

IN THE SMALL CLAIMS COURT OF NOVA SCOTIA

Citation: *Putnam v. Howatt Strategic HR Consulting Incorporated*, 2021 NSSM

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Claim No: SCCH 21-503708

BETWEEN:

Alycia Putnam

Claimant

Howatt Strategic HR Consulting Incorporated

Defendant

Barry Mason, QC appeared for the Claimant

Jillian Gallant appeared for the Defendant

DECISION

[1] This matter came before me on August 17, 2021, in a special time sitting via a Teams virtual platform.

[2] Based upon her arrangement to provide services for the Defendant, Ms. Putnam is claiming the following relief:

- 1 Wages for the period between November 1st, 2020 and January 11th, 2021 in the amount of \$16,680.09;
- 2 4% prejudgment interest in the amount of \$500.40
- 3 A \$2000 bonus that she says the Defendant offered in December of 2020, for a total of \$19,180.19.

[3] The Defendant counterclaims as follows:

- 1 “Replaced consultant time”:
- 2 Durham School Board (Aug 5-13, 2020) \$9000;

- 3 Maritime Electric (Oct 26 – nov 20, 2020) \$3600;
- 4 4% prejudgment interest;
- 5 Costs associated with filing this counterclaim in the amount of \$171.55.

[4] The issues in this case are threefold: 1) A factual determination of whether the circumstances of Ms. Putnam's retainer met the legal definition of independent contractor, dependent contractor, or employee; 2) Whether the Defendant had cause (or required cause) to terminate Ms. Putnam's retainer; 3) Whether Ms. Putnam is liable to the Claimant for damages that it says were caused as a result of her failure to meet the terms of her contract.

[5] Through the reasons explained below, I find that Ms. Putnam's status was that of a dependent contractor. I do not find that the Defendant had cause to terminate her contract. I am granting her claim in the amount of \$16,890.79, detailed below.

[6] I dismiss the Defendant's counterclaim in its entirety.

The Facts:

[7] Ms. Putnam gave oral evidence on her own behalf in this proceeding, and Mr. Jesse Adams, Chief Operating Officer, filed an affidavit and gave oral evidence for the Defendant.

[8] The following facts are not in dispute between the parties:

[9] Ms. Putnam began work for a predecessor business, Howatt Consulting ("Howatt"), on November 1st, 2019. She left a full-time position as an employee of another consulting company to take this position with Howatt.

[10] A document titled "Independent Contractor Agreement" (the "Agreement") was signed by Ms. Putnam and Mr. Adams on October 7th, 2019, with Ms. Putnam listed as "contractor". That Agreement governed the period between November 1st, 2019 and January 31st, 2020. Upon completion of that term, the document provides that Howatt and Ms. Putnam "will renegotiate contract terms".

[11] Compensation in the Agreement was set out as a monthly payment of \$7083.33 for that three-month period, with an understanding that Ms. Putnam would be working four to five days per week during that time.

[12] The Agreement also stated that any intellectual property currently in existence or created under the Agreement would be the property of Howatt, and that Ms. Putnam agreed not to use any such material for any other purpose.

[13] At the same time and on that same date, (October 7th, 2019) the parties also signed a document titled “Non-Disclosure Agreement” (the “NDA”), which I will not reproduce entirely here, but which states that Howatt has certain “nonpublic information” and “would be prepared to share [this] with Ms. Putnam to “evaluate a possible commercial relationship between Howatt HR and Ms. Putnam”. The terms of that NDA include that Ms. Putnam would keep the information confidential and not disclose it to a third party, would return it upon request, that ownership rights would stay with Howatt, that confidentiality did not apply to publicly available information, and that Ms. Putnam agreed that she would not “solicit or hire any Howatt employee for a 12-month period from the date of the agreement”.

[14] It was on the basis of these agreements that Ms. Putnam began working on projects relating to human resource issues for Howatt.

[15] When the Agreement term ended at the end of January of 2020, although there was discussion between Ms. Putnam and Mr. Adams moving into the summer of 2020, no further documentation was created in order to define the relationship between the parties until November of 2020.

