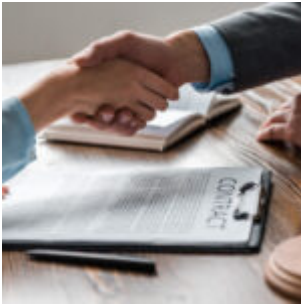


The Complexities Of Dependent Contractors And Restrictive Covenants



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In the recent decision of *Dibble v. Creative Music Therapy Solutions Inc.*, 2024 BCSC 1066, the B.C. Supreme Court provided a helpful reminder that a long-term contract with a worker can result in the worker being categorized as a “dependent contractor” who is entitled to reasonable notice on termination of the contract. The Court also provided a reminder that a restrictive covenant is held to a high threshold to be enforceable.

Background

Creative Music Therapy Solutions Inc. (“CMTS”) provides music therapy services in various facilities. Christine Dibble, who is an accredited music therapist, worked with CMTS from 2010 until her contract was terminated in October 2022.

Notwithstanding her long tenure with CMTS, the contract was terminated without any amount of termination notice or pay in lieu thereof. She sought legal recourse.

Issues

For the purposes of this article, the main issues in the case were whether Ms. Dibble was entitled to reasonable notice of

termination on termination of the contract and whether she breached any non-competition or non-solicitation obligations owed to CMTS.

Decision

- *Nature of the work relationship*

The Court determined that Ms. Dibble was neither an independent contractor nor an employee. Instead, she fell into the well-established intermediate category of dependent contractor and was thus entitled to reasonable notice of termination.

The Court emphasized that the evaluation of a worker's status requires more than checking whether the worker was issued a T4 "Statement of Remuneration Paid" slip or was receiving benefits or had statutory amounts deducted or withheld from his or her pay. The Court examined the following factors set out in *Glimhagen v. GWR Resources Inc.*, 2017 BCSC 761:

- Economic dependency and exclusivity: Dibble had earned between 14 and 92 percent of her income from CMTS in each year between 2010 and 2021 while she attended school. In her last full year, she earned 92 percent of her income from CMTS. She was largely economically dependent on her income from CMTS.
- Control: Dibble was subject to the control of CMTS. Her contract required her to "always be a few minutes early for contract positions", "provide CMTS with relevant information which comes up at contracted placements", "provide CMTS with changes in schedule as they occur", and "respond to e-mails or phone calls from CMTS immediately". The contract also significantly restricted the other work that she could take on.
- Tools: Dibble provided her own instruments or equipment.
- Risk of loss or possibility of profit: Dibble provided monthly invoices which included a list of the facilities

and individuals to whom she had provided music therapy services during that month. She was then paid directly after CMTS had approved the invoices. Notably, CMTS would pay its music therapists even if clients did not pay for the session and CMTS would pay the music therapists almost immediately after the services were provided.

- Whose business is it? Dibble's biography and photograph were posted on CMTS' website over the 12 years she worked there and staff reviews took place annually. CMTS' music therapists wore name tags with CMTS logos when providing their services.

Considering all of the *Glimhagen* factors, the Court took the view that Ms. Dibble was a dependent contractor.

The Court concluded that CMTS did not have just cause for termination of Ms. Dibble's contract and she was thus entitled to reasonable notice of termination. The Court held that the matters reviewed in the termination letter – including allegations of unauthorized work and unprofessional conduct – did not meet the just cause threshold. A 12-month notice period subject to the usual principles of mitigation was appropriate in all the circumstances.

- *Restrictive covenant*

CMTS sought to enforce a restrictive covenant against Ms. Dibble which would have prohibited her from soliciting or accepting work with facilities and individuals previously associated with CMTS for a period of three years. It stated:

The contractor agrees that on the termination of this contract, the contractor will not solicit or accept work with the facility outside of Creative Music Therapy Solutions for a period of 3 years (time period) from the date of termination of this contract.

The Court concluded that this restrictive covenant was

unenforceable due to its ambiguity and unreasonable scope. The covenant was excessively broad in scope and not limited geographically and lacked clarity on what constituted “the facility” and “work”.

Takeaways

- Businesses should carefully consider the nature of the working relationship they have with their workers to eliminate or minimize unintended liabilities associated with wrongful dismissal or breach of contract.
- Just cause for termination must be made out on clear evidence.
- Restrictive covenants are held to a high threshold for enforcement. They must unambiguously and clearly delineate the scope and duration of the restrictions and define the proscribed activities and not be contrary to public policy.

The content of this article is intended to provide a general guide to the subject matter. Specialist advice should be sought about your specific circumstances.

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