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Supreme Court Limits Employment Relationship in Human Rights Cases

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Case commented on: *McCormick v Fasken Martineau DuMoulin LLP*, 2014 SCC 39

In an earlier post, I expressed hope that in *McCormick*, the Supreme Court of Canada would clear up the issue of "employment" in human rights cases. They have certainly spoken, but perhaps have not cleared up the issue in the way I was hoping they would.

Until recent times, employment (i.e. the legislative terms "employ", "employee", "employer") was given a large and liberal interpretation, in keeping with the notion that human rights law is quasi-constitutional. For example, an employment relationship would be found to exist for human rights law, where it might not be found for tax law. The trend of narrowing the interpretation of employment may contradict the educational and remedial purposes of human rights law. Concerns about this trend in law may explain why several human rights commissions —including Alberta's—intervened in this Supreme Court of Canada case.

McCormick was an equity partner in Fasken Martineau DuMoulin LLP ("Fasken"). The partnership agreement provided that equity partners would no longer remain as partners at the end of the year they turned 65. On an exceptional, individual basis, continued employment could be negotiated afterward. McCormick argued that the partnership agreement discriminated against him on the ground of age in the area of employment under British Columbia's *Human Rights Code*, RSBC 1996, c 210.

In order to determine whether the BC Human Rights Commission had jurisdiction to address this complaint, the SCC had to "examine the essential character of the relationship and the extent to which it is a dependent one" (para 4). On this issue, the British Columbia Human Rights Tribunal had relied on *Crane v British Columbia (Ministry of Health Services (No.1))*, (2005) 53 CHRR D/156, reversed on other grounds (2007), 60 CHRR D/381 (BCSC) and applied the factors as follows (para 13):

- Utilization: Fasken utilized McCormick to provide legal services to clients and to generate intellectual property;
- Control: Fasken's managing partners, clients and file managers directed the partners;
- Financial burden: While partnership involves sharing profits rather than paying fixed wages, the firm must determine and pay compensation; and

- Remedial purpose: McCormick was treated differently because of his age and this involved the broad, remedial purpose of the *Human Rights Code.*

The Tribunal concluded that McCormick was in an employment relationship. The British Columbia Supreme Court dismissed Fasken's application for judicial review. The British Columbia Court of Appeal disagreed with the lower court and the Tribunal, and concluded that McCormick was not in an employment relationship because a partnership is not a separate legal entity from its partners; thus it is a legal impossibility for a partner to be employed by his/her partnership (para 14).

Justice Abella wrote the judgment and the other members of the SCC concurred. All parties had agreed that the standard of review in the case should be correctness. British Columbia's *Human Rights Code* defines "employment" and "person" as follows (para 20):

> "employment" includes the relationship of master and servant, master and apprentice and principal and agent, if a substantial part of the agent's services relate to the affairs of one principal, and "employ" has a corresponding meaning;
>
> . . .
>
> "person" includes an employer, an employment agency, an employers' organization, an occupational association and a trade union;

Justice Abella noted that statutory interpretation principles require that the definition of "employment" includes these relationships (e.g., master and servant) but is not restricted to them (para 21). She held that while the Court should not rely on a "formalistic" approach to the relationship, the types of relationships to be included should be analogous to those found in the definition (para 21).

Justice Abella also noted that independent contractors had been found to be employees for the purposes of human rights legislation, even though they might not be in other contexts (para 22). She held that the test for "employment" involves:

> [23] Examining how two synergetic aspects function in an employment relationship: control exercised by an employer over working conditions and remuneration, and corresponding dependency on the part of a worker. In other words, the test is who is responsible for determining working conditions and financial benefits and to what extent does a worker have an influential say in those determinations?

