Docket: 2004-4371(EI)

BETWEEN:

DIANA WILLIAMS PROMOTIONS LIMITED,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

Appeal heard on common evidence with the appeal of
Diana Williams Promotions Limited (2004-4373(CPP))
on October 3, 2005 at Toronto, Ontario

Before: The Honourable W.E. MacLatchy, Deputy Judge

Appearances:

Agent for the Appellant: Andrew Goodman

Counsel for the Respondent: John Grant

JUDGMENT

The appeal is allowed and the decision of the Minister is varied in accordance with the attached Reasons for Judgment.

Signed at Toronto, Ontario, this 27th day of October 2005.

"W.E. MacLatchy"

MacLatchy, D.J.

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Citation: 2005TCC695
Date: 20051027
Dockets: 2004-4371(EI)
2004-4373(CPP)

BETWEEN:

DIANA WILLIAMS PROMOTIONS LIMITED,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

REASONS FOR JUDGMENT

MacLatchy, D.J.

[1] These appeals were heard on common evidence on October 3, 2005 at Toronto, Ontario.

[2] As a result of a payroll audit, the Trust Examination section of the Toronto Centre Tax Services Office sent a request for a ruling to the CPP/EI Eligibility section of the Scarborough Tax Services Office.

[3] The Rulings Officer, M. Ebanks, determined that Nancy Bota, Dania Thurman and Melanie Groom (the "Workers" or "Talent") were engaged under contracts of service during the period of January 1, 2003 to December 19, 2003.

[4] The Appellant and the Workers were advised of the decision by letter dated December 19, 2003.

[5] The Appellant disagreed with the Rulings Officer's decision and filed an appeal in January 2004.

[6] The Appellant appealed a ruling to the Minister of National Revenue (the "Minister") for the determination of the question of whether or not the Workers were employed in insurable and pensionable employment, while engaged by the Appellant during the period in question, within the meaning of the *Employment Insurance Act* (the "*Act*") and the *Canada Pension Plan* (the "*Plan*").

[7] By letter dated August 20, 2004, the Minister informed the Worker, Nancy Bota and the Appellant that it had been determined that employment insurance premiums and Canada pension plan contributions were not payable since she did not perform any services for the Appellant, during the period in question, pursuant to the *EI Act* and the *Plan*.

[8] Furthermore, the Minister informed the Workers Melanie Groom and Dania Thurman and the Appellant that it had been determined that employment insurance premiums and Canada pension plan contributions were payable since they were engaged by a placement agency, during the period in question, pursuant to paragraph 6(*g*) of the *Employment Insurance Regulations (*the "*EIR*") and subsection 34(1) of the *Plan*.

[9] The Appellant disagreed with the Minister's decision and filed an appeal to this Court on November 16, 2004.

[10] Both Diana Williams, the sole shareholder of the Appellant and Melanie Groom who is part of the Talent pool to be promoted by the Appellant gave clear, straightforward evidence to support the Appellant.

[11] On behalf of the Appellant, Diana Williams stated that the assumptions of facts stated in subparagraphs 12(b) to (t) of the Replies to the Notices of Appeal were essentially correct as follows:

> (b) the Appellant's business is to provide hostesses and spokespeople (the "Talent") to corporate clients (the "Clients") conducting trade shows and corporate functions, in order to promote their businesses;
>
> (c) the Talent engage the Appellant's agency to promote them to corporate clients, and the Appellant act (*sic*) as a promotional agent to find them work on a casual, part time-basis;
>
> (d) the Clients contact the Appellant's agency looking for special Talent to staff a promotion or event;

(e) when a request is received, the Appellant offers the opportunity to its Talent who is free to accept or refuse the assignment;

(f) the Talent performed their assignments under a verbal agreement;

(g) in general, the Talent is paid a minimum of 4 hours for an assignment;

(h) the Clients are invoiced for the hours worked by the Talent plus the agency's fees, by the Appellant;

(i) the Talent is paid when the Appellant receives payment from their Clients;

(j) work was awarded to the Appellant based on written or verbal quotations, which the Appellant provided to their Clients;

(k) the Talent arrived at the assignment, at a particular date and time, with specified wardrobe, hair and makeup;

(l) the duties were described verbally to the Talent and each assignment had a specified start and finish time;

(m) the Talent are normally paid at an hourly rate of pay which varied depending on the assignment;

(n) the Talent were normally paid by cheque from the Appellant, after the Appellant received the funds from the Clients;

(o) the Talent were not paid vacation pay, neither were entitled to paid vacation;

(p) the Talent hours and days of the week worked varied, depending of the assignment;

(q) the Clients determined the Talent's hours of work;

(r) the Talent reported their hours of work to the Appellant, after each assignment, who in turn invoiced the Client;

(s) if the Talent was unable to attend an accepted assignment, she would report to the Appellant, who in turn would notify the Client;

(t) the Talent had to provide the services personally;

[12] The remaining assumptions were at issue.

