



Citation: 2012TCC169

Date: 20120530

Dockets: 2011-2387(EI)

2011-2389(CPP)

BETWEEN:

BARB STANTON,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

REASONS FOR JUDGMENT

(Appeals heard on March 16, 2012, at Toronto, Ontario and decision rendered orally on March 23, 2012 by conference call.)

D'Arcy J.

[1] The Appellant is appealing decisions made by the Minister of National Revenue (the “*Minister*”) under the *Canada Pension Plan* (the “*CPP*”) and the *Employment Insurance Act* (the “*EI Act*”).

[2] The issue raised in the appeal is whether Mr. James White was employed in pensionable and insurable employment within the meaning of the previously mentioned acts.

[3] It is the Appellant’s position that she retained Mr. White as an independent contractor, not an employee. The Respondent disagrees.

[4] These are my oral reasons for judgment.

[5] The Appellant carried on the business of providing cleaning services to a number of commercial clients and a few residential customers. The business was operated under the name B.A. Sanitation.

[6] Mr. White was hired by B.A. Sanitation in 2007 as an employee. He was laid off after approximately six months due to a lack of work.

[7] Mr. White's second engagement with B.A. Sanitation began in 2009. It is the relationship between B.A. Sanitation and Mr. White during this second engagement that is the subject of this appeal.

[8] Mr. White testified that he provided cleaning services at the premises of five different customers of B.A. Sanitation. It appears that he spent the majority of his time at a customer that was referred to as Armada.

[9] During the course of the hearing I heard testimony from three witnesses: the Appellant, a Mr. Manion and Mr. White. Mr. Manion was involved in the management of B.A. Sanitation's business during the relevant period.

[10] Mr. White's testimony was not consistent with the testimony of the Appellant and Mr. Manion. In such a situation the Court must make a finding with respect to the credibility of the three witnesses.

[11] After observing the witnesses and considering the objective evidence before me, I have concluded that Mr. Manion and the Appellant were credible witnesses. I do not believe that Mr. White was completely forthcoming in his testimony.

[12] As a result, where the testimony of the Appellant and Mr. Manion is inconsistent with the testimony of Mr. White, I have accepted the testimony of Mr. Manion and the Appellant.

[13] The question that must be answered in these appeals is whether Mr. White performed his services as a person in business on his own account or whether he performed the services in the capacity of an employee.

[14] The leading case on the principles to be applied in distinguishing a contract of service from a contract for services is *Wiebe Door Services Ltd v. The Minister of National Revenue*¹.

[15] *Wiebe Door* was approved by the Supreme Court of Canada in *Sagaz Industries Canada Inc.*².

¹ 87 D.T.C. 5025 (FCA) ("*Wiebe Door*").

[16] The Supreme Court summarized the relevant principles as follows³:

[...]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.

It bears repeating that the above factors constitute a non-exhaustive list, and there is no set formula as to their application. The relative weight of each will depend on the particular facts and circumstances of the case.

[17] The intention of the parties is also a relevant factor.

[18] The Federal Court of Appeal recently addressed the intention issue in *TBT Personnel Services Inc. v. Canada*⁴.

[19] The Court stated the following⁵:

The agreement signed by each of the 39 drivers contained a clause in which the driver represented that he was an independent contractor, and another clause expressing the driver's agreement that he was not being engaged as an employee. Those clauses suggest a common intention that the driver would be engaged as a person carrying on his own business.

Such intention clauses are relevant but not conclusive. The *Wiebe Door* factors must also be considered to determine whether the contractual intention suggested by the intention clauses is consistent with the remaining contractual terms and the manner in which the contractual relationship operated in fact. [...]

[20] In the current appeal the relevant factors are control, who supplied the required tools, the hiring of helpers, and the risk of loss.

² *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, 2001 SCC 59 ("*Sagaz Industries Canada Inc.*").

³ *Supra*, at paras. 47 and 48.

⁴ *TBT Personnel Services Inc. v. Canada*, 2011 FCA 256.

⁵ *Supra*, at paras. 34 and 35.

Control

[21] Mr. Manion testified that the hours of work for both employees and independent contractors were set by the clients. The clients determined when their premises were to be cleaned.

