e2r Alert!

Case Comment – Remote workers, foreign employers and the common employer doctrine

A recent case out of Nova Scotia is a cautionary tale for foreign employers (including employers who promote 'work from anywhere' type policies/programs).

In Mian v. Expro Group Canada Inc., 2024 NSSC 218 (CanLII), the employee originally applied to work for a UK company called Expro North Sea Ltd. and worked for this company temporarily, however he was ultimately hired on a permanent basis by Expro Group Canada Inc. and would work out of Nova Scotia. He commenced indefinite employment on or about August 25, 2020 with the Canadian subsidiary. His employment was terminated on October 17, 2022. Mr. Mian initiated a wrongful dismissal application against both Expro Group Canada Inc. – the employer noted in his employment contract – but also against the UK company Expro North Sea Ltd.

The UK company challenged the jurisdiction of the Nova Scotia courts to hear the matter on a number of grounds, including that the employee did not have a contractual relationship with the UK company, nor did the company conduct business in Nova Scotia, among other things.

It is not unusual for corporations to structure their foreign subsidiaries in such a way as to limit liability to that particular country – it is not underhanded or inappropriate, it makes good business sense. However, does it accomplish what you wish to accomplish as a foreign employer? The employee argued that the two companies were common employers under the common law doctrine. Where companies are found to be common employers the liabilities are shared from an employment law perspective. Regardless of the corporate structure, the courts will look at the actual employment relationship to make this determination.

The Nova Scotia court concluded that the two companies were to be considered common employers based on the fact that the two companies were under common

control and had significant connections such as payroll and ease of transferring expenses from one company to the other.

Consequently, the court went on to determine that it did, indeed, have jurisdiction to hear matters related to the UK company in Nova Scotia given the employee worked from and was compensated there and the province's taxes were deducted from his compensation.

So, what does this tell us? Obviously that companies who have closely integrated subsidiaries, that share functions, resources, leadership/management, and that interchange or share these functions seamlessly run the risk of being found to be common employers.

It also tells us that Canadian courts can and will take jurisdiction with regard to a 'foreign' employer if they find a nexus between that employer and where and how the work is performed – the substantial connection test. This is something employers contemplating 'work from anywhere' should pay close attention to when deciding on fully remote foreign employees. Would a foreign country take jurisdiction over your Canadian corporation if you have an employee working in that country? Possibly. What are the legal tests in that country? If you don't know, you need to know. It pays to engage legal counsel in that 'foreign' jurisdiction in advance of any remote work arrangement.

If you have any questions about any of the above, please do not hesitate to reach out to speak to an e2r™ Advisor.