Claim No: SCCH - 469521

IN THE SMALL CLAIMS COURT OF NOVA SCOTIA
Citation: Shaham v. Airline Employee Travel Consulting Inc., 2018 NSSM 18

BETWEEN:

GUY SHAHAM

Claimant

- and -

AIRLINE EMPLOYEE TRAVEL CONSULTING INC.

Defendant

REASONS FOR DECISION

BEFORE

Eric K. Slone, Adjudicator

Hearing held at Halifax, Nova Scotia on February 13, 23 and March 13, 2018

Decision rendered on March 28, 2018

APPEARANCES

For the Claimant	Thomas Blackburn Counsel
For the Defendant	Geoff Breen Counsel

BY THE COURT:

[1] The Claimant in this case is suing for breach of contract in connection with work he did as a contractor, or quasi-employee, for the Defendant during approximately the first half of 2017. His contract, which began on January 9, 2017, was abruptly terminated by the Defendant on June 19, 2017.

[2] The Defendant is a small company, of the type colloquially referred to as a startup, which has been in existence since 2012 when the business idea was conceived by its founder, Donna Lavallee.

[3] Ms. Lavallee is a former airline employee who became familiar with a conundrum faced by many airline employees who enjoy the perquisite of being able to fly at little or no cost for their airfare. The scenario is that while they and their families are able to book flights for little or no cost on a standby basis, they are often bumped from those flights at the last minute and forced to take later flights. When such bumps occur, they often have to cancel their hotel reservations and pay a penalty to the hotel. The idea that Ms. Lavallee came up with was to create a website exclusively for the use of airline employees, where they could book hotels in such a way that there were no cancellation fees in the event that their flights got bumped. Accordingly, the title GoBumpFree ("GBF") was created, which is the business name used by the Defendant company.

[4] The business model required, in order to be successful, the cooperation of many airlines as well as a large number of hotels. The airlines were needed in order to obtain their employee lists as well as their cooperation in promoting the service to their employees. Perhaps the greater need was the cooperation of large numbers of hotels across the world, who would be willing to offer rooms on

a no cancellation fee basis, or something close to it, as an incentive to fill their rooms on a last-minute basis. As is well known, standard practice for many if not most hotels is to charge a cancellation fee for last minute cancellations such as after 6:00 p.m. on the day of the reservation. GBF was negotiating for more favourable terms, or in some instances the business model would be to absorb some penalties as part of the cost of doing business.

[5] By the time the Claimant entered the picture in early 2017, the company was theoretically up and running but operating on a very limited basis. There had been considerable work put into signing up hotels, but the website was basically nonfunctional, and the company had no revenues to speak of. In the four-plus years that it had been operating, it was operating on cash investment rather than business income.

[6] The Claimant is 45 years old, and self-described as an entrepreneur and executive with considerable experience in the travel industry. Much of his experience was in Israel, from which he emigrated in 2003, and to which he has very recently returned.

[7] In early January 2017, the Defendant advertised for someone to be employed as Director of Sales. The posting sought somebody with proven sales and business development experience including the hotel and travel industry and offered "base salary plus commissions with continuous income earning potential."

[8] The Claimant responded to the ad. Clearly, he impressed Ms. Lavallee in their interview and on January 5, 2017, an employment offer letter was issued, including the following:

> This position will have a starting salary of $60,000 and an incentive program to be discussed and implemented in 90 days from your start date. Competitive company health and dental benefits program will be available to you 90 days from your start date, you will receive one weeks paid vacation for your first year and vacations are to be taken at such time that are mutually convenient for the employee and the employer.

[9] The Claimant responded in a lengthy email, where he raised several points. The following statements by him are significant:

> $60,000 biweekly pay - I am good with that as I know I will be able to reach my income goal through my incentive commissions.
>
> Incentives - I am sure we can find the right compensation in the next 90 days as suggested.

[10] In this email he raised a question, which was whether or not the Company would be offering stock options to senior employees. The response from Ms. Lavallee was:

> ... at this point in time we are not, but if we can reach a sustainable revenue and don't require further equity investors I'd be happy to have this conversation with you.

[11] The Claimant also suggested that the arrangement not be structured as employment, but rather that he would be a contractor and would simply invoice the company for $2,500 twice per month. The motivation to do it this way appears to have been largely one of cash flow, as there would be no deductions for income tax or other matters, and he was recently separated from his spouse and paying child support. He also had an interest in remaining free to work on other projects, as he apparently had some other consulting that he was doing, although he recognized that working for GBF would require putting in

considerable hours. The Defendant had no problem structuring the arrangement as a contract rather than employee-employer relationship.

