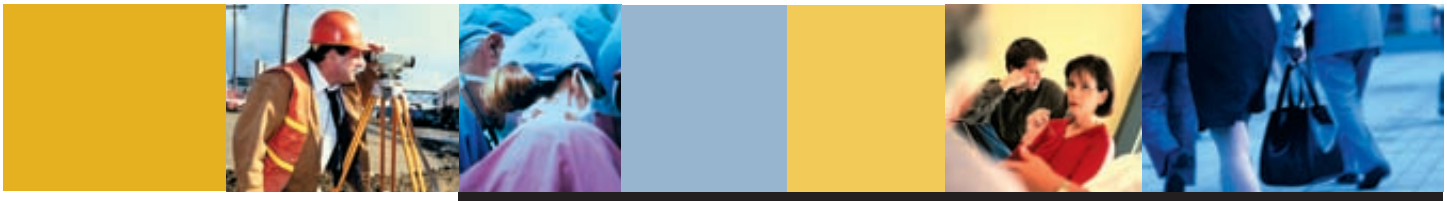


Heenan Blaikie LLP

Labour & Employment in the News

February 2011

LABOUR & EMPLOYMENT IN THE NEWS

Partner in Law Firm is "Employee" Under Human Rights Law

The courts have long recognized that human rights legislation must be interpreted broadly and generously but, in some cases, it can be surprising just how far the arm of human rights law extends. In its recent decision in *McCormick v. Fasken Martineau Dumoulin*[1], the British Columbia Human Rights Tribunal found that even an equity partner in a law firm may be considered an "employee" under human rights law.

WHAT HAPPENED?

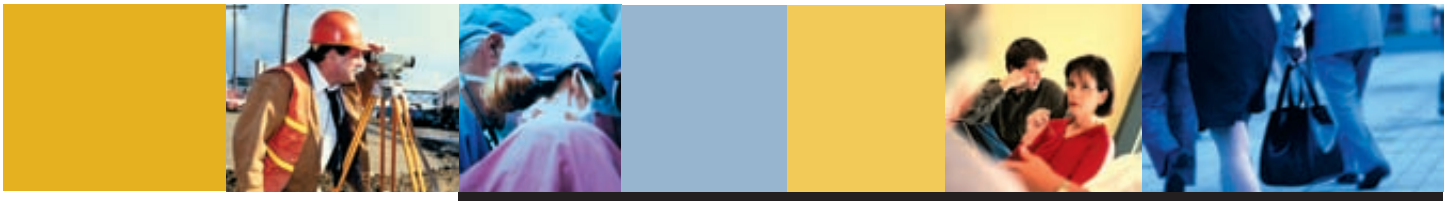
Mr. McCormick is a lawyer and one of approximately 60 "equity partners" in the Vancouver office of Fasken Martineau Dumoulin LLP ("Fasken"). Fasken operates as a limited liability partnership, registered under the *Partnership Act.* All of Fasken's equity partners, including Mr. McCormick, are parties to a partnership agreement. The partnership agreement includes requirements for equity partners to retire after the age of 65. The partnership agreement also states that equity partners, like Mr. McCormick, have an ownership interest in the firm.

In addition to the terms of the partnership agreement, Fasken also applied a number of policies to equity partners. In particular, Fasken had a policy stating that partners at the firm could not act for particular types of clients or in particular types of matters, and another policy stating that all of a partner's intellectual property, including written opinions, was the property of the firm and not of the lawyer who had produced them.

Mr. McCormick turned 65 on March 28, 2010 and, under the partnership agreement, will be required to retire on January 31, 2011. Mr. McCormick brought a complaint of discrimination against Fasken under the British Columbia *Human Rights Code*, alleging that he suffered discrimination on the basis of age when Fasken persistently tried to compel him to leave the firm and retire in compliance with the partnership agreement. Mr. McCormick complained that those efforts, which started in the summer of 2006, included demanding that he relinquish his equity partner status for non-equity partner status and denying him increases in compensation, bonuses and raise and performance goals in a manner unrelated to his performance or consistent with how other equity partners were treated.

THE TRIBUNAL'S DECISION

Fasken applied to dismiss Mr. McCormick's human rights complaint. Fasken argued that Mr. McCormick's complaint was not within the jurisdiction of the Tribunal and there was no reasonable prospect that his complaint would succeed because Mr. McCormick was a partner of the firm, not an employee.



The Code prohibits discrimination in employment on a number of grounds, including age. It defines "employment" as *including* the "relationship of master and servant, master and apprentice, and principal and agent, if a substantial part of the agent's services relate to the affairs of one principal." The Tribunal does not apply a specific test to determine whether someone is an "employee" under the Code, but considers a number of factors including:

a) whether the alleged employer "**utilized**" or gained a benefit from the employee in question;

b) the **control** exercised by the alleged employer over the employee;

c) whether the alleged employer bore the **financial burden** of remunerating the employee; and

d) whether the alleged employer had the **ability to remedy** discrimination that was suffered by the employee.

