Docket: 2009-2409(EI)

BETWEEN:

HAROLD ISAAC OP SUNRISE ELECTRICAL,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

Appeal heard on common evidence with the appeal of
Harold Isaac OP Sunrise Electrical (2009-2410(CPP)), on March 23 and 26, 2010,
at Kelowna, British Columbia.

Before: The Honourable Justice Patrick Boyle

Appearances:

Agent for the appellant:	Harold David Isaac
Counsel for the respondent:	Matthew Canzer Amandeep Sandhu

JUDGMENT

The appeal under the *Employment Insurance Act* is dismissed in accordance with the Reasons for Judgment attached hereto.

Costs in the amount of $250 shall be payable by the appellant in favour of the respondent.

Signed at Ottawa, Canada, this 3rd day of May 2010.

"Patrick Boyle"

Boyle J.

Docket: 2009-2410(CPP)

BETWEEN:

HAROLD ISAAC OP SUNRISE ELECTRICAL,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

Appeal heard on common evidence with the appeal of
Harold Isaac OP Sunrise Electrical (2009-2409(EI)), on March 23 and 26, 2010,
at Kelowna, British Columbia.

Before: The Honourable Justice Patrick Boyle

Appearances:

Agent for the appellant:	Harold David Isaac
Counsel for the respondent:	Matthew Canzer Amandeep Sandhu

JUDGMENT

The appeal under the *Canada Pension Plan* is dismissed in accordance with the Reasons for Judgment attached hereto.

Signed at Ottawa, Canada, this 3rd day of May 2010.

"Patrick Boyle"

Boyle J.

Citation: 2010 TCC 225
Date: 20100503
Dockets: 2009-2409(EI)
2009-2410(CPP)

BETWEEN:

HAROLD ISAAC OP SUNRISE ELECTRICAL,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

REASONS FOR JUDGMENT

Boyle J.

[1] Mr. Harold Isaac, who operates as Sunrise Electrical in the Vernon British Columbia area, has appealed from rulings and assessments made under the Employment Insurance ("EI") and Canada Pension Plan ("CPP") legislation in respect of the paid work done for him by Justen Kitchener in 2008 as an apprentice electrician.

I. The Motion for Adjournment

[2] These matters were set down to be heard on Tuesday, March 23 in Kelowna. At the opening of Court Mr. Isaac asked for an adjournment of the trial in order to better prepare given that he had only just received a copy of Exhibit A-10, the Canada Revenue Agency Report on an Appeal, which described why his appeal to the Canada Revenue Agency ("CRA") of the rulings and assessments were not allowed. The Court gave Mr. Isaac an adjournment of more than 45 minutes to review the five-page document and advise the Court if and why he felt any further delay was needed to allow him to prepare differently.

[3] The document made it clear that the CRA had obtained virtually all of its information from Mr. Kitchener and that Mr. Isaac had not replied to any of its queries by telephone, mail and registered mail.

[4] Following that adjournment, Mr. Isaac maintained that he would need an adjournment until later in the week to even assess if there was anything in the document that required him to need more time to prepare. The Court advised Mr. Isaac it did not feel he was entitled to a further adjournment but was prepared to defer hearing the case until the afternoon, almost two hours later. The Court advised Mr. Isaac that it would instead be prepared to consider his request for an adjournment until Friday, March 26 provided there was no prejudice that could not be compensated in a costs award against him. His appeals were the only matters before the Court on Tuesday. They would be the only matters before the Court on Friday. Thus, the judge, registrar, court reporter and Crown counsel would be engaged a further day solely because of his adjournment request. The Crown had subpoenaed Mr. Kitchener to attend on Tuesday requiring him to miss work and this young man would need to miss another day's paid work to attend on Friday to accommodate Mr. Isaac's request for a further adjournment to allow him more time to prepare. The Court advised Mr. Isaac that, if he wanted a three-day adjournment instead of a two-hour adjournment, the Court would be ordering costs payable by him to the respondent in the amount of $250, one-half of which I would order the Crown to pay to Mr. Kitchener in compensation for a further lost day of work.

[5] After a further adjournment to consider his options, Mr. Isaac indicated he wanted the matter adjourned until Friday upon those terms.

II. The Evidence at the Trial

[6] Mr. Kitchener and Mr. Isaac testified on Friday.

[7] Mr. Kitchener is an honest and forthright young man and I accept his testimony in its entirety.

[8] Mr. Kitchener was 19 at the relevant time, in the early stages of completing his required training and apprenticeship in order to become a certified journeyman electrician. He had been laid off due to a shortage of work by his previous electrical contractor employer after having completed about one-third of his needed apprenticeship hours. His previous employer helped arrange the work opportunity for him with Mr. Isaac's Sunrise Electrical.

[9] When he was hired by Mr. Isaac, he was told he would be paid by Mr. Isaac with a personal cheque at the agreed rate of $15 per hour worked and that there would be no taxes withheld which meant he would be responsible for that. The specific issue of whether this was to be employment or a contract for services or an independent contractor relationship was not discussed.

[10] Mr. Kitchener understood that, as an apprentice, he could not carry on business independently and was required to be an employee. He understood that only journeyman electricians could carry on business independently. He considered himself to be an employee. Mr. Kitchener was not asked how he accounted for his taxes and that is not before the Court in these appeals.

[11] Mr. Kitchener was only able to, and only did work together with a certified journeyman electrician during his apprenticeship stage. Most of the time he worked with a journeyman electrician who worked for Mr. Isaac's Sunrise Electrical but on occasion he worked with Mr. Isaac. He was not able to and did not work alone on a job site before, during or after regular work hours.