[12] The Claimant commenced work the following week, on January 9, 2017, and began to perform the tasks assigned to him as well as those he found necessary. As he dug into the documentation within the company, he became concerned with the state of the contractual relationships the company had, mostly with hotels but also with airlines. He found that most, if not all of the contracts in the company files were not signed, or otherwise deficient in some way.

[13] A great deal of the evidence at trial concerned the state of the Company's business, and whether or not its contracts with airlines and hotels were in force or properly documented. It is not necessary to get into particulars. I believe it can be fairly summarized that there were (at least at that time) significant deficiencies in the contractual relationships, and the website which was central to the business was nonfunctional and needed to be replaced. The Claimant had a significant role in trying to remedy these problems.

[14] Overall, I found Ms. Lavallee's evidence somewhat troubling on the question of whether or not her contractual relationships were in good shape. She seemed to have many blind spots about the documents that she put forward as evidence of the relationships that she had with hotels. I believe the Claimant perceived real problems and, if Ms. Lavallee’s evidence at trial is any indication, the Claimant was rightly concerned and may well have been at odds with Ms. Lavallee about what needed to be done to advance the business.

[15] I think it is also fair to say that the Claimant worked hard and, at least initially, saw a real opportunity to get in on the ground floor of what looked to be a promising business.

[16] The contractual arrangement contemplated a 90-day probationary period, but that 90 days appears to have passed without any formal or otherwise meaningful review and it simply continued. At some point the Claimant took on the additional title as Director of Sales and Business Development, with no change in his compensation.

What were the contractual terms?

[17] A central question for this court is: what were the essential terms of this contract - either express or implied? Specifically, did it offer commissions on sales? Did it include any offer of equity shares? And on what terms, such as notice, could the contract be terminated?

Commissions?

[18] On the question of commissions, I have no doubt that there was an understanding that there would eventually be a commission on sales, but for the entire duration of the Claimant's work there were no significant sales, nor any real ability to generate sales. This was because the website was barely functional, and the business had not really gotten off the ground. This was no fault of the Claimant, who I believe was working hard but was up against obstacles not of his creation, and which it simply took considerable time to resolve. Indeed, upon the admission of Ms. Lavallee, even to this day in 2018, there are barely any sales being realized.

[19] I do not see the Claimant being able to make a claim for commissions in the absence of some evidence that he would more likely than not have earned some commissions in the immediate aftermath of the termination of his contract.

Stock options?

[20] On the question of stock options, the Claimant testified that he had a discussion with Ms. Lavallee, partway into his term, when he was told that he could expect to be compensated by way of an equity interest in the company of 2.5%. Ms. Lavallee denies that such a promise was made.

[21] The Claimant testified that the promise by Ms. Lavallee of shares occurred some months into the employment when he sought a raise. He quoted her as saying words to the effect of "I can't increase your salary" but "when I raise more investment funds, and when the website is operational, I will offer you 2.5%."

[22] The Claimant admits that no one else was there at the time this offer was made. Nor could he point to any email or other writing that mentions this discussion.

[23] The Claimant says he is entitled to an equity interest in the Defendant because the new website was launched within days of his contract being terminated, and also a new round of investment was received at about the same time.

[24] Although I was generally favourably impressed with the Claimant, and in many respects prefer his evidence over that of Ms. Lavallee, I find it difficult to

conclude that in the case of shares, there was anything other than a general discussion about possible future equity participation. The written communications between the parties make no mention of shares or of any percentage of equity. I find that the contract between the parties was for regular bi-monthly payments of $2,500.00, plus future commissions when the business was more developed, and with future discussions about equity to take place at some later point. This cannot, in my view, be elevated to a promise of an equity interest. To the extent that the Claimant seeks 2.5% of the company in this action, it cannot succeed.

[25] An agreement to hold future discussions about equity participation cannot be enforced as an agreement to provide equity shares. Even less so does it support a claim for damages based on an estimated value of those shares.

[26] I do note that some months after the Claimant began to work for the Defendant, there were shares issued to investors, who placed significant financial value on those shares. It seems improbable that the Defendant, or specifically Ms. Lavallee, would have diluted the value of those shares by issuing an equity interest to someone not actually investing money.

The events leading to termination

[27] The Claimant testified that he worked 10 to 11 hours per day, seven days per week during his time there. Because the company did not have a large dedicated business premises, much of his work was done at home, or at coffee shops.

