Dockets: 2013-1440(EI)
2013-1441(CPP)

BETWEEN:

BODY BOOMERS INC.,

appellant,

and

THE MINISTER OF NATIONAL REVENUE,

respondent,

and

DALLAS GUIMOND,

intervenor.

Appeals heard on 28 August 2014, at Toronto, Ontario.

Before: The Honourable Justice Gaston Jorré

Appearances:

Counsel for the appellant:	Steven Pellegrino
Counsel for the respondent:	Stephen Oakey
Agent for the intervenor:	Amy St. Barbe Golberg

JUDGMENT

The appeals are dismissed and the decision made by the Minister of National Revenue on 13 March 2013 under the *Employment Insurance Act* and the *Canada Pension Plan* is confirmed in accordance with the attached reasons for judgment.

Signed at Ottawa, Ontario, this 27th day of April 2015.

"Gaston Jorré"

Jorré J.

Citation: 2015 TCC 102
Date: 20150427
Dockets: 2013-1440(EI)
2013-1441(CPP)

BETWEEN:

BODY BOOMERS INC.,

appellant,

and

THE MINISTER OF NATIONAL REVENUE,

respondent,

and

DALLAS GUIMOND,

intervenor.

REASONS FOR JUDGMENT

Jorré J.

Introduction

[1] The appellant, Body Boomers Inc., appeals from a determination made by the Minister of National Revenue that Dallas Guimond, the worker and intervenor in these appeals, was engaged in insurable employment within the meaning of the *Employment Insurance Act* and pensionable employment within the meaning of the *Canada Pension Plan* during the period from 1 January 2011 to 19 June 2012.

[2] The appellant operated a number of gyms where members of the public could obtain memberships and go to work out. Ms. Guimond's work was in relation to one of those gyms.

[3] There is nothing in these appeals that would lead to a different result in respect of the *Canada Pension Plan* and employment insurance and, as a result, I will limit myself to dealing with the employment insurance appeal.

Law

[4] The dispute in this matter is essentially one of fact. The law in this area is well settled and Justice Campbell of this Court provides a useful summary in the following paragraphs of her decision in the appeal of *Grand Oak Lawn and Landscape v. M.N.R.*:[1]

> 13 The jurisprudence governing the issue in these appeals is well established. Two observations stand out with respect to the caselaw. First, in determining whether an individual is an employee or an independent contractor, there is no one conclusive test that can be applied uniformly to the individual facts of every appeal. Second, the central question in such appeals that must be answered is whether the worker, who is performing the services, is truly a person in business on his own account (*1392644 Ontario Inc. o/a Connor Homes v. Minister of National Revenue*, 2013 FCA 85, ["*Connor Homes*"]).
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> 14 This central question was established in *Market Investigations Ltd. v. Minister of Social Security*, [1968] 3 All ER 732 (QBD) and later adopted by the Federal Court of Appeal in the widely-cited case of *Wiebe Door Services Ltd. v. Minister of National Revenue* (1986), 87 DTC 5025 (FCA) ["*Wiebe Door*"] and then by the Supreme Court of Canada in *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, 2001 SCC 59, [2001] SCJ No. 61. The factors to be canvassed in answering this central question, as set out in *Wiebe Door*, are commonly referred to as the 'four-in-one test'. They are: control over the work, ownership of tools and equipment, the chance of profit and the risk of loss. However, the relative importance accorded to each factor will be dependent upon the facts and circumstances presented in each case. Intention of the parties must also be ascertained and considered in determining the issue (*Royal Winnipeg Ballet v. Minister of National Revenue*, 2006 FCA 87, 2006 DTC 6323).
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> 15 To summarize, in answering the central question in this type of issue, the Court must follow a two-step analysis. First, the intention of the parties must be determined in order to ascertain what type of relationship the parties intended to create. Second, an analysis of the facts of the case must be undertaken to determine if the objective reality reflects that intention. It is in the second step that the *Wiebe Door* factors must be considered. At paragraph 42, Justice Mainville, in *Connor Homes*, summarized the test as follows:
>
> > … The first step of the analysis should always be to determine at the outset the intent of the parties and then, using the prism of that intent, determining in a second step whether the parties' relationship, as reflected in objective reality, is one of employer-employee or of independent contractor. …

[1] 2014 TCC 203.