Fasken argued that the definition of "employment" under the Code was limited to employment as described by the common law and that, because he was essentially a co-owner of the firm, Mr. McCormick could not be considered an "employee" under the Code. In particular, Fasken argued that, rather than Mr. McCormick being "utilized" by Fasken, he gained benefit from the partnership by utilizing it to service his clients. Fasken also argued that Mr. McCormick was not subject to the control of the partnership but that he participated as an equal of other partners in the firm in making decisions about how the firm should be operated and managed. Fasken also argued that it did not bear the financial burden of remunerating Mr. McCormick, since he received a share of profits, rather than wages, and his income as an equity partner was never guaranteed.

The Tribunal refused to dismiss Mr. McCormick's complaint. It agreed that Mr. McCormick was not an employee of Fasken at common law or under other statutes, but reiterated that human rights legislation is unique and must be interpreted in a broad, liberal and purposive way. The Tribunal stated that the definition of employment must be interpreted generously to further the Code's purposes of eliminating and remedying prohibited discrimination. In other cases, the definition of "employment" under the Code had been held to include not only traditional common law employment relationships, but also independent contractor and volunteer relationships.

The Tribunal found that, considering all the factors, Mr. McCormick was an "employee" of Fasken for the purposes of the Code. Fasken gained a benefit from McCormick, who was "utilized" by the partnership to provide legal services to its clients and to generate intellectual property over which the firm retained ownership. The Tribunal said that, even though there was a mutual benefit to Fasken and Mr. McCormick from their relationship, the facts still favoured finding Mr. McCormick was an employee of Fasken. The Tribunal also emphasized that the ways in which the partnership exerted control over Mr. McCormick were significant. Fasken's policies required Mr. McCormick to use certain standard forms, specified the kinds of clients for which he could act and required Mr. McCormick to decline profitable work if it would not serve the strategic interests of the firm. Fasken also established, administered,

and could change at any time, the criteria used to determine Mr. McCormick's compensation. The firm also restricted Mr. McCormick's ability to work for a competitor or take clients with him upon leaving the firm. Finally, the Tribunal noted that the firm employed and directed Mr. McCormick's support staff. Accordingly, even though Mr. McCormick had participated in opportunities to govern the firm as an equity partner, the Tribunal found that the firm nonetheless exercised considerable control over the work that Mr. McCormick could do, how he could do it and how he would be remunerated for that work. These facts outweighed his role in the governance of the firm. The Tribunal also found that Fasken bore the financial burden of remunerating Mr. McCormick since his income was not related only to his billings but was determined by the firm considering a number of factors, only one of which was the profit generated. Finally, the Tribunal considered that it was more consistent with the Code's purposes of preventing and remedying discrimination to extend protection against discrimination to Mr. McCormick, despite his status as a partner.

The Tribunal was careful to state that not every partner in a law firm will be considered an "employee" for the purposes of the Code, and that each case must be considered on its own the facts, including the size of the partnership and the details of the business and personal relationships within the partnership.

WHAT IT MEANS FOR EMPLOYERS

The decision is significant in a number of ways. Above all, it shows how far into the workplace human rights law can reach to prevent and remedy discrimination. Given the broad and generous interpretation of human rights legislation and the inclusive definition of employment under the Code, employers should be aware that human rights tribunals are likely to include a wider variety of relationships under the protection of the human rights legislation, even if those relationships would not be considered employment at common law or under other legislation. As a result, employers should always take care to comply and be cognizant of their obligations under human rights laws with respect to all "employment-like" relationships, including with partners, independent contractors and volunteers.

For further information on this decision or how human rights laws may apply to your business, please contact one of the members of our Labour and Employment group listed below. ■

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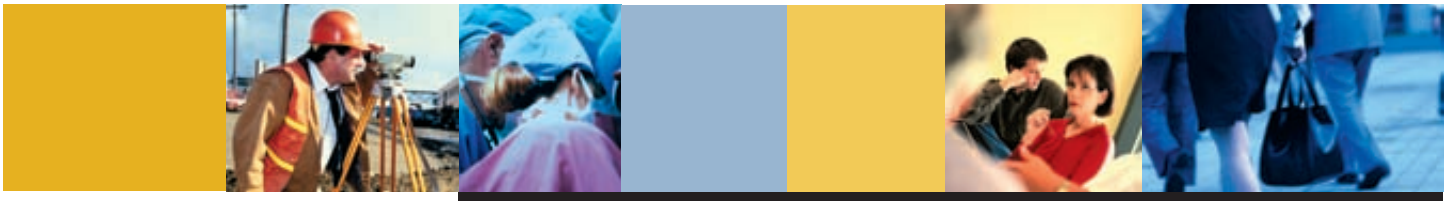
[1] 2010 BCHRT 347



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