[28] One of the things that the Claimant did fairly early in his tenure, which became an issue, was to recommend that the Defendant also hire a friend and business associate of his, Jessie Colondres in New York, to work from the US on

sales and business development. Jessie is the spouse of Frank Colondres, who was also a longtime friend and business associate of the Claimant. As will be seen later, it was something that passed between the Claimant and Frank Colondres that led to the contract being terminated.

[29] One of the weaknesses that the Claimant determined upon his view of all that was taking place, was that there was a significant financial risk to the company because many of the hotel contracts did not provide absolute freedom from cancellation fees. In many cases, cancellation fees would only be waived if the booking was cancelled by a certain time, but bumping was a problem that often happened at the last minute. The Claimant came up with an idea that the GBF website should be in direct contact with its clients, using SMS (texting) technology, to track their whereabouts and to learn at the earliest possible time whether or not the client had been bumped from their flight. This would allow hotels to be cancelled at the earliest possible moment, avoiding some of the cancellation fees that might otherwise be levied.

[30] The idea of such a system linking clients with a website via SMS was something that the Claimant had conceived of in relation to an earlier business idea of his, which he called “Passporto” and/or Geo-Concierge. These were business ideas that had never actually gotten off the ground, so to speak, but which he was still thinking about for future use. The idea of text messaging with clients added a dimension to the business that GBF had not previously considered.

[31] During May 2017, the new website was being created, and studies were underway to determine the feasibility of introducing the SMS dimension to the website. The new website went on line in mid-June 2017, after the Claimant’s contract was terminated. The idea of using SMS was never adopted.

[32] It was also in this time frame that the Claimant attended an important industry conference in Washington DC, called “IPW”, where he met with and presented information about GBF to a large number of industry representatives.

[33] As described by Mr. Shaham, the format for that conference was like "speed dating" where suppliers would meet buyers in a burst of short encounters. It was his evidence that he only discussed GBF with these people. However, in the course of speaking to these suppliers he learned things about their business and what might be available if he were to later approach them about his other business idea, Geo-Concierge. In fact, at this meeting he bumped into a couple of people that he knew from previous businesses and admits that he did speak to them about Geo-Concierge.

[34] On June 13, 2017, Mr. Shaham wrote an email to Frank Colondres which became the ostensible reason for him being terminated. The email asked the following:

> What do you think of the following idea? Outside of GBF, you, Jessie and I will create a non-transactional travel website where we look like a legit travel site but all the activities on the site are basically "referring clients" to other travel sites where we can get commission from. Many travel websites do the same and have the same business model. I believe that Marcel started this way.
>
> In the IPW I met several suppliers and including Diego, Wyndham Vacations, attractions etc.… that will pay us if we refer them clients, kind of affiliate programs. Some will even give you free branded website white label or add our logo on the top of their pages.
>
> All that we will need to do to build our Geo-Concierge concept is to push "our travel site" to the world by any means possible. There is a huge industry that makes lots of money by referring clients from their sites to others. It will be solely up to us to push it via social media, as SEO and

> whatever tactics. This can start to generate us some revenue while we looking into Geo-Concierge. We can do it from home, coffee shop etc.…
>
> Unfortunately I don't believe that GBF will last and I must think about alternatives. It shouldn't be hard for me to build such sites as long as I don't need to integrate it to payment systems. All payments happen on other sites and we get commission. We can push it to groups, school travel, businesses we know that travel frequently etc.… and even offer booking services so we book their travel on our partners sites.
>
> Your thoughts?

[35] This was a private email sent by Mr. Shaham to Frank Colondres, but it was susceptible to being seen by virtue of the fact that he used his GBF email address. At or around this time, Ms. Lavallee had become suspicious of how Mr. Shaham was spending his time and she arranged for an audit of his email account. This email was discovered, and she concluded that Mr. Shaham was not working in the best interests of GBF, but rather had been self-dealing while at the conference for which he was being sponsored by GBF. This persuaded her that Mr. Shaham's contract should be terminated, and a letter of termination was drafted, and handed to him on June 19, 2017. The salient part of that letter was as follows:

> This letter confirms our conversation of today wherein you are advised that your agreement with Airline Employee Travel Consulting Inc. (the "Company") is terminated for cause effective immediately.
>
> As discussed, the Company has learned that you have been using company resources to plan and organize a competing business. These plans and efforts, which have been documented through your use of company email, include the misuse of company business plans, intellectual property, personnel and business expenses. These actions are in direct violation of your obligation to perform services in the interests of the Company and not to divulge or misappropriate its confidential and proprietary information.

[36] The letter had been drafted in advance and was given to Mr. Shaham without any meaningful discussion or any opportunity for Mr. Shaham to explain himself.