[5] It must be emphasized that the factors usually referred to in the "four-in-one test" are not an exclusive list of factors to consider.[2] To give but one example, whether or not the individual can hire helpers to assist or replace him is a commonly considered factor.

Facts and Analysis

[6] In this appeal there is a quite dramatic difference as to the facts according to the testimony of the company's witness, Mr. Hotrum, and of the payee, Ms. Guimond.[3]

[7] For example, there is a disagreement as to whether the parties agreed to the payee becoming an independent contractor. Mr. Hotrum produced an agreement, Exhibit R-2; Ms. Guimond was categorical that she never signed any such agreement although she agreed that one of the signatures looked like her signature.

[8] The parties are in agreement that Ms. Guimond started out as an employee of the appellant when she was first hired in the fall of 2008 as a receptionist. She was first hired as a part-time receptionist and later became head receptionist in December 2008.

[9] According to the appellant, her role changed at the end of 2010 and Ms. Guimond became an independent contractor.

[10] Mr. Hotrum produced an agreement, Exhibit R-2, which he says the parties signed; the copy of the agreement was only located the day before the hearing.[4] Ms. Guimond was categorical that she never signed any such agreement although she agreed that one of the signatures kind of looked like her signature.[5]

[11] I would observe that, just because one describes an agreement as a subcontractor agreement, that does not make someone a subcontractor if the terms of the agreement do not in fact correspond to a contract for services.

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[2] See paragraph 48 of *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, 2001 SCC 59.

[3] Ms. Guimond married after the relevant time for this appeal; I shall simply refer to her by her maiden name, Guimond.

[4] Transcript, page 43; it was Mr. Hotrum's testimony that the payee had stolen the original which was kept in a binder at the reception desk.

[5] Transcript, page 107.

[12] Exhibit R-2 is a curious document. It calls itself a subcontractor agreement and it states that Ms. Guimond "understands" that she is a subcontractor and agrees that she is responsible (i) for her own income tax, CPP and EI, (ii) for invoicing the appellant, for her work attire, for her own work materials and work space and for setting her own hours "as needed to accomplish any such work load". The appellant says that it understands that Ms. Guimond is not bound to work solely for the appellant.

[13] Nowhere in the document does Ms. Guimond agree to provide a service or do work and nowhere in the document does the appellant agree to pay for any work or service. There is only an acknowledgment of certain responsibilities by each party that presupposes another agreement that already exists, whether oral or written.

[14] Assuming, without deciding, that the parties agreed to something in late 2010 and that what the parties agreed to is reflected in the agreement dated 16 December 2010[6] filed as Exhibit R-2, that agreement, by itself, constitutes neither a contract of employment nor a contract for services.

[15] As stated succinctly by Fridman in "The Law of Contract in Canada", fifth edition, at page 5: "A contract is a legally recognized agreement between two or more persons, giving rise to obligations that may be enforced in the courts."

[16] If that agreement of December 16th is the totality of the agreement, I can not see what could be enforced; there is no contract. The agreement of December 16th only makes sense if it supplements some other agreement.

[17] It has not been suggested that there was any other written agreement and, as a result, the written agreement of December 16th, assuming the parties entered into that written agreement, could only have meaning if there was an oral contract of employment or an oral contract for services.

[18] At this point it is necessary for me to deal with issues of credibility.

[19] Mr. Hotrum's evidence was vague on many issues and, on a critical matter, rather implausible.

[6] The date is unclear and might be the 10th instead of the 16th.

[20] On the other hand, Ms. Guimond's evidence was clear, consistent and plausible.

[21] Let me give one example of this in relation to the nature of the work done by Ms. Guimond during the period in issue.

[22] Mr. Hotrum described Ms. Guimond's role as, primarily, data entry and some administration such as typing manuals or preparing signs. She was free to "work from anywhere, anytime she wanted to work, as long as the job got done".[7] The company exercised minimal control.

[23] In cross-examination, Mr. Hotrum agreed that during the period in issue Ms. Guimond could have sometimes answered the phone, greeted members, helped sign up new members, entered membership information into the computer system, sold goods at the desk, cleaned cardio equipment, done laundry, trained employees and placed orders with suppliers.[8] Mr. Hotrum commented in respect of some of these tasks that the function was not in her job description, but that, as a former employee, she took it upon herself to do these things.