[16] Ms. Putman continued to work for Howatt, and in April of 2020 (she says on the advice of Mr. Adams), Ms. Putnam began charging HST on her invoices.

[17] At some point during 2020, and the evidence of exactly when is not before me, Howatt became Howatt Strategic HR Consulting Incorporated (“Howatt Consulting”). I note that in the monthly invoices Ms. Putnam provided, up to August 31, 2020 ,Adams Strategic Health Consulting Incorporated was the entity she billed to, and as of September 30, 2020, they were directed to “Howatt Strategic HR Consulting”.

[18] The change in that corporate structure did not seem on the evidence to make a difference with respect to the day to day business relationship between the

parties, largely defined in the evidence by the relationship between Ms. Putnam and Mr. Adams, although it has other ramifications which I will explain below.

[19] It should be noted that due to the global COVID-19 pandemic and associated restrictions in place in Nova Scotia for almost all of 2020, much of the interaction between Ms. Putnam and Mr. Adams occurred via email and text message.

[20] Discussions regarding what role Ms. Putnam would have going forward with Howatt HR came to a head in November of 2020. Ms. Putnam initially asked for a few days off at the beginning of November, 2020, to consider her position, which became two weeks at the suggestion of Mr. Adams.

[21] It seems to be a common understanding between the parties that she would use the time to consider what form her future role in the company would take. Both parties drafted documents outlining their vision of the arrangement going forward.

[22] Mr. Adams proposed two options: Option A, to work as a committed contractor, for 24 hours or three days weekly at an annual salary of \$46,080 (hourly \$40), or option B, project work, at an hourly rate of \$45 an hour.

[23] Ms. Putnam proposed a two month commitment, that being December of 2020 and January of 2021, to be reevaluated at the beginning of February, with standard weekly hours of 22.5, and standard daily hours of 7.5 at an hourly rate of \$54.40, for a total contract amount of \$11,016 plus GST.

[24] She also added an annual profit-sharing bonus as a scalable percentage of “defined success metrics”. In her evidence, Ms. Putnam described this proposal as a “band aid solution”, after which she hoped to move into a regular employment relationship with Howatt HR. She explained that she and her partner had been attempting to buy property, and it was difficult to obtain financing when her employment status was not reduced to writing, and so she was eager to acquire a short term contract that she could show to the bank.

[25] On November 28th, 2020 Ms. Putnam submitted her invoice for November of 2020, for the same amount as usual.

[26] That invoice was received negatively by Mr. Adams, in fact, described in his evidence as “extortative”, although it was not clear why he took that position.

[27] The relationship between the parties was terminated as of December 2nd, 2020. On December 4th, 2020 Ms. Gallant, the lawyer for the Defendant, sent Ms. Putnam a document titled “Settlement agreement, Indemnity and Release”.

[28] That document offered the payment of two weeks’ contract compensation in the amount of \$3759.61 inclusive of HST as well as the sum of \$2000 “in consideration of the execution of the settlement agreement”. The document further required Ms. Putnam effectively not to work for any of the defendant’s competitors for a period of one year, or to solicit any client of the company for three years.

[29] Ms. Putnam declined to agree to these conditions, and as a result this claim was commenced in January of 2021.

[30] Mr. Adams says that also in March of 2021, he found emails that Ms. Putnam had sent to herself to an outside email address she had with “Evoke Consulting”, including a link to Howatt HR’s Sharepoint directory and its private client information.

[31] For her part, Ms. Putnam says that the period of time during which she was providing services to the Defendant were characterized by a lack of control over resources, under resourcing, and timelines which were not always realistic in terms of her ability to meet required deadlines. She says that she was sending samples of her work product to her outside email address, and had no intention of converting to her own use any proprietary materials.

[32] Mr. Adams, in the alternative, claims that there were issues with Ms. Putnam's work that led to the requirement that the relationship be severed. Although Mr. Adams says that he addressed Ms. Putnam's alleged performance deficiencies, there is no written evidence of anything but encouragement and positive feedback from Mr. Adams during the course of their business relationship.

