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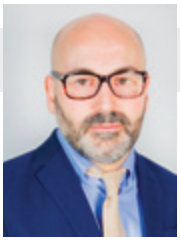

PRACTICE AREA LINKS

Employment & Labour

Litigation

Professional Services Partnerships and Human Rights Legislation

THE SUPREME COURT OF CANADA HAS ESTABLISHED THE SCOPE OF THE DEFINITION OF "EMPLOYEE" IN HUMAN RIGHTS LEGISLATION, HOLDING THAT AN EQUITY PARTNER IN A LAW FIRM DOES NOT AMOUNT TO AN EMPLOYEE FOR THE PURPOSES OF THE BRITISH COLUMBIA HUMAN RIGHTS CODE, R.S.B.C. 1996, C.210 (THE "CODE"). THIS CASE WILL HAVE IMPLICATIONS FOR EQUITY PARTNERS IN A RANGE OF PROFESSIONAL ORGANIZATIONS, INCLUDING LAW AND ACCOUNTING FIRMS.

In McCormick v. Fasken Martineau DuMoulin LLP, 2014 SCC 39, per Abella J., the plaintiff had been an equity partner at the defendant law firm since 1979. The firm had a Partnership Agreement which stated that equity partners had to divest their ownership shares in the partnership at the end of the year in which they turned 65 years old. A partner could make individual arrangements at that point to continue working as an employee or a "regular" partner. The plaintiff alleged that the mandatory retirement provision in the Partnership Agreement amounted to age discrimination under the Code. The law firm applied to have the claim dismissed on the grounds that an equity partnership was not the type of employment relationship protected by the Code. At issue was how to characterize the lawyer's relationship with the law firm in order to determine if the issue came within the jurisdiction of the Code over employment.

The Court held that the plaintiff's claim ought to be dismissed on the basis that the lawyer was not in an employment relationship as defined in the Code.

First, the issue of deciding who was in an employment relationship under the Code meant examining two aspects of the relationship, i.e. the control exercised by the employer over working conditions and remuneration and the corresponding dependency on the part of the worker. 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?". According to the Court, the more the work life of individuals is controlled, the greater their dependency and consequently, their economic, social and psychological vulnerability in the workplace.

The Court then noted that in most cases, partners in a partnership were not employees of the partnership, but were, collectively, "the employer". In the instant case, the lawyer, as an equity partner, had the right to participate in the management of the partnership and benefitted from other "control mechanisms", such the right to vote for and stand for election to the firm's Board. Moreover, other partners owed a duty to the lawyer to render accounts. The lawyer also had the right, on leaving the firm, to his share of the firm's capital account. Accordingly, the lawyer was not working for the benefit of someone else, but was in a common enterprise with his partners for profit.

The Court did note that its ruling did not mean that a partner in a firm could never be an employee under the Code. However, a partner would only likely be characterized as an employee where the powers, rights and protections normally associated with a partnership were greatly diminished.

Moreover, the fact that the lawyer had no remedy under the Code did not mean that he had no recourse for claims of discrimination. The duty of a partner to act with the "utmost fairness and good faith", as set out in the B.C. Partnerships Act, could form the basis of a claim for discrimination against the partnership. Having said that, the Court held that it was "difficult to see how the duty of good faith would preclude a partnership from instituting an equity divestment policy designed to benefit all partners".

As Director of Legal Research at Torkin Manes, Marco provides legal opinions and analyses on a range of topics in the civil litigation and corporate/commercial context. He has drafted legal memoranda, facta and materials for all levels of court, with a particular emphasis on appellate cases.

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