Case In Point

Court Pierces Corporate Veil in “Common Employer” Case

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Justice Gray of the Ontario Superior Court recently reviewed the common employer doctrine within the context of a *Mareva* injunction motion.

In *Kingston v. GMA Cover Corp.*, the plaintiffs had been employed by GMA Cover Corp. in Guelph. For tax reasons, the business underwent a complex reorganization and ultimately was acquired by a United States-based trust. The plaintiffs were told in December 2011 that the Guelph business was closing and that, in exchange for a full and final release giving up any claims against their employer, they could continue work as independent contractors. Not surprisingly, none of the plaintiffs accepted this offer and the employer terminated each of them without notice or pay in lieu thereof.

The plaintiffs sued for damages, arguing that the new complex corporate structure of the defendants constituted a “common employer” who were jointly and severally liable for the relief sought in the action. The only Ontario asset owned by any of the defendants was a property in Guelph, the sale of which would leave the plaintiffs scrambling to trace money or the defendants in the United States. They brought a motion for a *Mareva* injunction to prevent the sale of this asset.

The defendants stated that the reorganization was done for legitimate tax purposes and that they did not constitute a common employer, arguing that “the mere fact of inter-corporate control or direction from others is insufficient to establish a common employer relationship.”

The Court reviewed the history of the “common employer” doctrine and stated:

[50] In my view, the purpose of the common law doctrine is similar to the underlying purpose behind the statutory provisions: to protect the legitimate rights of employees when there is uncertainty as to who the real employer is, or where a business is carried on through more than one entity. Employees have no control over corporate structures, or who makes decisions regarding their employment terms and conditions.

Although the mere fact of a parent-subsidiary relationship is insufficient to establish a common employer, the Court rejected the defendants’ argument that the doctrine only applies where a number of entities operate together in a seamless fashion:

[53] Fundamentally, the issue boils down to where decision-making about employment matters resides. Control is thus important, but not definitive. Many subsidiary corporations make their own employment decisions. However, where employment decisions are made by the parent company for a number of subsidiary corporations, and they are operated as a business unit, it may be quite appropriate to treat them as one employer. Employees have no control over corporate transactions or relationships, and generally speaking they have no knowledge as to who makes employment decisions.

In this case, the plaintiffs had no way of knowing which entity made the decisions regarding their employment – that information was solely with the defendants. The Court pointed out that someone made the decision to not give them any notice of termination or pay in lieu thereof. The defendants’ affidavits on the motion shed no light on the matter. The defendants simply submitted affidavits sworn by lawyers setting out the corporate structure.

The Court found that it was not open to the defendants to “stonewall” and claim that the plaintiffs had failed to establish who made the employment decisions. As a result of the defendants’ failure to provide information on which entity made the employment decisions at issue, the Court, in effect, made an adverse inference against them and held that the plaintiffs had established a strong *prima facie* case that the defendants were common employers and thus jointly and severally liable for

the plaintiffs' damages.

In the end, the plaintiffs were successful in obtaining the *Mareva* injunction sought, thereby preventing the sale of the only remaining Ontario asset of the defendants, pending disposition of the action.

This case is a reminder to employers that courts will not simply rely on a corporate structure to determine an employee-employer relationship. Rather, they will look behind the "corporate veil" to see where control over the employee truly lies. Moreover, where, as here, the defendants attempt to deliberately draw such a veil by withholding key information and providing meaningless evidence, they run the clear risk of having an adverse inference made against them.