

Docket: 2014-2565(EI)

BETWEEN:

CALVIN DROST,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent,

and

MCHATTEN BUILDERS LTD.,

Intervenor.

Appeal heard on common evidence with the appeal of *Calvin Drost*
2014-2566(CPP) on July 7, 2015, at Fredericton, New Brunswick
Before: The Honourable Justice Valerie Miller

Appearances:

For the Appellant:	The Appellant himself
Counsel for the Respondent:	David Besler
Agent for the Intervenor:	Colleen McHatten

JUDGMENT

The appeal with respect to the decision made under the *Employment Insurance Act* dated April 14, 2014 is allowed and the decision is varied on the basis that the Appellant was an employee when he worked for McHatten Builders Ltd.

Signed at Ottawa, Canada, this 20th day of November 2015.

“V.A. Miller”

V.A. Miller J.

Docket: 2014-2566(CPP)

BETWEEN:

CALVIN DROST,

Appellant,

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THE MINISTER OF NATIONAL REVENUE,

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Appeal heard on common evidence with the appeal of *Calvin Drost*
2014-2565(EI) on July 7, 2015, at Fredericton, New Brunswick

Before: The Honourable Justice Valerie Miller

Appearances:

For the Appellant:	The Appellant himself
Counsel for the Respondent:	David Besler
Agent for the Intervenor:	Colleen McHatten

JUDGMENT

The appeal with respect to the decision made under the *Canada Pension Plan* dated April 14, 2014 is allowed and the decision is varied on the basis that the Appellant was an employee when he worked for McHatten Builders Ltd.

Signed at Ottawa, Canada, this 20th day of November 2015.

“V.A. Miller”

V.A. Miller J.

Citation: 2015TCC291

Date: 20151120

Docket: 2014-2565(EI)

BETWEEN:

CALVIN DROST,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent,

and

MCHATTEN BUILDERS LTD.,

Intervenor,

Docket: 204-2566(CPP)

AND BETWEEN:

CALVIN DROST,

Appellant,

and

MINSTER OF NATIONAL REVENUE,

Respondent,

and

MCHATTEN BUILDERS LTD.,

Intervenor.

REASONS FOR JUDGMENT

V.A. Miller J.

[1] These appeals have been brought under the *Canada Pension Plan* and the *Employment Insurance Act*. The issue in both appeals is whether Mr. Drost was engaged by McHatten Builders Ltd. (“McHatten”) as an employee or an independent contractor.

[2] The Reply in each appeal stated that the period under appeal was January 1, 2012 to December 31, 2012. However, the Replies were in error and the correct period under appeal is November 18, 2012 to September 27, 2013. Both the “Fact –Finding Questionnaire” (Exhibit A-1) tendered by Mr. Drost and the ruling issued by the Canada Revenue Agency (“CRA”) give the period as November 18, 2012 to September 27, 2013.

[3] In 2013, Mr. Drost applied to the CRA for a ruling on the insurability and pensionability of his work relationship with McHatten. By letters dated January 14, 2014, the Rulings Officer advised Mr. Drost and McHatten that Mr. Drost was employed in insurable and pensionable employment with McHatten.

[4] McHatten appealed the ruling and by letter dated April 14, 2014, the Minister of National Revenue (the “Minister”) determined that Mr. Drost was an independent contractor and his employment with McHatten was neither insurable nor pensionable.

[5] The only witnesses at the hearing were Mr. Drost and Colleen McHatten and I have considered that both witnesses were self-interested.

Facts

[6] Colleen McHatten and her spouse, Joe McHatten, each hold 50% of the shares in McHatten. Together they control the day-to-day operations and make all major decisions for the business. McHatten operates a home renovation business which includes the installation of windows, siding, kitchens and bathrooms.

[7] During the period, McHatten received the majority of its contract work from Kent Building Supplies. The procedure was that Kent Building Supplies contracted with various homeowners for renovation work and then it subcontracted the work to various contractors, including McHatten. It is McHatten’s position that it further subcontracted this renovation work to its workers which included Mr. Drost.

[8] Each renovation job required a crew of two to four workers.

[9] Mr. Drost worked for McHatten for a brief period in 2005. He stated that he stopped working for McHatten in 2005 when he lost his driver’s licence and couldn’t travel to the various jobs. He again started to work for McHatten in late 2006 (See transcript page 17) until the end of September 2013. His duties included plumbing, tiling, crack filling, and installing windows, doors and drywall.

Law

[10] In order to determine whether Mr. Drost was engaged as an employee or an independent contractor, the essential question that must be answered is whether he was performing his services as a person in business on his own account: *671122 Ontario Ltd v Sagaz Industries Canada Inc*, [2001] 2 S.C.R. 983 at paragraph 47.

[11] In *1392644 Ontario Inc v Minister of National Revenue*, 2013 FCA 85 (“Connor Homes”), the Federal Court of Appeal stated that there is a two-step test which is to be used when deciding this question. Under the first-step, the Court must determine the subjective intent of each party to the work relationship. The second step of the test is to analyze the work relationship between Mr. Drost and McHatten with a view to ascertaining whether their working relationship was consistent with their intention. The factors from *Wiebe Door Services Ltd v MNR*, [1986] 3 FC 553(FCA) are to be used in this second step of the test. Those factors include control, ownership of tools, chance of profit and risk of loss.

Analysis

Intention

[12] It is clear from Colleen McHatten’s testimony that McHatten intended to engage Mr. Drost as an independent contractor. She stated that McHatten’s contracts required a crew of two to four workers, depending on the job, and all workers, including her son Coty McHatten, were engaged as independent contractors. In support of this intention, McHatten did not withhold source deductions and it filed “Statements of Contract Payments” (T5018) with the CRA for its workers in 2005, 2006, 2008, 2009, 2010, 2011, 2012 and 2013.

