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CHARITY & NFP LAW BULLETIN NO. 418

MARCH 29, 2018

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COURT REVIEWS COMMON EMPLOYER DOCTRINE

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A. INTRODUCTION

On February 5, 2018, the Ontario Superior Court of Justice released a decision on a motion in *Currie v Gledhill et al*.[1] An action for wrongful dismissal brought by Laurie Currie (the "Plaintiff") named two co-defendants, Gledhill Avenue Child Care Centre ("Gledhill") and the City of Toronto (the "City").[2] The Plaintiff's motion sought leave of the court to amend her statement of claim in relation to the City being a "common employer".[3] However, while Gledhill admitted it was the Plaintiff's former employer, the City denied having had an employment relationship with the Plaintiff.[4] The City accordingly brought its own motion asking the court to dismiss the action against the City as it was not a "common employer."[5] This Bulletin will review this decision, focusing on the common employer doctrine. The decision is relevant for charities and not-for-profits which may receive significant funding from outside sources if those funding sources seek to have operational control or decision-making authority.

B. BACKGROUND

The Plaintiff had been employed by Gledhill for 27 years, having occupied the role of Executive Director for the last 12 years.[6] Gledhill terminated the employment relationship in August 2016 alleging

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[1] 2018 ONSC 775.
[2] *Ibid* at paras 2, 20 and n 1.
[3] *Ibid* at para 2.
[4] *Ibid* at para 5.
[5] *Ibid* at para 1.
[6] *Ibid* at para 3.

termination for cause.[7] The Plaintiff named both Gledhill and the City as defendants, claiming that they were both her employers at common law and under the *Employment Standards Act, 2000* ("ESA").[8] The City objected to being sued, and brought a motion pursuant to Rule 21 of the *Rules of Civil Procedure*[9] to have the action dismissed as against it, on the basis that the Plaintiff's claim disclosed no reasonable cause of action and had no reasonable prospect of success. The Plaintiff's motion to amend her statement of claim was also before the court, as she was seeking leave to amend her original statement of claim to properly plead her claim against the City.

In support of her motion claiming that Gledhill and the City were common employers, the Plaintiff relied on the common law as well as section 4 of the ESA,[10] which before amendments that came into force on January 1, 2018 read as follows:

> **Separate persons treated as one employer**
>
> 4 (1) Subsection (2) applies if,
>
> (a) associated or related activities or businesses are or were carried on by or through an employer and one or more other persons; and
>
> (b) the intent or effect of their doing so is or has been to directly or indirectly defeat the intent and purpose of this Act.
>
> (2) The employer and the other person or persons described in subsection (1) shall all be treated as one employer for the purposes of this Act.
>
> […]
>
> (5) Persons who are treated as one employer under this section are jointly and severally liable for any contravention of this Act and the regulations under it and for any wages owing to an employee of any of them.

In this regard, the Plaintiff alleged that the City "exercised significant control" over the financial and staffing affairs of Gledhill, and that, as common employers, both Gledhill and the City were jointly and severally liable to the Plaintiff for wrongful dismissal.[11]

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[7] *Ibid* at para 4.
[8] SO 2000, c 41.
[9] RRO 1990, Reg 194.
[10] *Supra* note 8, s 4(1) currently reads as follows: "Subsection (2) applies if associated or related activities or businesses are or were carried on by or through an employer and one or more other persons."
[11] *Supra* note 1, at para 21.

C. ANALYSIS BY THE COURT

The court recognized the common law doctrine of common employer as applied in several fact scenarios in which different legal entities were deemed to have been involved in the same individual's employment,[12] and described the necessary relationship by quoting as follows:

> As long as there exists a sufficient degree of relationship between the different legal entities who apparently compete for the role of employer, there is no reason in law or in equity why they ought not all to be regarded as one for the purpose of determining liability for obligations owed to those employees who, in effect, have served all without regard for any precise notion of to whom they were bound in contract. What will constitute a sufficient degree of relationship will depend, in each case, on the details of such relationship, including such factors as individual shareholdings, corporate shareholdings, and interlocking business directorships. The essence of that relationship will be the element of common control. (*Sinclair, supra* at paragraph 18)
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> […] although an employer is entitled to establish complex corporate structures and relationships, the law should be vigilant to ensure that permissible complexity in corporate arrangements does not work an injustice in the realm of employment law. At the end of the day, [the employee's] situation is a simple, common and important one – he is a man who had a job, with a salary, benefits and duties. He was fired – wrongfully. The definition of 'employer' in this simple and common scenario should be one that recognizes the complexity of modern corporate structures, but does not permit that complexity to defeat the legitimate entitlements of wrongfully dismissed employees. (*Downtown Eatery, supra* at paragraph 36)
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> Recognizing the intricacies of modern business and the modern employment relationship, the common employer doctrine imposes joint and several liability for breaches of an employment contract on legal entities who had a meaningful role to play in the employment relationship. The doctrine recognizes that an employee may have a collective as employer. (*De Kever, supra* at paragraph 7)