[24] When asked in more detail about what the administrative and data entry role consisted of, Mr. Hotrum answered inputting memberships, typing manuals, doing up schedules, for example, schedules for Thanksgiving and Christmas, and copying articles when requested. He also said data entry was the most common task; it would be on a daily basis. The example given of this was that, when new members joined, she would enter them into the system, usually, when they joined. Indeed, as I understood the evidence, all or virtually all the data inputting was related to members.

[25] While there was the assertion that the job could be done anytime, anywhere, there was no explanation as to how this could be done. For example, Mr. Hotrum did not suggest that there could be remote access into the appellant's computer and that Ms. Guimond had such remote access.

[26] Ms. Guimond's evidence was that she worked at the gym and that, as a result of the departure of another employee, she continued on with her role of head receptionist and took on some of the tasks of the employee who departed. She also

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[7] Transcript, pages 29 and 30.
[8] Transcript, pages 52 to 54.

got paid more. She testified that normally when someone came in and joined, their information, their data, would be entered immediately.

[27] The arrangement suggested by Mr. Hotrum's evidence is implausible in the context of a gym whereas that of Ms. Guimond's is far more plausible. As a result, I do not accept Mr. Hotrum's evidence when it conflicts with that of Ms. Guimond.

[28] I accept Ms. Guimond's evidence that she did not sign the written agreement of December 16th. However, there is enough in common in the evidence of both witnesses that I accept that Ms. Guimond was told that there would be some sort of change to her status, that she would not receive a T4, that she would have to provide invoices and that she could claim expenses.

[29] Ms. Guimond testified that she had to provide invoices in order to get paid and that, at the time, she did not understand what an independent contractor was.

[30] I would also note that Mr. Hotrum claimed that in filing her tax return Ms. Guimond had claimed expenses. However, his evidence did not disclose any basis on which he could know that, other than by, presumably, making an inference from the following: the appellant did not issue a T4 and had told Ms. Guimond she could claim expenses.

[31] Ms. Guimond's evidence on the point is that, when she went to the person who prepared her taxes, he advised her that, based on the arrangement she described, she could not claim expenses. I also accept her evidence on this point.

[32] The appellant has not convinced me that both parties agreed in late 2010 that Ms. Guimond would cease to be an employee and would become an independent contractor; put differently, I am not satisfied that there was a mutual intention to change from a contract of employment to a contract for services.

[33] I now turn to the examination of the actual conduct of the parties. It is only necessary that I do so briefly.

[34] With respect to control, it is also important to remember that it is the right to control that matters, whether or not the control is actually exercised. In this case, there was clearly control.

[35] For example, Ms. Guimond had to work at hours set by the appellant; see the schedules in Exhibit R-3. While changes could be made, they could only be made

if arrangements were made for someone else to be there, one of the other receptionists. Ms. Guimond never hired someone else to take her place.

[36] Ms. Guimond's work was done at the appellant's premises.

[37] With the exception of the three invoices covering the two Christmas/New Year periods and her final work period, these invoices never went below 88 hours, a 44-hour-per-week average. The invoices were often for over 100 hours and once went up to 114.5 hours. Clearly this was full-time work.

[38] With respect to chance of profit and risk of loss, Ms. Guimond was paid for the hours invoiced every two weeks. She had no expenses of any significance since she worked at the appellant's premises and used the appellant's equipment. She did, however, a minor expense for the cost of the appellant's T-shirts, which she was required to wear. She had no capital investment.

[39] Given this, there could be no risk of loss and, while Ms. Guimond could earn more by working more, there was no possibility of her making a profit by, for example, providing the same services in fewer hours while continuing to receive the same fee.

[40] There is no suggestion that Ms. Guimond provided the same services to someone else apart from the appellant.

[41] Was Ms. Guimond running her own business when she was doing work for the appellant? The answer is very clearly no; she was an employee.

[42] Before concluding, I would add that the objective reality of the relationship of the parties here is such that, even if there had been an intention to create an independent contractor relationship, the result would still have been an employment relationship.

Conclusion

[43] The appeals are dismissed.

Signed at Ottawa, Ontario, this 27th day of April 2015.

"Gaston Jorré"

Jorré J.

CITATION:	2015 TCC 102
COURT FILE NOS.:	2013-1440(EI) 2013-1441(CPP)
STYLE OF CAUSE:	BODY BOOMERS INC. v. M.N.R. and DALLAS GUIMOND
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APPEARANCES:

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