[22] It appears that Mr. White received most of his training in 2007 and 2008 when he was hired as an employee. There was some limited training when he returned in 2009.

[23] Mr. Manion testified that Mr. White was not supervised in the same manner as employees. The employees were supervised by the two supervisors employed by B.A. Sanitation. The supervisors did not supervise the work of Mr. White.

[24] Mr. Manion noted that when Armada began to question the quality of Mr. White's work, he began to visit Armada on a weekly basis to review Mr. White's work. However, Mr. White was not supervised when he physically performed the services at Armada.

[25] I have concluded, based upon the evidence before me, that Mr. White was subject to little or no supervision, particularly when he was cleaning at Armada. This supports a finding of independent contractor.

Tools

[26] A cleaner requires vacuums, mops, buckets and, for certain jobs, a swing machine. Mr. Manion testified that in many instances, the tools were supplied by the client. However, if a client did not supply the tools, then B.A. Sanitation supplied the equipment for employees.

[27] Mr. Manion testified that B.A. Sanitation did not supply the equipment for contractors such as Mr. White. The contractor was required to supply the equipment unless it was supplied by the customer.

[28] Mr. White testified that Armada supplied most of the cleaning equipment and his supplies. As a result, this is not an important factor in this appeal.

[29] However, Mr. Manion testified that he sold a swing machine to Mr. White in consideration for a number of cash payments. Mr. White did not make the payments. Mr. White had no recollection of purchasing the machine. He testified that he borrowed the machine and then returned it when he was finished.

[30] I accept the testimony of Mr. Manion.

[31] Although the ownership of tools is not a critical factor in this appeal, the fact that Mr. White purchased the swing machine from Mr. Manion supports a finding of independent contractor.

Hiring of helpers

[32] Mr. Manion believed that Mr. White retained helpers. He identified one of the helpers as a Mr. Brad Hendricks, the son of Mr. White's then girlfriend.

[33] The Appellant testified that she received a call from Mr. Hendricks' mother asking why her son had not been paid. The Appellant testified that she told Ms. Hendricks that her son was not employed by B.A. Sanitation and, if he was working on the Armada site, then he must be working for Mr. White.

[34] Mr. White testified that Mr. Hendricks did perform cleaning services at Armada. He stated Mr. Hendricks was retained by B.A. Sanitation and that he paid Mr. Hendricks in cash, using funds received from B.A. Sanitation.

[35] There is no evidence before me that B.A. Sanitation made cash payments to Mr. White. Rather, Mr. White was paid by cheque. The cash payments made to Mr. Hendricks were made by Mr. White, not B.A. Sanitation. This strongly supports a finding that Mr. White was an independent contractor.

Risk of Loss

[36] Mr. Manion testified that employees of B.A. Sanitation were paid on an hourly basis. Independent contractors were normally paid a flat-rate based upon the contract with the customer. However, for small jobs the independent contractor would be paid an hourly rate.

[37] The Appellant provided the Court with a number of invoices issued by Mr. White. The invoices for large jobs, including Armada, show a flat-rate charge. This objective evidence supports the testimony of Mr. Manion.

[38] Since Mr. White charged a flat-rate there was a chance for him to increase his profit by efficiently completing the cleaning of Armada facilities. By retaining helpers, Mr. White increased the risk of loss if the job was not completed efficiently.

[39] This factor also favours a finding of independent contractor.

The Intention of the Parties

[40] It is clear from the evidence before me, particularly the one-page contract entered into by Mr. White and B.A. Sanitation, that the parties intended Mr. White to be an independent contractor. This intention is consistent with the manner in which the contractual relationship operated in fact.

[41] The four factors I have considered; control, who supplied the required tools, the hiring of helpers, and the risk of loss, all support a finding of independent contractor.

[42] For the foregoing reasons, the appeal is allowed, without costs. The worker James White performed his services as a person in business on his own account. As a result, he was not engaged in pensionable or insurable employment within the meaning of the *CPP* and the *EI Act*.

D'Arcy J.

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REASONS FOR JUDGMENT BY: The Honourable Justice Steven K. D'Arcy

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DATE OF ORAL REASONS
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APPEARANCES:

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