[37] Over the next few days, there was a flurry of email communication between Ms. Lavallee and Mr. Shaham, concerning monies that Mr. Shaham believed were owing to him. There was also some serious protest by Mr. Shaham, who believed he had done nothing wrong. He insisted that Geo-Concierge had nothing to do with GBF and was not a competing product, and as such there was nothing prohibiting him from attempting to develop this idea. He pointed out, which is not disputed, that it was a term of his contract that he was free to work on other non-conflicting pursuits, so long as all of the work for GBF was done. He also took issue with the allegation that he had in any way sought to appropriate proprietary information which was something he'd been accused of in the letter, although no specifics were really given.

[38] The reference to proprietary information appears to have been based on a theory that the proposed use of SMS messaging by GBF was in some way a proprietary technology. By the time this matter reached trial, no such allegation was made. Moreover, it is fairly clear that GBF had no intention of using SMS technology, and in fact had abandoned the idea. Even had it intended to use that technology, it was already well-established elsewhere and GBF had no proprietary interest in it.

[39] In his lengthy email dated June 19, 2017, obviously written in the hours immediately following the termination, Mr. Shaham concluded with the following proposal:

> In order to settle things as soon as possible and without complicating the process I need you to agree to the following:
>
> 1. In the last 19 days working for GBF I have fulfilled all that is required from me and more. Nothing has changed since January 9th when I have functioned at 500% more from what my initial job description was and as such I [am] eligible to receive the following:
>
> 19 days pay in June = $3,166 plus tax ($5000 / 30 ×19]. Attached please find my invoice.
>
> 2. Attached is the statements from my cards (one is in Hebrew so it is in Israeli shekels so you'll need to check conversion rates) the IPW expense report. What is not on the statement was paid in cash. I will expect to receive the full amount of the expense report immediately with my pay.
>
> 3. In order to end this relationship on the positive side I am asking to receive these payments immediately plus a letter from GBF acknowledging what Geo-Concierge is so you can see for yourself that it is not a competition to GBF. It has nothing to do with airline employees, airlines and free hotel cancellation. Location-based platforms are not my invention it is in the marketplace for years and many companies use them for years. If you wish I am willing to give you a letter that states that we are not selling it to airline employees not targeting airline companies or hotels. We plan to target only the general public which is the one thing GBF is not doing.
>
> Please advise me by email… when will be a good time to meet. Only then I will drop the computer and give you the phone and in return you'll need to provide me with the letter and money order or confirmation of e-transfer.

[40] The reference to the computer and phone concerned the company-owned cell phone and laptop which Ms. Lavallee had been pressing Mr. Shaham to return.

[41] In response to this demand of June 19, Ms. Lavallee consulted her lawyers and a letter dated June 22, 2017 was issued by Mr. Breen of Cox & Palmer which contained the following:

> Our client has brought us up to speed on your engagement as an independent contractor and the recent termination of that relationship for cause. I understand that you have expressed some confusion as to what you will be paid in conclusion of your contract. To be clear, the company is prepared to pay you the following upon your return of all Company property: a payment on your invoice for the period of June 1-19, 2017 in the amount of $3,641, and the reimbursement of expenses in the sum of $90 CAD plus $102.89 USD.
>
> Company property that must be returned includes:
>
> (a) the company laptop, cell phone and any other physical devices and materials; and
>
> (b) all confidential and proprietary information of the company, whether physical or electronic.

[42] Mr. Shaham's request that GBF issue a letter concerning Geo-Concierge was not accepted. The letter went on to caution Mr. Shaham to honour his contractual obligation especially with respect to not revealing or exploiting confidential information.

[43] In fact, Mr. Shaham attended at the offices of Cox & Palmer and exchanged the laptop and cell phone for these payments.

[44] It was not until many months later that this claim in the Small Claims Court was launched, seeking various items of relief. It is the position of GBF that the exchange of the computer and cell phone for the payments made, constituted a final settlement of all matters between the parties. GBF takes the position that this exchange constituted, in effect, a release, and that the Claimant should be estopped from making his claims for something more than he accepted at the time.

[45] On this question, it is noteworthy that Mr. Shaham was not legally represented during this time, and there is nothing in the evidence that suggests that he was acting with any legal advice. In order to hold Mr. Shaham to this transaction as settling all of his claims, it should have been explicit in some fashion that this would be the effect. Had this transaction intended to finally resolve all issues between the parties, one might have expected to see a signed release or other document where Mr. Shaham would have expressly released GBF from any further obligations to him. There is nothing explicit. In my opinion, it would be unconscionable to imply a term into that exchange that Mr. Shaham, who believed he had done nothing wrong, was forfeiting any rights to contractual relief simply to get the paycheque and reimbursement for expenses that were clearly due to him for work up to the date of his termination. I am unwilling to give it such an interpretation, and as such I hold that there was no full and final settlement at that time. I regard that exchange as something that dealt with immediate, somewhat mundane issues that occur at the end of a relationship but left larger issues unresolved.