[13] The issue before the Court is whether the Talent were employed in insurable and pensionable employment during the period in question, within the meaning of paragraph 6(*g*) of the *EIR* and subsection 34(1) of the *Plan*.

[14] Essentially, the first area of argument between the parties was whether the Appellant was a placement or employment agency. The Appellant holds itself out as a "promotional agency" and not an employment agency. The Appellant has a pool of Talent that has come to it to have the Appellant provide them with extra and part-time work. The Appellant prepares brochures and Web sites to show off the Talent, who pay her to include them in such promotional endeavours. Clients contact the Appellant for Talent to staff trade shows, corporate functions or other specific events. They do not want another employee, as such, but to have particular skills for a specific event and then to have no further connection to the Talent. The Appellant, being advised of the needs of the clients, then selects the persons with the talent to perform at the particular event and offers the Talent members the opportunity to accept or refuse the assignment. The Appellant and the Talent agree to a per hour performance rate and the client is invoiced for an hourly rate that includes the Appellant's fee. The Talent is advised what the assignment is about, given a scenario (when appropriate) to follow, provided with costumes (as necessary) by the client, etc. The Talent attends the event, performs or attends and uses their skills as expected. The Talent invoices the Appellant but is not paid until the Appellant receives payment from the client. There is no direction or control by the client over the Talent or by the Appellant as the Talent is selected for his or her skills, physical attributes and innate ability to perform for the particular event. In some instances, the Appellant might have a supervisor in place if a large number of such Talent is required for an event for logistical purposes only.

[15] The question then arises whether there is a contract of service or contract for services between the Appellant and the Talent. The contract between those parties is verbal and is for a particular assignment. The question of control is of little importance when the Talent has skills or attributes which they control and exercise by themselves. They are told what is expected for the event and are then left to perform using their own skills or attributes.

[16] The Talent provides his or her own clothing or props, as the assignment would expect unless a specific costume is needed such as "the energizer bunny" type, which is supplied by the client. Thus, the tools test is of little or no value.

[17] The chance of profit and risk of loss is of doubtful value as well because the work performed by the Talent is only part-time and would depend on the number of assignments the Talent could perform or not, as he or she may decide.

[18] The integration test is more helpful as the Talent run their own business and believe they are independant contractors. The evidence of Melanie Groom supported these conclusions. She indicated she paid her own expenses whatever they were unless the client supplied these items as a "perk" such as parking or food, which was not common. She was able to choose an assignment or refuse it as she wished depending on its timing or hourly rate. She could work for others as she chose and could carry on other assignments so long as there were no conflicts in timing. She was not supervised nor directed because she performed as the needs for her skills were required. She could be a "Barbie" or a "greetor" or "spokesperson" with a scenario to memorize as the assignment dictates.

[19] The intention of the parties must be examined to flush out the real relationship between the Appellant and the Talent. The evidence clearly showed that both parties believed they were operating their own businesses, separate and apart from each other. The Talent had specific skills, talent or physical or mental attributes that he or she controlled and that produced his or her livelihood. Ms. Groom never saw herself as an employee but went to the Appellant to promote and fully use her skills and attributes to the greatest extent possible. The Appellant wanted a supply of Talent to provide it with depth for clients' needs. But for further clarity it was made abundantly clear by both witnesses that no payment for services was to be paid until the Appellant received payment from the client. That payment was for the hours performed by the Talent with the Appellant's commission added on top. The "conduit" explanation seems to fit in these circumstances. The Appellant deducted its commission or fee and remitted the balance to the Talent as invoiced.

[20] For the above reasons, this Court finds that the Appellant is not a placement agency and is merely a conduit for the monies to flow through to the Talent who have performed as needed in the circumstances. Further, the Court finds that the Talent were independent contractors and operated pursuant to verbal contracts for services and are not insurable nor pensionable within the meaning of the *EI Act* and the *Plan.*

[21] The Court allows the appeals accordingly.

Signed at Toronto, Ontario, this 27th day of October 2005.

"W.E. MacLatchy"

MacLatchy, D.J.

CITATION:	2005TCC695
COURT FILE NO.:	2004-4371(EI) and 2004-4373(CPP)
STYLE OF CAUSE:	Diana Williams Promotions Limited and M.N.R.
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	October 3, 2005
REASONS FOR JUDGEMENT BY:	The Honourable W.E. MacLatchy, Deputy Judge
DATE OF JUDGMENT:	October 27, 2005

APPEARANCES:

Agent for the Appellant:	Andrew Goodman
Counsel for the Respondent:	John Grant

COUNSEL OF RECORD:

For the Appellant:

Name:

Firm:

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