However, while admitting that the doctrine of common employer is a developing area of law and not limited to the context of inter-related corporations,[13] the court found that the facts of the cases relied on by the Plaintiff involved related corporations where the issue was about "piercing the corporate veil", which were factually distinct from the present case.[14]

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[12] *Ibid* at paras 17, 18. The court referenced the following precedents: *Downtown Eatery (1993) Ltd. v. Ontario* (2001), 2001 CanLII 8538 (ON CA), 54 O.R. (3d) 161 (CA); *Sinclair v. Dover Engineering Services Ltd.*, 1987 CanLII 2692 (BC SC); *De Kever v. Nemato*, 2014 ONSC 6576 (CanLII) at paragraphs 6, 7, 14; affirmed 2015 ONSC 6273 (CanLII), 2015 ONSC 6273 (Div. Ct.).
[13] *Ibid* at para 25.
[14] *Ibid* at para 24.

Applying the law to the facts before the court, the decision held that the Plaintiff's claim was "lacking material facts to support the conclusions" that the City had been in any way involved with the commencement or termination of the Plaintiff's employment with Gledhill.[15] The Plaintiff failed to plead material facts that would support "the type of inter-relationship and commonality of operations between Gledhill and the City".[16] As the Plaintiff had been Executive Director, the court noted that she should have been able to put forward material facts to support her claim that the City was a common employer, but did not do so.[17]

Referring to the precedent from *Bernal v Centre for Spanish Speaking Peoples*,[18] the court explained that "an organization which funds a plaintiff's employer, but has no active day to day management role, and who is not a party to the employment contract, is not an employer."[19] In this regard, the fact that the City provided funding to Gledhill did not, without more, make the City a common employer with Gledhill.

Regarding section 4 of the ESA, the court held that in accordance with clause 4(1)(b), the Plaintiff was required to explain how the entities alleged to be carrying their activities as one employer had either intended or directly or indirectly defeated the intent and purpose of the ESA.[20] Specifically, the court held that the Plaintiff had failed to allege "material facts indicating that actions taken by Gledhill or the City […] had the intent or effect of directly or indirectly defeating the intent or purpose of the Act."[21] It should be noted that clause 4(1)(b) of the ESA was repealed effective January 1, 2018 as part of the amendment of the ESA brought about by the passing of Bill 148.[22] Should cases of this type arise in the future, any entitlements under the ESA will be determined by reference to the new ESA provisions as set out in sections 4(1) to 4(5). However, the common law tests as to common employer status will remain relevant.

For these reasons, the court concluded that the Plaintiff had no reasonable cause of action against the City, as it was not the Plaintiff's common employer with Gledhill.[23] In this regard, the Plaintiff could only

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[15] *Ibid* at para 23.
[16] *Ibid* at para 25.
[17] *Ibid* at para 27.
[18] *Ibid* at para 26; 2016 ONSC 7981.
[19] *Idem.*
[20] *Ibid* at paras 19, 29.
[21] *Ibid* at para 29.
[22] Bill 148, *Fair Workplaces, Better Jobs Act, 2017*, 2nd Sess, 41st Parl, Ontario, 2017 (assented to 27 November 2017), SO 2017, c 22, Sched 1, s 4(1).
[23] *Supra* note 1, at paras 28, 35.

continue her action for wrongful dismissal against Gledhill. The court awarded the City $9,000 in legal costs payable by the Plaintiff.

D. CONCLUSION

This case is an interesting example of the application of the doctrine of common employer to the employees of an organization that receives external funding, in this case from a city government. For charities and not-for-profits that either receive or provide funding, this case clarifies that courts will look for more than financial involvement between the relevant entities in order to establish the elements of a type of relationship that would justify them being treated as common employers. Wherever the relationship involves not only financial support, but also inter-related or common operations, even if there was no intent to defeat the ESA, which is no longer required under section 4, a court may find the entities to be common employers and therefore jointly and severally liable for their employment related obligations and liabilities. Therefore, in order to avoid being deemed as a common employer, funding agencies, charities and not-for-profits need to be careful in how their respective operations or activities are carried out. Funding agreements should specify that the funder is not an employer for any purpose, and that the recipient retains full authority to hire, discipline or terminate employees. Employment contracts need to clearly identify the employer. However, the greater the extent of actual operational and managerial control exercised by any funding agency, the greater is the risk that the agency may be held by a court or tribunal to be a common employer.

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