

Whitten & Lublin is a team of legal experts who provide practical advice and advocacy for workplace issues.

COURT CONFIRMS NOTICE FOR 'DEPENDANT' CONTRACTORS

Using independent contractors instead of employees has a lot of advantages for an employer. One of the biggest advantages is that independent contractors – unlike employees – can often be terminated without, or very little, notice. More than one employer has had an unpleasant surprise, however, when a court later decides that their independent contractor wasn't independent after all, and makes an unexpected award for notice of termination. This was the situation in the recent British Columbia case of *Khan v. All-Can Express Ltd.*

Mr. Khan worked for All-Can (operating as Ace Courier) as a driver on a courier route. Mr. Khan owned his own truck. He signed an agreement with Ace Courier stating that he was an independent contractor. He was responsible for providing a truck and paying expenses such as fuel, he paid his own taxes, and he could even hire a replacement driver for himself. He received no benefits or vacation pay. At the same time, Ace Courier required Mr. Khan to wear an Ace Courier uniform, put an Ace Courier logo on his truck, and follow Ace Courier's policies. It also prohibited him from working for any competitors, both during the years he worked for Ace Courier, and for a full year afterwards.

After 5 years, Ace Courier terminated its relationship with Mr. Khan. He sued for pay in lieu of notice. The court concluded that while Mr. Khan was not an employee of Ace Courier, neither was he an independent contractor. Instead, he was a 'dependent contractor', and was entitled to reasonable notice of termination. The court awarded Mr. Khan 4 months of pay in lieu of notice, an amount similar to what an employee would have received.

Calling someone an independent contractor does not automatically make him an independent contractor. The law looks at the reality of the relationship, not the words used to describe it. Where the employer is the contractor's only client, it becomes a close call. If the employer controls how, when, where, and by whom the work is performed, disciplines the contractor, and sets policies, the relationship is probably not that of an independent contractor. Indeed, the contractor might even be ruled a full-fledged employee. Where, as with Mr. Khan, the contractor owns the tools, has a chance to make a profit or loss instead of just being paid by the hour, and can hire a replacement, a full-fledged employee classification is unlikely. In these situations, if the contractor is economically dependent on the employer and the relationship isn't temporary, he is probably a 'dependent contractor'. Much like employees, dependent contractors are entitled to reasonable notice of termination.

Ace Courier lost the classification battle with Mr. Khan. With the right contract though, it still could have effectively won the case. When he was hired, Mr. Khan signed whatever contract Ace Courier put in front of him, without negotiation. Ace Courier could and should have included a clause in the contract spelling out how much notice of termination Mr. Khan would receive. It didn't. Had it done so, Ace Courier could have reduced or even eliminated Mr. Khan's entitlement to notice.

With proper care, employers can enjoy the benefits of independent contractors, while protecting themselves against unpleasant surprises:

OUR LAWYERS

DAVID WHITTEN

DANIEL LUBLIN

CÉDRIC LAMARCHE

ELLEN LOW

AARON ROUSSEAU

DANIEL CHODOS

JONQUILLE PAK

MARK YAZDANI

CONSULTATIONS

For a consultation please call us at 416-640-2667 or submit your online request [here](#).

HR MANAGER'S GUIDE TO INDEPENDENT CONTRACTORS IN THE WORKPLACE



Available for purchase from [Carswell's store](#).

- Calling someone an independent contractor does not automatically make them an independent contractor. The reality of the relationship is the key;
- Like employees, dependent contractors are normally entitled to reasonable notice of termination;
- A proper contract can eliminate the risk of a large award of pay in lieu of notice of termination for a contractor and mitigate exposure to misclassification between independent contractors, dependent contractors, and employees

A great deal more on the law around independent contractors, including the challenges and best practices, can be found in Daniel Lublin and David Whitten's book *HR Manager's Guide to Independent Contractors in the Workplace*.

LATEST NEWS

On September 26, 2014, [Aaron Rousseau](#) presented a live webinar for the [Human Resources Professionals Association](#) entitled "Overtime and the Salaried Employee". For more information on this program, please visit the [HRPA's website here](#).

You may have heard [David Whitten](#) on [Moose FM Haliburton 93.5](#) on October 1, 2014, discussing vacation entitlement in the workplace.

On October 9, 2014, [David](#) partnered with Carswell and Avanti Software to present and discuss "The Impact of Terminations on Payroll".

On October 9, 2014, [Daniel Lublin](#) spoke at the [Human Resources Professionals Association](#) regarding the importance of drafting Intelligent Employment Contracts. More information about this webinar can be viewed on the [HRPA's website here](#).

[Daniel](#) continues to answer readers' questions about employment law in his [Globe & Mail Q&A](#). Earlier this month he answered questions on the topic of constructive dismissal and severance. Read more [here](#).

UPCOMING EVENTS

Save the date! [David Whitten](#) will be speaking about employment agreements at the [Human Resources Professionals Association's](#) Annual Conference taking place in 2015 from Wednesday, January 21 - Friday, January 23 at the Metro Toronto Convention Centre, Toronto, ON. For more information please visit [HRPA's website here](#).

LAW BLOG

[Read more here](#)

FOLLOW US ON TWITTER

 [Follow @DavidWhittenWL](#)

 [Follow @DanLublin](#)

VISIT OUR GOOGLE+ PAGE



WHITTEN & LUBLIN
141 ADELAIDE STREET WEST, SUITE 600, TORONTO, ON, M5H 3L5
WWW.CANADAEMPLOYMENTLAWYER.COM

BLOG.TORONTO-EMPLOYMENTLAWYER.COM