Justice Abella held that the test in *Crane* (set out above) applied by the Human Rights Tribunal is in essence a control/dependency test (para 24). If a worker has the "ability to influence decisions that critically affect his or her working life", this is the "compass for determining the true nature of the relationship" (para 27). The key is the degree of control or the "extent to which the worker is subject and subordinate to someone else's decision-making over working conditions and remuneration" (para 28, citation omitted). Justice Abella also noted that partnerships have distinctive features such as "the right to participate meaningfully in the decision-making process that determines their workplace conditions and remuneration" (para 31, citations omitted). Usually partnership agreements "create a high threshold for expulsion" (para 32). Thus, "control over workplace conditions and remuneration is with the partners who form the partnership" (para 33). Justice Abella also discusses precedents from the United States, Britain, Australia, New Zealand and elsewhere in Canada where courts have held that partnerships are not employment relationships for the purposes of human rights legislation or

"other protective legislation" (paras 34, 35, 37). In jurisdictions where human rights legislation applies to partnerships there is an "express statutory provision [that is] usually required" (para 36). Justice Abella concluded that even though it is the case that partnerships are often not covered under human rights laws, the court must still look at the substance of the actual relationship at issue and the role of control and dependency in it (para 38).

In this case, McCormick had control of decisions about workplace conditions because he had ownership, profit and loss sharing and the right to participate in management (para 39). He was therefore a part of the "group that controlled the partnership, not a person vulnerable to its control" (para 39). Further, Fasken's administrative rules did not transform its relationship with McCormick to one of subordination or dependency (para 40). Fasken's board, regional managing partners and compensation committees were "directly or indirectly accountable to, and controlled by the partnership as a whole, of which McCormick was a full and equal member" (para 40). McCormick even had an equal say in the mandatory retirement policy (para 40). McCormick was not "dependent on Fasken in a meaningful sense" (para 42). He was not working for the benefit of someone else; he was in "a common enterprise with his partners for profit, and was therefore working for his own benefit" (para 42).

The SCC concluded that the Tribunal had paid insufficient attention to whether McCormick was subject to the control of others and dependent on them (para 45). Thus, the Tribunal had erred when it concluded that it had jurisdiction over McCormick's partnership relationship (para 45).

Commentary

This case joins the cases that are tending to find that certain types of relationships are not employment for the purposes of human rights law. For example, in *Lockerbie & Hole Industrial Inc. v Alberta (Human Rights and Citizenship Commission, Director)*, 2011 ABCA 3 (see blog post here) the Alberta Court of Queen's Bench held, and the Alberta Court of Appeal agreed, that "employer" was not wide enough "to cover the relationship between the owner of an industrial site, and the employees of arm's length contractors working on the site" (paras 6 and 24). Taken with *McCormick*, and in light of the current realities in Alberta employment, it may be that the way a company structures its relationship with the workers can affect whether human rights law applies. In the case of *Lockerbie*, which involved a site owner and a contractor of a trade, the failure to recognize the role of the site owner means that all human rights liability for policies of the site owner will fall on the shoulders of the trade contractor, who has to decide whether to risk a discrimination claim from his or her employee or to comply with the discriminatory request by the site owner in order to do business with them.

Justice Abella commented in *McCormick* that in the case of partners, the *Partnership Act* provides that partners owe a duty of utmost fairness and good faith to each other (para 47). She notes (*in obiter*) that while this duty may well capture discrimination among partners, in McCormick's case, "it is difficult to see how the duty of good faith would preclude a partnership from instituting an equity divestment policy designed to benefit all partners by ensuring the regenerative turnover of partnership shares" (para 48). Thus, McCormick really had no alternative legal measures available in this case.

While Justice Abella says that the character of the individual relationship must be examined for control and dependency, this case seems to be a victory of form over substance. The nature of the relationship did define whether or not human rights law could apply.
Complainants could seek to distinguish this case, but we may be running out of contemporary "employment" relationships to which human rights law provisions might apply. Of course, the legislature could choose to amend human rights law so that the definition of employment includes these relationships.

[Another concern I have with the judgment is Justice Abella's use of "arbitrary disadvantage" to define discrimination. As this is being discussed by Jennifer Koshan in a separate blog post, I will refrain from further comment, except to say I share her concerns].