[46] Another way of putting it, is that GBF could have, but did not stipulate that there was an expectation that Mr. Shaham would be releasing any further rights by accepting the payments that he did. The letter from Cox & Palmer could have, but did not contain language that even hinted that such an interpretation might later be made. As such, applying the principle of *contra proferentem*, I hold that this was not GBF's intention in exchanging the payments for the Company property.

[47] Applying an estoppel framework, I find nothing in the evidence that establishes that the Defendant relied on this exchange as settling all of their

issues, and without reliance there can be no estoppel. Other elements of the claimed estoppel are also absent, or weak.

Just cause?

[48] Looking to whether or not the termination of the contract was justified, i.e. whether Mr. Shaham had given GBF "just cause," I have concluded on all of the evidence that Ms. Lavallee grossly overreacted to what she saw in the email that passed between Mr. Shaham and Mr. Colondres.

[49] I do believe that Ms. Lavallee correctly concluded that Mr. Shaham was losing faith in GBF, and this was no doubt disappointing. But instead of jumping to the conclusion that he was self-dealing on company time and at company expense, she ought to have given him at least the opportunity to explain himself. Had she done so, and had she fairly considered his comments, she would have concluded that he was still trying to promote GBF, and that his Geo-Concierge idea was something that he had been working on for years, which was very much still in the conceptual realm, and that there really was no conflict between those two business ideas.

[50] I do not believe that it would be a firing offense in an employment context for an employee to express concerns that his employer might not succeed in the long run, and to be looking to the future. In some industries, it is a virtual expectation - at least anecdotally - that your employees will be on the lookout for other employment opportunities right from the get go. Had there been the frank discussion that ought to have occurred, rather than the impulsive decision to terminate the contract, in such a conversation Mr. Shaham would undoubtedly have expressed all of the reasons why he felt that GBF was not moving in the

right direction, or was doing things wrongly, and a further discussion could have taken place as to whether or not Mr. Shaham could still be an effective representative of GBF.

[51] Mr. Shaham impressed me as someone who saw problems intelligently and was not afraid to speak his mind to his superior. His observations at the time were realistic and instead of firing him, GBF might have been better advised to take these concerns to heart. It is not lost on me that GBF is still struggling to launch its business almost a year later.

What terms may be implied into the contract?

[52] I must consider whether or not this particular contract between Mr. Shaham and GBF had any express or implied terms concerning termination. As is well-known, contracts of employment typically have an implied term that, in the absence of just cause, the contract may not be terminated without reasonable notice.

[53] Counsel for the Claimant argued that the contract between Mr. Shaham and the Defendant was really an employment contract by another name, and that it had such an implied term invoking reasonable notice. Counsel for the Defendant argued that it was an independent contractor relationship that could be terminated at will.

[54] At law, there are only three possible categories in which to place Mr. Shaham: employee, dependent contractor or independent contractor.

[55] The following lengthy extracts from the case of *Fisher v Hirtz*, 2016 ONSC 4768 (CanLII) are worth quoting, as they set out the categories of contracts and the analysis that must be used to determine the nature of the relationship: (emphasis added)

> [21] **Under employment law, the significance of a finding that a worker is an "employee" or a "dependent contractor," as distinguished from an "independent contractor," is that if the worker is dismissed without cause, then he or she is entitled to reasonable notice of termination or compensation in lieu of reasonable notice.** As foreshadowed in the introduction to these Reasons for Decision, my conclusion is that Ms. Fisher was an independent contractor, and from that conclusion it follows that her relationship with Group Five could be terminated without reasonable notice. It further follows that she had no claim for damages and thus there are also no issues about the reasonable notice period or about mitigation. The reasoning for my conclusion follows.
>
> [22] The determinative issue in this case is: what was the legal classification of the relationship between Ms. Fisher and Group Five at the end of that relationship. Because the law recognizes that employment relationships are dynamic and can and do change, the classification of a particular relationship requires a contextual examination over its entire course, but the relationship's classification at the end is what ultimately matters.
>
> [23] At one time, historically, in the context of work relationships, the law recognized just two types or classes of workplace relationships; namely (1) employer-employee (master-servant); and (2) contractor-independent contractor, and, as I shall explain below, the law developed criteria or factors for the courts to consider to differentiate the employee from the independent contractor. However, in 1936, the Ontario Court of Appeal recognized the existence of an "intermediate" position "where the relationship of master and servant does not exist but where an agreement to terminate the arrangement upon reasonable notice may be implied": *Carter v. Bell & Sons (Canada) Ltd.*, 1936 CanLII 75 (ON CA), [1936] O.R. 290 (C.A.).
>
> [24] The relationship intermediate between the employee and the independent contractor is the "dependent contractor," and thus courts across the country recognize three classes of work relationships.
>
> [citations omitted]