[13] Mr. Drost’s intention is not so clear. At the hearing he stated that he intended to be an employee with McHatten. However, I am not persuaded that Mr. Drost held this intention while he worked for McHatten. My hesitancy is based on the following evidence.

[14] Mr. Drost said that prior to working for McHatten, he worked for Renovations Plus as its foreman. He left this position in 2006 to be foreman for McHatten and to run its job sites. I have inferred from this testimony that he was an employee of Renovations Plus in 2006 and he left this employment to become an employee of McHatten in late 2006. However, the evidence showed that in his income tax return for 2006, Mr. Drost reported only business income and no

employment income. He has not filed an income tax return since 2006. I have concluded that Mr. Drost was not an employee with Renovations Plus and when he started to work for McHatten he did not intend to be an employee.

[15] It is my view that both parties intended that Mr. Drost would be an independent contractor.

Wiebe Door Factors

(a) Control

[16] Control has been defined as the “right to direct the manner of doing the work as opposed to whether the right was exercised” by the payer: *Gagnon v Canada (Minister of National Revenue)*, 2007 FCA 33 at paragraph 7. Both witnesses testified that Mr. Drost was not supervised in his duties. Colleen McHatten testified that Mr. Drost was experienced and very skilled. She stated that he could be relied on to perform his duties. Neither witness was asked whether McHatten had the right to direct how Mr. Drost performed his duties. There was no evidence as to whether McHatten had the expertise to direct Mr. Drost in the performance of his duties. In my view, the control test is not useful in the context of this appeal as the evidence failed to address whether control existed.

(b) Hours of Work, Invoices

[17] McHatten, in consultation with the homeowners, determined the hours of work for Mr. Drost and the crew who worked with him. They usually worked from 8:30 or 9 until 5 or 5:30 five days a week. Mr. Drost was expected to be at the job sites during the hours of work. It was important that each job was completed in a timely fashion because the crews were working in a person’s home. As a result, Mr. Drost worked on weekends if a client requested it.

[18] Both witnesses testified that Mr. Drost kept track of his hours of work.

[19] The Minister assumed that Mr. Drost was required to invoice McHatten in order to be paid. It is my view that Mr. Drost did not invoice McHatten for the services he performed. Colleen McHatten submitted documents which she considered to be invoices from Mr. Drost. Some of these documents were “Purchase Orders” and others were “Receipts”. However, there were only two documents which pertained to the period at issue and these were receipts. One showed that Mr. Drost received \$814 from McHatten on September 12, 2013 for

renovations and the other showed that he received \$968 from McHatten on September 5, 2013 for renovations. These were not invoices from Mr. Drost to McHatten for work completed but were receipts which evidenced that McHatten paid amounts to Mr. Drost. Mr. Drost signed that he received these amounts. He denied that he signed the “Purchase Orders” which were submitted into evidence and I believe him. I have concluded that these “Purchase Orders” were prepared by McHatten.

[20] The fact that McHatten determined the hours of work and that Mr. Drost did not invoice McHatten point to Mr. Drost being an employee.

(c) Ownership of Tools

[21] For each job, Mr. Drost provided his own hand tools which included a tape, a square, pencil, utility knife, hammer wrench and a saw. If larger tools were required, they were provided by McHatten.

[22] Mr. Drost owned the tools of the trade which it is reasonable for him to own. This test indicates that he was an independent contractor: *Precision Gutters Ltd v Minister of National Revenue*, 2002 FCA 207 at paragraph 25.

(d) Chance of Profit

[23] In 2006, Mr. Drost received \$18 an hour from McHatten. He stated that he did not negotiate his hourly rate but he received a series of raises so that during 2012 and 2013, he was paid \$22 per hour.

[24] The Minister assumed that Mr. Drost could hire assistants or replacements. However, this assumption was not based on reality. Mr. Drost never hired an assistant and he didn't ask if he could hire an assistant. I have inferred from his evidence that he could not hire an assistant. He stated that if a job required an additional worker, Joe McHatten asked him to recommend another worker and the hourly rate that should be paid to this worker. McHatten then hired and paid the additional worker. This favours the conclusion that Mr. Drost was an employee.

(e) Risk of Loss

[25] The only financial risk which Mr. Drost bore related to his tools and this cost was minor. If work had to be redone, Mr. Drost was paid to do it. The facts relating

to financial risk are more consistent with Mr. Drost being an employee than an independent contractor.

[26] Mr. Drost had his own business card on which he advertised as “Odd Job Services”. It was his evidence that he did work for other people on weekends but this work did not interfere with his duties for McHatten. In today’s economy it is quite normal for people to have a weekend job.

Conclusion

[27] In my view, the objective facts are not consistent with the parties’ intention. I have concluded that Mr. Drost was an employee when he worked with McHatten.

[28] The appeal is allowed.

Signed at Ottawa, Canada, this 20th day of November 2015.

“V.A. Miller”

V.A. Miller J.

CITATION: 2015TCC291
COURT FILE NO.: 2014-2565(EI)
STYLE OF CAUSE: CALVIN DROST AND M.N.R. AND
MCHATTEN BUILDERS LTD.
PLACE OF HEARING: Fredericton, New Brunswick
DATE OF HEARING: July 7, 2015
REASONS FOR JUDGMENT BY: The Honourable Justice Valerie Miller
DATE OF JUDGMENT: November 20, 2015

APPEARANCES:

For the Appellant:	The Appellant himself
Counsel for the Respondent:	David Besler
Agent for the Intervenor:	Colleen McHatten

COUNSEL OF RECORD:

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