



Are you a Co-Employer?

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The Alberta Court of Appeal examined the definition of “employer” within the meaning of section 7(1) of the *Human Rights, Citizenship and Multiculturalism Act*, R.S.A. 2000, c. H-14 (now the *Alberta Human Rights Act*, R.S.A. 2000, c. A-25.5) in ***Lockerbie & Hole Industrial Inc. v. Alberta (Human Rights and Citizenship Commission, Director)***, 2011 ABCA 3, released January 11, 2011. In this case, the Complainant, Donald Luka, failed a drug test and was denied access to a Syncrude Canada Ltd. (“Syncrude”) worksite in Fort McMurray, Alberta. Mr. Luka was an employee of Lockerbie & Hole Industrial Inc. (“Lockerbie & Hole”) and Lockerbie & Hole was under contract with Syncrude to perform work on Syncrude’s site. Syncrude had a policy that contractors could not bring workers onto its site unless they passed a drug test. Mr. Luka was therefore required to take a pre-access drug test before being permitted to work on Syncrude’s site, which he took and failed by testing positive for marijuana.

Mr. Luka filed a complaint with the Human Rights and Citizenship Commission against both Lockerbie & Hole and Syncrude alleging discrimination in his employment (s. 7(1)). While the Human Rights Panel concluded that there was no discrimination, it also concluded that both Lockerbie & Hole and Syncrude were Mr. Luka’s employers under the *Act*. While Lockerbie & Hole was the conventional employer in the true master-servant sense, Syncrude was considered an employer because it was “enjoying or utilizing the services of Mr. Luka, indirectly through Lockerbie & Hole.” The Panel also concluded that because the imposition of the safety policy rested with Syncrude, a direct link was created between Syncrude and Mr. Luka (*i.e.*, a link between Syncrude and its contractors and its contractors’ workers), sufficient to create a relationship of employment. Indeed the expansion of the definition of employer on these bases could have had a significant impact on organizations in Alberta that have contractors supplying their workers to perform services on their worksites. These risks include at least occupational health and safety, labour, union (Mr. Luka was a unionized employee), financial and tax consequences, any of which arise by virtue of a co-employment relationship. However, the Alberta Court of Queen’s Bench and now the Alberta Court of Appeal disagreed with the Panel’s position, finding that there was neither an express nor implied agreement between Mr. Luka and Syncrude.

On an appeal brought by the Alberta Human Rights Commission itself, the Alberta Court of Appeal reasoned that the Panel’s conclusion that Syncrude was also an employer of Mr. Luka resulted in Mr. Luka having two employers and extended the concept of employment far beyond previous case law and outside the intended scope of the legislation. The Commission’s interpretation of employer was therefore too broad. Noting that there was a clear relationship of employment between Lockerbie & Hole and Mr. Luka, the Court of Appeal emphasized that, in these circumstances, the following factors are relevant in determining whether a relationship of co-employment exists with the site owner (Syncrude):

- “The nexus between any co-employer and the employee, including whether there is a direct contractual relationship between the complainant and co-employer;

- The independence of any alleged co-employer from the primary employer, and the relationship (if any) between the two;
- The nature of the arrangement between the primary employer and the co-employer, for example, whether the co-employer is merely a labour broker, compared to an independent subcontractor;
- The extent to which the co-employer directs the performance of the work.”

The Court of Appeal also considered more general indicia of employment when reaching its decision on whether Syncrude qualified as an employer, including:

- “Whether there is another more obvious employer involved;
- The sources of the employee’s remuneration and where the financial burden falls;
- Normal indicia of employment, such as employment agreements, collective agreements, statutory payroll deductions and T4 slips;
- Who directs the activities of, and controls the employee, and has the power to hire, dismiss and discipline;
- Who has the direct benefit of, or directly utilizes the employee’s services;
- The extent to which the employee is a part of the employer’s organization, or is a part of an independent organization providing services;
- The perceptions of the parties as to who was the employer;
- Whether the arrangement has deliberately been structured to avoid statutory responsibilities.”

The relationship with Syncrude was determined to be too remote to justify a finding of employment. This finding effectively allows an organization, like Syncrude, to impose certain aspects of a safety or an alcohol and drug policy that could affect protected grounds under the *Act* (e.g., disability) in the interests of promoting safe worksites without being deemed an employer. The organization, usually the prime contractor or site owner, will then also be absolved of any liability for discrimination by virtue of not being the employer responsible for protecting that worker even where discrimination ensues from the imposition of its policy. The Alberta courts were not prepared in these circumstances to hold Syncrude responsible as an *employer* even though it imposed the site safety rule and ultimately denied access to the worker.

Therefore any claims of discrimination resulting from the imposition of these policies on workers of contractors will not likely succeed against the prime contractors or other owner/operators of worksites unless it can be established that a co-employment relationship exists in consideration of the above or other relevant factors. From a safety standpoint, this decision helps Alberta organizations understand what they can impose on contractors, at least with respect to safety or alcohol and drug policies, without creating obligations on them as *employers* under the *Act*, where it is clear that another, more obvious employer is involved and where the relationship with the worker of the contractor is too remote. Again, in these circumstances, the duty to protect a worker from discrimination under the *Act* rests with the *obvious employer* even in the case where the safety or alcohol and drug policy is being imposed by the non-employer party.