> [26] In *McKee v. Reid's Heritage Homes Ltd.*, supra, the Court of Appeal described the methodology or analytical approach to the determination of the worker relationship. The first step is to determine whether or not the worker is an employee or a contractor in accordance with the established methodology and criteria for differentiating an employee from an independent contractor. The analysis of the classification of the relationship ends if the worker is determined to be an employee. **However, if the worker is determined to be a contractor, the second step of the analysis is to determine whether he or she is a dependent or an independent contractor.**

[56] The court then set out at length the criteria for determining whether the relationship is one of employment or contractor (whether dependent or independent). I will omit this analysis and proceed to what I believe is the more important distinction - that between independent and dependent contractors:

> [33] **As noted above, if the first step of the analysis determines that the worker is a contractor, then it is necessary to go further and determine whether the worker is a dependent or independent contractor.** In *McKee v. Reid's Heritage Homes Ltd.*, supra, Justice MacPherson identified a variety of factors to differentiate dependent and independent contractors including: (1) the extent to which the worker was economically dependent on the particular working relationship; (2) the permanency of the working relationship; (3) the exclusivity or high level of exclusivity of the worker's relationship with the enterprise.
>
> [34] It follows from the factors identified by Justice MacPherson that the more permanent and exclusive the contractor relationship then the less it resembles an independent contractor status and the more it resembles an employee relationship and, therefore, the relationship should be classified as a dependent contractor relationship.
>
> [35] The extent to which, over the history of the relationship, the worker worked exclusively or near-exclusively or was required to devote his or her time and attention to the other contracting party's business is an important factor in determining whether the worker is a dependent or independent contractor: the greater the level of exclusivity over the course of the relationship, the greater the likelihood that the worker will be classified as a dependent contractor: *Keenan (c.o.b. Keenan Cabinetry) v. Canac Kitchens, a Division of Kohler Ltd.*, supra.

> [36] In *McKee v. Reid's Heritage Homes Ltd.*, supra, Justice MacPherson said that recognizing the intermediate category between employee and independent contractor accorded with the statutorily provided category of dependent contractor found in the Labour Relations Act, S.O. 1995. At para. 29 of his judgment in McKee v. Reid's Heritage Homes Ltd., he stated:
>
> > 29. Finally, recognizing an intermediate category based on economic dependency accords with the statutorily provided category of "dependent contractor" in Ontario, which the *Labour Relations Act*, S.O. 1995, c. 1, Sch. A, s. 1(1), defines as:
> >
> > [A] person, whether or not employed under a contract of employment, and whether or not furnishing tools, vehicles, equipment, machinery, material, or any other thing owned by the dependent contractor, who performs work or services for another person for compensation or reward on such terms and conditions that the dependent contractor is in a position of economic dependence upon, and under an obligation to perform duties for, that person more closely resembling the relationship of an employee than that of an independent contractor.
>
> *[37]* It should be noted that if the analysis of the worker relationship reaches the second stage, there will inevitably be indicia that the worker was a contractor; for example, that he or she was paid in exchange for invoices and not issued salary cheques, but the analysis, nevertheless, continues to examine the true substance of the relationship. Thus, the case law reveals that the fact that the worker operated as a sole proprietor or through a business is relevant but not determinative of the worker's status: *McKee v. Reid's Heritage Homes Ltd.*, supra, at para. 54; *Braiden v. La-Z-Boy Canada Ltd.*, supra, at para. 30; *Kordish v. Innotech Multimedia Corp*. [1998], 46 C.C.E.L. (2d) 318, (Ont. Gen. Div.), aff'd [2000] O.J. No. 2557 (C.A.).
>
> [38] What the parties may choose to call their relationship is relevant but not determinative, and the court will determine the nature of the relationship based on the conduct of the parties*: John A. Ford & Associates Inc. (c.o.b. Training Services) v. Keegan*, supra, at paras. 72, 77.

[57] As noted in *Fisher*, where there is not an employment contract (with all that entails) the all-important distinction may be that between a dependent

contractor and an independent contractor. The fact that Mr. Shaham was *prima facie* a contractor is not disputed, but a number of factors as identified in *Fisher* point to this being a dependent contractor situation.

