Dockets: 2006-2829(EI) and 2006-2830(CPP)

BETWEEN:

REED MARCOTTE,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

Appeals heard together on common evidence on June 13, 2007,
at Kingston, Ontario

Before: The Honourable Justice Wyman W. Webb

Appearances:

For the Appellant:	The Appellant himself
Counsel for the Respondent:	Nicolas Simard

JUDGMENT

The Appellant's appeal from a determination that Christopher English was engaged by the Appellant in insurable employment within the meaning of paragraph 5(1)(a) of the *Employment Insurance Act* and pensionable employment within the meaning of paragraph 6(1)(*a*) of the *Canada Pension Plan* is dismissed, without costs.

Signed at Halifax, Nova Scotia, this 18th day of July 2007.

"Wyman W. Webb"

Webb J.

Citation: 2007TCC386
Date: 20070718
Dockets: 2006-2829(EI) and 2006-2830(CPP)

BETWEEN:

REED MARCOTTE,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

REASONS FOR JUDGMENT

Webb J.

[1] This case deals with the issue of whether Christopher English was an employee of the Appellant or an independent contractor.

[2] The Appellant carried on his general contractor business as a sole proprietor and would perform various tasks for clients. In particular, in 2005 he had a job that required a person to do some landscaping work. He posted a listing on a Human Resources and Development Canada ("HRDC") job bank website for a general labourer for landscaping work. Christopher English responded to that posting and following a telephone discussion between Christopher English and the Appellant, Christopher English started work the following morning at the job site. While the Appellant indicated that it was his practice to hire workers as independent contractors, the Appellant's testimony in relation to the actual discussions that he had with Christopher English at the time that he was engaged, was sketchy.

[3] The question of whether an individual is an employee or an independent contractor has been the subject of several cases. In *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, [2001] S.C.J. 61, 2001 S.C.C. 59, Major J. of the Supreme Court of Canada stated as follows:

46 In my opinion, there is no one conclusive test which can be universally applied to determine whether a person is an employee or an independent contractor. Lord Denning stated in Stevenson Jordan, supra, that it may be impossible to give a precise definition of the distinction (p. 111) and, similarly, Fleming observed that "no single test seems to yield an invariably clear and acceptable answer to the many variables of ever changing employment relations ..." (p. 416). Further, I agree with MacGuigan J.A. in Wiebe Door, at p. 563, citing Atiyah, supra, at p. 38, that what must always occur is a search for the total relationship of the parties:

> [I]t is exceedingly doubtful whether the search for a formula in the nature of a single test for identifying a contract of service any longer serves a useful purpose.... The most that can profitably be done is to examine all the possible factors which have been referred to in these cases as bearing on the nature of the relationship between the parties concerned. Clearly not all of these factors will be relevant in all cases, or have the same weight in all cases. Equally clearly no magic formula can be propounded for determining which factors should, in any given case, be treated as the determining ones.

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.

48 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.

[4] In recent decisions of the Federal Court of Appeal the issue of the intent of the parties has been addressed. In the recent decision of the Federal Court of Appeal in *Combined Insurance Co. of America v. M.N.R.*, 2007 FCA 60, Nadon J.A. of the Federal Court of Appeal stated as follows:

> 35. In my view, the following principles emerge from these decisions:
>
> 1. The relevant facts, including the parties' intent regarding the nature of their contractual relationship, must be looked at in the light of the factors in *Wiebe Door*, *supra*, and in the light of any factor which may prove to be relevant in the particular circumstances of the case;
>
> 2. There is no predetermined way of applying the relevant factors and their importance will depend on the circumstances and the particular facts of the case.
>
> Although as a general rule the control test is of special importance, the tests developed in *Wiebe Door* and *Sagaz*, *supra*, will nevertheless be useful in determining the real nature of his contract.

[5] In this particular case, there is a disagreement between the Appellant and Christopher English with respect to their intent and whether Christopher English was being hired as an employee or as an independent contractor.

[6] The Appellant testified that it was his practice to always have those who worked for him sign an "agreement". A copy of the "agreement" that was signed by Christopher English was introduced as an exhibit. This "agreement" was dated August 24, 2005, approximately two months after Christopher English started to work for the Appellant. The entire "agreement" consists of one paragraph which is as follows:

> As a subcontractor of Reed Marcotte Contracting you must be registered with the Workplace Safety and Insurance Board ("WSIB") with *Personal Insurance*. By signing this waiver you are agreeing to take full responsibility for your health and safety at the workplace.

[7] I find that Christopher English started to work for the Appellant in late June of 2005. At the time that he started there was no discussion of this particular "agreement" being signed. This was not raised by the Appellant until the date that it was signed (August 24, 2005) and was simply presented to the worker one morning to sign. While there is a reference to the person signing being a "subcontractor", in my opinion if this document was to reflect the true intention of both parties that Christopher English would be an independent contractor and not an employee, then this document ought to have expressed this in greater detail and ought to have been discussed and negotiated prior to Christopher English starting to work for the Appellant. To introduce this document approximately two months after Christopher English had commenced work cannot be used to support the intention of both parties at the time that Christopher English started working.