In December of 2020, did Ms. Putnam's retainer meet the legal definition of independent contractor, dependent contractor, or employee?

[33] The evidence before me makes it clear that neither party after the end of January, 2020, had any clear idea of the exact nature of their business relationship. From her evidence, Ms. Putnam says that her goal was to become an employee of the company. From the perspective of Howatt and Howatt HR, taking the November 2020 draft of the proposed contract as evidence of intention, it appears

that Howard HR wished to retain Ms. Putnam as an independent contractor, at least in terms of the words they used.

[34] The only thing that is clear was that there wasn't clarity. To some extent, matters came to a head largely because there was not clarity about what Ms. Putnam's role in the organization was, or even clarity on whether the company wished her role to continue.

[35] The parties referred me to a number of authorities on the issue of determining the status of a worker. In the Supreme Court of Canada decision 671122 *Ontario Limited v Sagaz Industry Canada Inc*, 2001 SCC 59, Justice Major described the approach to determining whether a person was an employee or an independent contractor as follows:

47 Although there is no universal test to determine whether a person is an employee or an independent contractor, I agree with MacGuigan J.A. that a persuasive approach to the issue is that taken by Cooke J. in Market Investigations, supra. The central question is whether the person who has been engaged to perform the services is performing them as a person in business on his own account. In making this determination, the level of control the employer has over the worker's activities will always be a factor. However, other factors to consider include whether the worker provides his or her own equipment, whether the worker hires his or her own helpers, the degree of financial risk taken by the worker, the degree of responsibility for investment and management held by the worker, and the worker's opportunity for profit in the performance of his or her tasks.

[36] In the 2009 K Ontario Court of appeal case of *McKee v Reid's Heritage Homes limited*, 2009 ONCA 916, Justice MacPherson further considered a two-step test for determining whether a worker was a dependent or an independent contractor, stating as follows:

[34] In this way, the proper initial step is to determine whether a worker is a contractor or an employee, for which the Sagaz/Belton analysis, described in the next section, controls. Under that analysis, the exclusivity of the worker is listed as a factor weighing in favour of the employee category (Belton's first principle). The next step, required only if the first step results in a contractor conclusion, determines whether the contractor is independent or dependent, for which a worker's exclusivity is determinative, as it demonstrates economic dependence. Therefore, exclusivity might be a "hallmark" of the dependent contractor category vis-à-vis the broader category of contractors. However, it continues also as a factor in determining whether the worker is not a contractor at all, but rather an employee, in the first-step analysis.

[37] Based upon the above direction from the authorities, and applying it to the facts before me, I conclude that Ms. Putnam was not an employee. I base this decision not on what the parties said, but how they acted, which is the critical test. The relationship was much more couched in a “fee for service” model, even taking into account the degree of isolation required by the effects of the COVID 19 pandemic.

[38] The work assigned to Ms. Putnam certainly appeared to be project based. Ms. Putnam was clearly providing her own equipment (albeit that was a computer only). Despite Mr. Adam’s eventual position that Howatt HR was unhappy with her performance, there is no evidence of anything approaching the performance management one would expect of an employment relationship, during the term of her provision of services to Howatt HR. On the facts before me, Ms. Putnam was a contractor.

[39] Also on the facts before me, I have concluded that her relationship with Howatt HR, until the end, was that of a dependent contractor. Even taking into account the evidence that the parties agreed that Ms. Putnam might be continuing working as a musician (obviously impacted by the pandemic), the fact remains that the arrangement between the parties, from the agreement in writing with Howatt in October of 2019, to an ongoing understanding not reduced to writing after the end of January of 2020, was that Ms. Putnam was expected to work for the Defendant four to five days per week. Those time demands do not give Ms. Putnam any ability to work for other vendors – the relationship is exclusive. That it was exclusive and dependent, is further illustrated by the fact that Ms. Putnam was seeking to clarify her relationship with the Defendant as she and her partner sought to purchase a house. There is no evidence to support that she had any other source of income with which to satisfy the bank.