[58] Even applying the test for an employee versus contractor, there are a number of factors which might point to this as an employment situation. Most importantly, the original intention of GPF was to hire an employee. The idea of doing it as a contract was floated by Mr. Shaham, who saw some tax and cash flow advantages to doing it this way.

[59] However, I believe it would be perverse to hold this to be an employment relationship, thus granting certain benefits to Mr. Shaham, given that it was his idea to be a contractor for the perceived benefits that he wished to achieve by being in a contractor relationship. Many of the reported cases which have looked beyond the contractor framework and found the relationship to be one of employment were situations where the “employer” insisted on such a framework and the “employee” had no bargaining power to insist that it be an employment relationship. This is not such a case.

[60] But the real question is whether the contract was independent or dependent.

[61] Looking at all the criteria identified here, it is difficult to find a single fact pointing to an independent contractor relationship. Although Mr. Shaham had the right to work on other projects, it was clearly understood in the relationship that he would be working long hours for GBF. It was also pretty clear that he was relying on this income to support himself and that it was a potentially permanent relationship, or at least indefinite by the time the initial three month

period expired. Mr. Shaham was expected to work almost exclusively for GBF, under the direction of Ms. Lavallee. He had no expectation of profit beyond the monthly earnings under the contract. He was expected to perform the work personally; i.e. he was not free to subcontract the work to someone else. In the totality, I believe the evidence overwhelmingly favours a finding that this was a dependent contractor relationship.

[62] The upshot of that finding is that there would be an implied term in such relationship that is similar to the term that is implied in employment relationships, namely that the relationship may not be terminated except for just cause or upon reasonable notice.

[63] Of course, an implied term may be supplanted by an express term, but that is not the case here. The duration of the contract was initially supposed to be for three months, but nothing happened at the end of three months. What would be the implied duration of the contract then? One possibility would be that it was “month to month,” although there is nothing in the evidence to suggest that the parties saw it that way. The only reference to a “month” was that it was payable at a rate of $5,000.00 per month and would be billed twice per month. A true month to month contract would have something more, such as performance appraisals on a monthly basis, and projects limited in scope. Here there was nothing that suggested that there was a month-long horizon.

[64] In my opinion, the most compelling finding is that it became a contract of indefinite duration.

[65] It further follows that, given my finding that there was no conduct that rose to the level of just cause, Mr. Shaham ought not to have been terminated without

reasonable notice, and it was a breach of contract for the Defendant to terminate the contract as it did.

What damages flow from the breach of contract?

[66] The Claimant supplied several relevant authorities on the question of notice. In *H.W. Taggart v. K.D.N. Distribution & Warehousing Ltd.* 1997 CanLII 14952 (NS SC), a 3-month employee received six months' notice after being wrongfully dismissed. The factor that influenced the court appears to be that the employee was relatively senior. Macdonald J. (as he then was) stated:

> As well, the plaintiff was a senior level employee. Having considered all the relevant facts, I agree with counsel for the plaintiff that an appropriate notice period would be six months. I refer specifically to the following excerpt from Harris, supra, at pages 4-43 and 4-44 as guidance:
>
> > Two decisions of the Ontario Court of Appeal appear to have concluded that senior level employees having completed only a relatively short term of employment ought to be entitled to a notice period, barring anything unusual, in the range of six months. In Isaacs v. M.H.G. Intemational Limited (1984), 1984 CanLII 1862 (ON CA), 4 C.C.E.L. 197, 45 O.R. (2d) 693, 7 D.L.R. (4th) 570, O.A.C. 301, the Court of Appeal reviewed the trial judge's assessment of nine months awarded to the plaintiff, who had been hired on August 31, 1981 at an annual salary of $41,000 and subsequently terminated on August 9, 1982. Although the court determined that the trial assessment of nine months' notice was high, none the less It was not a judgement which was sufficient to warrant interference on appeal, although the court did indicate that in normal circumstances the notice period ought to have been in the range of six months:
> >
> > We do not think that the nine months' notice represents an error in principle in the circumstances of this case, although members of the court individually might have been disposed to fix a shorter period of notice, such as six months. We do not consider that there was palpable error on this question which would warrant our intervention. (p. 695 [O.R.])

