such as employment agreements, collective agreements, statutory payroll deductions, and T4 slips;
- who directs the activities of, and controls the employee, and has the power to hire, dismiss and discipline;
- who has the direct benefit of, or directly utilizes the employee's services;
- the extent to which the employee is a part of the employer's organization, or is a part of an independent organization providing services;
- the perceptions of the parties as to who was the employer;
- whether the arrangement has deliberately been structured to avoid statutory responsibilities.

Where it is alleged that there is more than one co-employer, the following factors are also relevant (*Noel* at para. 30):

- the nexus between any co-employer and the employee, including whether there is a direct contractual relationship between the complainant and the co-employer;
- the independence of any alleged co-employer from the primary employer, and the relationship (if any) between the two;
- the nature of the arrangement between the primary employer and the co-employer, for example, whether the co-employer is merely a labour broker, compared to an independent subcontractor;
- the extent to which the co-employer directs the performance of the work.

Based on these factors, Justice Greckol concluded that neither the Camp nor its owner were Noel's employer. The Camp did not pay Noel, did not direct her activities, did not have power to discipline or dismiss her, did not benefit from her services, and neither party appears to have been under the impression that Noel was employed by the Camp (*Noel* at para 31). Noel's employer Dy-Kel Services was not named as a party to the complaint. The only connection between Noel and the Camp was the provision of accommodation, and Noel did not complain under section 4 of the *AHRA* (discrimination in services customarily available to the public).

It is interesting to note that Justice Greckol states that "reluctantly" she must conclude that the discrimination and sexual harassment did not occur under the employment provision of the *AHRA* (section 7(1)(b)) (*Noel* at para 32). Also, Justice Greckol notes that because five years have passed since the events occurred, Noel could not cure the problem by adding her employer to the complaint or making her complaint against the Camp under section 4 (*Noel* at para 32). The limitation period for making a complaint under the *AHRA* is one year.

Based on the test in *Lockerbie*, this was the correct result, but what would have been the result if Noel had complained against her employer, Dy-Kel services? The Tribunal would have applied the test in *Lockerbie* to determine whether the discrimination fell under employment. In *Lockerbie*, the Court of Appeal concluded that while Luka (the complainant) was clearly an employee of Lockerbie & Hole, he had no contractual relationship with Syncrude, he was not part of the organization, nor did he report to Syncrude, and Syncrude did not direct his work. Thus, his relationship with Syncrude was too remote to justify a finding of employment, even under an extended meaning given to "employment" under human rights law (*Lockerbie* at para 26). Thus, the burden of protecting Luka's human rights under the *AHRA* fell on Lockerbie & Hole (*Lockerbie* at para 26).

In *Noel*, Dy-Kel would likely have argued that it was not responsible for the conduct of the Camp employee and that it could not control that person. The Camp employee was clearly not an employee of Dy-Kel's. Noel would have argued that since her employer paid for the accommodation, that the employment site was remote with no other reasonable alternative accommodation available, and that she was subject to a poisoned work environment (an environment where she was exposed to unwanted sexual attention), Dy-Kel should be liable.

However, in a similar case, *Cluff v Canada (Department of Agriculture)*, [1994] 2 FC 176 (FCTD) ["*Cluff*"], the Federal Court Trial Division was asked to determine whether sexual harassment experienced by Cluff occurred "in the course of employment" such that her employer was liable. Unlike *Noel*, which involved a complaint under the *AHRA*, this case was brought under the *Canadian Human Rights Act* ("*CHRA*") because the employer was the federal government. Cluff was required by her employer (Communications Branch, Agriculture Canada) to host a hospitality suite at a work-related conference held at a hotel. For practical reasons, Cluff was required to sleep in the bedroom portion of the hospitality suite. At 2:00 a.m., after the hospitality suite was closed, Cluff alleged that she was sexually harassed by a senior employee of the Communications Branch of Agriculture Canada. She complained to the Canadian Human Rights Commission, and the key issue was whether the harassment occurred in "the course of employment". The Tribunal set out the following criteria for this determination (as set out in *Cluff* at para 17):

> An employee is in the course of employment when, within the period covered by the employment, he or she is carrying out:
>
> (1) activities which he or she might normally or reasonably do or be specifically authorised to do while so employed;
> (2) activities which fairly and reasonably may be said to be incidental to the employment or logically and naturally connected with it;
> (3) activities in furtherance of duties he or she owes to his or her employer; or
> (4) activities in furtherance of duties owed to the employer where the latter is exercising or could exercise control over what the employee does.
>
> An employee is still in the course of employment when he or she is carrying out intentionally or unintentionally, authorised or unauthorised, with or without the approval of his or her employer, activities which are discriminatory under the *CHRA* and are in some way related or associated with the employment. However, an employee is considered to have deviated from the course of his or her employment when engaged in those activities which are not related to his or her employment or are personal in nature.

The Federal Court Trial Division (Justice Gibson) determined that while the work of Cluff at the conference may have been incidental to her employment, the alleged sexual harassment occurred at a time when Cluff and the alleged harasser ceased to be in the course of employment or engaged in matters related to employment. Justice Gibson also stated that "to conclude otherwise would place an intolerable burden of responsibility on employers of those who travel in the course of employment and of those who attend conferences and the like on behalf of their employers" (*Cluff* at para 22).

Applying the factors and principles set out in *Cluff*, Noel's employer might have been able to argue that the harassment occurred outside the course of her employment and thus escape legal responsibility under the *AHRA* employment provision. Thus, perhaps her best recourse would have been to complain against the Camp and its owners under *AHRA* section 4 (services customarily available to the public).

In the end, Noel did not get her deserved remedy and will not be able to pursue any other remedy because of the limitation issue. This is an unfortunate case, which, like *Lockerbie* turned on a legalistic approach to the *AHRA*, rather than a remedial one.