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Business Legal Adviser

This resource is a practice-oriented how-to guide to business transactions. It features commentary, materials and precedents covering: the buying and selling of a business; the family trust; shareholders' buy-sell agreements; Investment Canada; tax implications of a business purchase/sale; incorporation; executive compensation, and employment law. It also refers to pertinent sections of the *Income Tax Act* and Interpretation Bulletins.

This release features updates to the case law and commentary in the following Chapters: 1 (Choices of Business Form), 9 (Employment Law), 10 Business Practices), and 11 (E-Business).

Highlights

- **Company Entering Service Contract with Worker's Company – Worker Suspended – Whether Duty of Care to Worker –** Where the telecommunications service provider entered into a short-term contract with a company, which had only one worker, to provide technician services, and the worker was subsequently removed from the service provider's work schedule for an unsubstantiated allegation of theft, the service provider was liable for breach of the contract with the company, but not wrongful dismissal of the worker. In this case, the defendant T Inc. was in the business of providing telecommunications installation services for telecommunication companies. The plaintiff corporation was wholly-owned

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by the worker's brother-in-law, and the worker was its only employee. The corporation told the T Inc. that it was a growing business, and would be able to provide many trained technicians, but this never materialized. T Inc. offered the corporation and the worker a tier 1 fee for service rate, reserved for subcontractors with more than two employees, which was presumably provided to them based upon their representations about growing its business. In July 2015, the corporation and T Inc. entered into a services agreement, and the worker was put on T Inc.'s work schedule. The agreement was not executed until August 2015, but was backdated to July 9, 2015. The agreement was to be in effect until October 31, 2015. The parties intended to enter a renewal services agreement after the expiry of the services agreement, and continued to behave as though the agreement remained in effect. In December 2015, T Inc. suspended the worker because he failed some performance metrics imposed by the telecommunications company it received work from. On December 20, 2015, T Inc. accused the worker of theft after he took tools he needed from the warehouse when the supervisor had gone home. T Inc. then removed the worker from the work schedule, and refused to use him thereafter. T Inc. argued that the worker was not its employee or dependent contractor. The corporation and the worker commenced an action for damages for breach of contract, intentional interference with economic relations, negligence and wrongful dismissal. Their action was allowed in part. T Inc. breached the agreement; all other claims were dismissed.

The services agreement governed the relationship between the parties, and was clear and unequivocal and not inconsistent with the parties' negotiations. The fact that it was negotiated after the work began, and backdated did not change its legal effect. The proposed renewal agreement was virtually the same except for a four-month term and, while never executed, the parties agreed to it by their conduct, on the same terms as the services agreement. T Inc. did not induce the worker and the corporation to purchase vehicles or equipment. The corporation intended to grow its business, and the worker had to have certain tools for work, which were not recoverable under the services agreement. T Inc. remained open to doing business with the corporation after removing the worker from the schedule, and did not know the worker was the corporation's only employee. T Inc. owed the corporation a contractual duty of honesty and good faith, but owed no duty to the worker, whom it had no contract with. T Inc. had no express right to suspend or remove the contractors, and the agreement showed an intention for the corporation to control its manpower. T Inc. breached the services agreement by removing the worker from the work load, and keeping him off. It appeared to be common practice for an outside contractor to pick up tools on their own, and the worker could reasonably have believed that T Inc. would have understood the need to supply himself as he did in

such a situation. There was no theft, and T Inc.'s substandard investigation and persistence with the allegation was a breach of the duty of good faith owed to the corporation. There was no intentional interference with economic relations as there was no unlawful act, and T Inc. did act not act to intentionally cause economic harm to the corporation. The plaintiffs did not establish a duty of care relationship between T Inc. and the worker.

The worker was an independent contractor in relation to T Inc., and as a result, the worker had no standing in regard to his wrongful dismissal claim. T Inc. controlled the assignment of work, but did not pay the worker's wages, had little direct control, and it was not clear it had the right to discipline the worker. Moreover, the worker was not a crucial element of T Inc.'s the business and bore the risk of profit and loss. T Inc. did not terminate its agreement with the corporation, and nothing prevented the worker from looking for new work, so there was no loss of opportunity. Given the worker was an independent contractor and no tort was established, he could not seek aggravated damages. While T Inc.'s refusal to admit its mistake reflected poorly on it, it did not warrant punitive damages. The corporation was awarded $10,857, for what it would have been paid for the worker's services until the end of the contract: *Lightstream Telecommunications Inc. v. Telecon Inc.*, 2018 CarswellBC 2987, [2018] B.C.J. No. 3590, 2018 BCSC 1940 (B.C. S.C.).

- **Human Right – Family Status – Indirect Discrimination – Newly-Born Child – Father Refusing Out-of-Province Work Assignment –** Where the employee refused to accept an out-of-province work assignment, following the birth of his first child, the employee failed to prove indirect discrimination based on a change in the term of his employment, resulting in a serious interference with a substantial parental duty or obligation. In this case, the employer provided environmental remediation services, and the employee worked as a project manager. From time to time, the employee was required to travel to project sites away from home. Shortly after the birth of his first child, the employee was dismissed, when he refused to accept an out-of-province work assignment, which required him to be away for several months. The employer indicated that it would not pay for him to return home until the end of that period. The employee claimed he was needed at home to care for his baby daughter, who had health issues. After his dismissal, the employee brought a human rights complaint against the employer, on the basis of family status discrimination. The employer applied to have the complaint dismissed under the Human Rights Code. The employer claimed that the complaint did not raise a valid issue of discrimination. The Human Rights Tribunal dismissed the employer's application. The Tribunal held there was a reasonable prospect the employee could establish indirect or adverse effect discrimination. The employer applied for judicial review of the Tribunal decision. The employer's application was dismissed. The

standard of review was patent unreasonableness. The Tribunal decision was discretionary, and entitled to deference. A prima facie case was made out against the employer. The Tribunal did not employ the wrong test. The grounds analyzed by the Tribunal member were correct ones, and were well explained in her decision. The matter was properly found to be one that should proceed to a hearing. The employer appealed, and its appeal was allowed, and the Tribunal's decision was set aside.

In order to prove indirect discrimination, an employee must establish: (i) there had been a change in a term or condition of employment; and (ii) such a change resulted in a serious interference with a substantial parental or other family duty or obligation: *Campbell River & North Island Transition Society v. H.S.A.B.C.* (2004), 2004 BCCA 260 B.C. C.A.). The facts the employee alleged were not capable of satisfying the second step of this test. While the employee's desire to remain close to home to be with his child, and to assist his wife in caring for the child outside of his normal weekday working hours, and on weekends, was understandable and commendable, he was no different than the vast majority of parents. There were many parents who were required to be away from home for extended periods for work-related reasons who continued to meet their obligations to their children. Nothing in the employee's complaint or affidavit suggested his child would not be well cared for in his absence. As result, the Tribunal's discretionary decision was arbitrary and, therefore, patently unreasonable. The matter was remitted to the Tribunal for further proceedings, consistent with the reasons of the appellate court: *Envirocon Environmental Services, ULC v. Suen*, 2019 BCCA 46, 2019 CarswellBC 204 (B.C. C.A.), reversed, 2018 CarswellBC 2150, 2018 BCSC 1367, 2019 C.L.L.C. 230-002 (B.C. S.C.); application for judicial review refused, 2017 CarswellBC 2977, 2017 BCHRT 226 (B.C. Human Rights Trib.).