[40] As such, Ms. Putnam is entitled to reasonable notice of termination of the arrangement between the parties, absent any just cause on the part of Howatt HR. This brings me to the Defendant’s counterclaim and Defence.

The Defendant’s Counterclaim:

[41] The Defendant claims some \$12,600 for what is describes as “replaced consultant costs”. This claim relates to two contracts, one with the Durham School Board between August 5 and 13, 2020, and one with Maritime Electric between October 26 and November 20th, 2020.

[42] On a balance of probabilities, there is not evidence to support either of these claims. If Ms. Putnam defaulted on a work project in August of 2020, and the Defendant thought of her as an independent contractor, it makes no sense that her entire invoice for August of 2020 would have been paid. Again, the lack of documentation regarding issues with work product defeats the Defendant's claim. With respect to the Maritime Electric Contract between October 26 and November 20th, 2020, it is equally nonplussing on the face of it to understand why matters ended the way they did. Mr. Adams told Ms. Putnam to take two weeks off in November of 2020 consider what her role might be in the future, with no mention of any issues with her Maritime Electric work. Yet, his evidence at the hearing was that he felt that her request for payment for the November month was, in his terms "extortion".

[43] There is no evidence to suggest that Ms. Putnam had been given any indication that her monthly invoice would not be paid. In fact, that communication seems to have been first made when the relationship was severed on December 2nd, 2020.

[44] The Defendant now relies as well by way of "after acquired cause", on emails that were discovered months after the relationship was severed, which indicated that in October of 2020, Ms. Putnam sent some documents to an email address which was external to the company, and which Ms. Putnam describes as having been provided to her by a mentor who ran her own company (Evolve Consulting). These documents show Ms. Putnam's work in orienting workers at Howatt and Howatt HR with the mechanics of using Sharepoint and the Teams App, by way of short technical "tips and tricks" emails.

[45] The Defendant argued that one of these emails contained a SharePoint link, and that this meant that Ms. Putnam was sending confidential company information to a competitor.

[46] This argument is not supported by the evidence. As argued by counsel for the Claimant, a link to the company SharePoint could only be accessed through a Howatt email, and with Howatt credentials, and so sending it to an external third party would not allow for access. The link in the emails would be a broken link.

[47] On the evidence before me, if Ms. Putnam wanted to share confidential information, she did not in October of 2020 need to send herself an external link to the SharePoint, she simply had to print it off or download it via her existing

Howatt HR account. Further, there is absolutely no evidence that any confidential information ever came into the hands of a competitor.

[48] It is also worth noting that while there remains a common law duty of loyalty, even on a dependent contractor, not to compromise the business interests of their employer, any obligations created by the written agreement and NDA signed in October of 2019, were of no force and effect by mid-October of 2020. The written agreement had been long replaced by an unwritten one, Howatt had been replaced by Howatt HR, and the NDA was subject to the same limitations.

[49] Based on these facts, I dismiss the counterclaim in its entirety. Ms. Putnam is entitled to proper notice of termination.

Decision:

[50] Taking into account all of the above, I award the amount of \$16,890.79 as follows:

- 1 Ms. Putnam is entitled to be paid for November of 2020 (\$7083.33 plus 1062.50 in HST). This is not notice, but unpaid monies owing, as I find she was still employed by Howatt HR in November of 2020;
- 2 Given her tenure as a contractor, of approximately one year, based on common law notice periods, I award one month's notice in the amount of \$7083.33 plus 1062.50 in HST is awarded.
- 3 I decline to award the \$2000 offered to Ms. Putnam in the December 2020 settlement proposal, as I find it was an *ex gratia* payment offer designed to incentivize the settlement, and cannot be characterized as any amount owing.
- 4 I award 4% interest from date of filing (January 6, 2021) to date of hearing (August 17, 2021) in the amount of \$399.78.
- 5 In addition, I award the cost of filing this claim in the amount of \$199.35.

[51] I thank both parties for their helpful submissions. An order will issue accordingly.

Dated at Halifax, Nova Scotia on September 30th, 2021

Dale Allane Darling, QC

Adjudicator