[8] As well, in my opinion, the circumstances surrounding the hiring of Christopher English by the Appellant are also relevant. Since the position that was posted on the HRDC job bank website was for a general labourer for landscaping, any person responding to that would expect to be responding to a posting for a job, i.e., an employment relationship. This expectation combined with a lack of clear discussion between the Appellant and Christopher English at the time that Christopher English was engaged, in my opinion, leads to a conclusion that there was no mutual intent of the parties for Christopher English to be an independent contractor.

[9] In the absence of a mutual intent it is still necessary to look at the other factors as listed by the Federal Court of Appeal in *Wiebe Door Services Ltd. v. M.N.R.*, [1986] 3 F.C. 553, (1986) 70 N.R. 214, 87 DTC 5025, and the Supreme Court of Canada in the *Sagaz* case referred to above.

Control

[10] Christopher English was hired as a general labourer for landscaping. The main job that he worked at initially was the job in Eganville. The hours that he worked were determined by the nature of the work. He understood that since it was landscaping work he would work for as many hours as possible. The tasks that he would perform would be assigned to him from time to time by the Appellant. While the Appellant testified that it was usually the client of the Appellant that would assign the work, Christopher English testified that he had little, if any, contact with the ultimate client. I accept the testimony of Christopher English as the Appellant indicated that he was dealing with several workers and several times it was not clear whether he was talking about his relationship with other workers or

Christopher English in particular. Since Christopher English's recollection with respect to his dealings with the Appellant was more specific, I accept the testimony of Christopher English.

[11] Christopher English also testified, and I accept his testimony, that it was his understanding that while he was working for the Appellant he was not permitted to work for anyone else.

[12] Therefore I find that in relation to the control factor, the control factor supports an employer/employee relationship rather than that of an independent contractor.

Ownership of Equipment

[13] Christopher English testified, and I accept his testimony, that he did not provide any of his own tools. The tools that he used were either provided by the Appellant or by the client of the Appellant. Therefore this factor would suggest an employer-employee relationship and not that of an independent contractor.

Whether the Worker Hires His or Her Own Helpers

[14] Christopher English was hired as a general labourer for landscaping and did not hire any helpers. Although the Appellant testified that Christopher English was free to hire any other person to do his job, this did not happen. As a result this factor is neutral.

Degree of Financial Risk / Opportunity for Profit

[15] In this particular case Christopher English was hired as a general labourer for landscaping and paid by the hour. The Appellant insisted that he submit invoices showing the number of hours that he worked. The position of the Appellant was that this confirmed that he must have been an independent contractor. However, the submission of the documents by Christopher English did not necessarily mean that he was an independent contractor. This would not have been any different than an employee who would submit his time sheet showing the number of hours that the employee worked.

[16] The Appellant indicated that if the worker did not do a job correctly then the worker would have to fix the problem on their own time. However, this again does not necessarily mean that the relationship was that of an independent contractor. If

an employee were to perform a task incorrectly, an employer may also require the employee to fix the problem on their own time.

[17] The only expenses that the Appellant incurred in relation to this work were expenses that an employee would incur – the cost of work clothing, travelling to and from work and any meals that were not provided.

[18] As a result, since Christopher English was simply paid a fixed amount per hour for the number of hours that he worked and since he did not incur any expenses other than those expenses that an employee would incur, the degree of financial risk that he took in this relationship was more akin to that taken by an employee than that taken by an independent contractor.

[19] As noted, the only opportunity for profit was based on the number of hours worked by Christopher English. This is consistent with an employer/employee relationship rather than that of an independent contractor. This is no different than an employee whose paycheque is based on the number of hours that the employee works and therefore employees who are willing to work longer hours will obviously be paid more than those who are not.

The Degree of Responsibility for Investment and Management Held by the Worker

[20] The degree of responsibility for investment and management held by the worker would indicate that the relationship in this case was that of an employer/employee relationship rather than that of an independent contractor. As noted above, the worker was simply hired as a general labourer for landscaping and performed the tasks that were assigned to him and was not responsible for any investment or management duties.

Conclusion

[21] In light of all of the factors and, in particular, the circumstances surrounding the engagement of the worker by posting the job on the HRDC website with limited discussions of the nature of the relationship between the Appellant and Christopher English, I find that in this situation Christopher English was an employee of the Appellant and therefore engaged by the Appellant in insurable employment within the meaning of paragraph 5(1)(a) of the *Employment Insurance Act* and pensionable employment within the meaning of paragraph 6(1)(*a*) of the *Canada Pension Plan.*

[21] As a result the appeal is dismissed, without costs.

Signed at Halifax, Nova Scotia, this 18th day of July 2007.

"Wyman W. Webb"

Webb, J.

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APPEARANCES:

For the Appellant:	The Appellant himself
Counsel for the Respondent:	Nicolas Simard

COUNSEL OF RECORD:

For the Appellant:

Name:	
Firm:	

For the Respondent:	John H. Sims, Q.C. Deputy Attorney General of Canada Ottawa, Canada