> A similar conclusion was reached by the Ontario Court of Appeal in Hall v. Canadian Corporate Management Co. (1984), 4 C.C.E.L. 166, 3 O.A.C. 289, leave to appeal to S.C.C. refused (sub nom. Hall v. Regal Cashway Sales Ltd. (1984), 56 N.R. 319 (S.C.C.). The plaintiff, who was 51 years of age at the time of termination, had been employed for a period of approximately 11 months. To accept the offer of employment, he had moved from Peterborough to Mississauga and had sold two or three businesses in Peterborough. He built himself a new home in Mississauga, anticipating a fairly lengthy period of employment with the new company. The title held by the plaintiff was that of vice-president, Marketing and merchandising, yielding an annual salary of $57,000. The initial trial judge's award of 12 months was reflected upon by the Court of Appeal and considered to be overly high in view of the length of employment and the other usual factors. The Court of Appeal reduced the award of 12 months to 6.

[67] That case was cited by Adjudicator O'Hara of this court in *Orovec v. Ryan Duffy's Management Ltd.*, 2016 NSSM 7 (CanLII) where a senior employee with under five months of employment received three months as reasonable notice. The learned Adjudicator cited a number of other relevant cases in arriving at the 3-month notice period.

[68] The Defendant cited several employment cases where shorter notice periods have been allowed.

[69] I am aware from my past experience as an employment lawyer of an abundance of cases where management employees with less than a year's service have received damage awards of between two and seven months. See for example:

> *Andrew v. Kamloops Lincoln Mercury Sales Ltd.* (1994), 7 C.C.E.L. (2d) 228 (B.C.S.C.), Business Manager employed for 4 mos received notice of 3 mos.

Babcock v. Weickert (C. & R.) Enterprises Ltd. (1993), 50 C.C.E.L. 1 (N.S.C.A.), 40 year old General Manager employed for 9 mos. received notice of 5 mos.

Byrne v. Nfld. Transport Ltd. (1984), 48 Nfld. & P.E.I.R. 147 (Nfld. T.D.), Steele J. Area Manager employed for 5 mos received notice of 3 mos.

Cringle v. Northern Union Insurance Co.Ltd. (1981), 124 D.L.R. (3d) 22 (B.C.S.C.), 36 year old Western Claims Manager employed for 10 wks. received notice of 2 mos.

Gilbert v. TS Realty Inc. (1996), 23 C.C.E.L. (2d) 100 (Ont. Gen. Div.), 40 year old Manager employed for 6 mos received notice of 6 mos.

Kreager v. Davidson (1992), 74 B.C.L.R. (2d)205 (C.A.), 30 year old Store Manager employed for 11 mos received notice of 6 mos.

McCann v. Aylward's Ltd. (1990), T.L.W. 941-045 (Nfld. T.D.), Lang J. Manager employed for 1 yr. received notice of 6 mos.

Taggart v. K.D.N. Distribution & Warehousing Ltd. (1997), 29 C.C.E.L. (2d) 204 (N.S.S.C.) Operations Manager employed for 3 mos received notice of 6 mos.

Woodward v. Crothers Ltd. (1988), T.L.W.911-019 (Ont. H.C.), Saunders J. 35 year old Branch Manager employed for under 7 mos. received notice of 6 mos.

[70] In the case here, I would assess the period of reasonable notice at three months, and his damages at $15,000.00.

Mitigation

[71] The Defendant has argued that the Claimant failed to mitigate his damages. It is argued that Mr. Shaham showed little evidence of having applied for jobs, specifically other sales jobs.

[72] Mr. Shaham testified that he was active online looking for other opportunities in the startup and travel field, but nothing presented itself immediately. He also testified that he spent two months in Israel, partly for family reasons as he had just inherited full custody of his children after his ex-wife died, but he was active on line even while there. He eventually accepted a job in Israel, to which he has recently returned.

[73] The bottom line is that he did not earn money elsewhere during the 3 months following the termination of his contract. He admits that he did not apply for generic sales jobs, which would not have interested him in the long term.

[74] The onus to prove a lack of mitigation rests on the Defendant. Mitigation need only be reasonable, depending on all of the circumstances.

[75] An employee may show that he was taking reasonable steps to advance his career or longer-term goals, which advancement may not involve taking the first job offered and which job might be a dead end from a career perspective. A dismissed employee (or dependent contractor) does not owe a paramount duty to save the employer money.

[76] Under the circumstances here, I do not consider that the Claimant acted unreasonably. With a history of entrepreneurship and involvement in the travel industry, I do not think it is unreasonable for him to have been focused on finding something that fed into his future ambitions.

[77] In the result, I find that the Claimant is entitled to damages of $15,000.00 plus his costs of $199.35 for filing, and $99.00 for serving the claim. He has

asked for $141.00 for printing costs, which I find to be excessive. I will allow $75.00 for copy and printing.

Eric K. Slone, Adjudicator