[12] Mr. Kitchener worked between the hours of 7 a.m. and 3 p.m., Mondays through Fridays. He did not work these hours each day throughout each week of the period in question but those were the Sunrise Electrical working hours. During the period Mr. Kitchener worked 808 hours in a fully supervised capacity which qualified toward his certificate apprenticeship requirements. There was no evidence Mr. Kitchener worked for anyone else during this time nor that he tried to.

[13] Mr. Kitchener usually reported to work at the worksite of the Sunrise Electrical customer at which Mr. Isaac or the other journeyman was working. Occasionally, he was taken to the worksite by the other journeyman. He never worked alone on an unsupervised basis.

[14] The work he did for Sunrise Electrical was similar to the work and terms of his previous employment.

[15] Mr. Kitchener provided his own work boots, safety hat, pliers and screwdrivers. The other tools and supplies, including ladders and power tools needed for Sunrise Electrical's commercial and residential customers, were provided by Mr. Isaac. Mr. Kitchener did not pay anything for the use of Sunrise Electrical's equipment.

[16] Mr. Kitchener signed time sheets and was paid each Friday by cheque at the negotiated agreed rate of $15 an hour for each hour recorded. The rate increased by a dollar an hour near the end of the period. There were no other amounts charged or paid nor did Mr. Kitchener submit invoices. Mr. Kitchener had no other financial investment, participation or incentive than his set hourly wage. His only financial risk was if Mr. Isaac did not or could not pay him on Friday which never happened. Mr. Kitchener was paid for each hour worked even if the time exceeded the time allotted for the task.

[17] In order to qualify towards his certification apprenticeship requirements, Mr. Kitchener had to do the work himself.

[18] Mr. Kitchener never had any say in settling the terms of service or arrangements with the paying customers, including scheduling when their work would get attended to.

[19] There was no written agreement and Mr. Kitchener has yet to submit his 808 hours worked for Mr. Isaac for credit towards his certification but it remains his intention to do so. Presumably this will involve some paperwork which will require Mr. Isaac's signature.

[20] The Court was not told why Mr. Kitchener's work for Mr. Isaac came to an end. When it did, Mr. Kitchener applied for EI and at that time inquired whether his work at Sunrise Electrical qualified towards his EI entitlement and benefits. Based upon the information provided by him, and based upon Mr. Isaac's refusal to respond to inquiries, it was ruled that it did.

[21] Mr. Kitchener and Mr. Isaac agreed that the total hours worked were 808 hours. Their evidence was also consistent on the total amount paid.

[22] Mr. Isaac also testified. I must begin by saying I found that he was often unhelpful in his direct testimony and, in cross-examination and in answering the Court's requested clarifications, he was often evasive, argumentative and generally dodging, bobbing and weaving. By way of example, he insisted he was not carrying on a business and that Sunrise Electrical was not a trade name. He said he was merely engaged in a non-business personal endeavour of providing electrical services to others who paid him for service and that these people identified his activities as Sunrise Electrical. He also changed his answer three times in one breath as to whether he reported the revenues of his personal endeavour for tax purposes. His answers on whether the people who hired him paid him for his services were also

progressive. His behaviour, demeanour and answers compel me to reject his testimony wherever it departs from the testimony of Mr. Kitchener or the other evidence. It also causes me to doubt the totality of his evidence since I take it as compelling evidence that Mr. Isaac does not value truthfulness. While the saying "the truth, the whole truth and nothing but the truth" may seem redundant in the case of most Canadians, it appears that Mr. Isaac chooses to be Clintonesque and goes to great lengths to parse ordinary words and rationalize things away by defining words uniquely. Mr. Isaac struck me as a man in complete charge of his faculties and his irrational testimony on these and other points, and his attempts to rationalize things, leads to no other conclusion.

[23] In addition to casting doubt on all of his testimony, it occurs to me that EI and CPP assessments in respect of Mr. Kitchener may prove to be the least of Mr. Isaac's issues with the CRA. According to one of the documents he put into evidence, he has not been filing income tax returns or GST returns as required for years. However, those questions are not before the Court in these appeals.

[24] Mr. Isaac did acknowledge in cross-examination that his endeavour's insurance extended to the work performed for him by Mr. Kitchener.

III. Law, Analysis and Conclusion

[25] The facts and evidence in this case leave me with no doubt that Mr. Kitchener was engaged by Mr. Isaac in insurable employment for EI purposes and in pensionable employment for CPP purposes.

[26] The tests for a contract of service / employment versus a contract for services / independent contractor are well settled. The issue of employee versus independent contractor for purposes of the definitions of pensionable employment and insurable employment are to be resolved by determining whether the individual is truly operating a business on his or her own account. This is the question set out by the British courts in *Market Investigations, Ltd. v. Minister of Social Security,* [1968] 3 All E.R. 732 (Q.B.D.), approved by the Federal Court of Appeal in *Wiebe Door Services Ltd. v. M.N.R.*, 87 DTC 5025, for purposes of the Canadian definitions of insurable employment and pensionable employment, and adopted by the Supreme Court of Canada in *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, 2001 SCC 59, [2001] 2 S.C.R. 983. This question is to be decided having regard to all of the relevant circumstances and having regard to a number of criteria or useful guidelines including: 1) the intent of the parties; 2) control over the work; 3)

ownership of tools; 4) chance of profit / risk of loss and 5) what has been referred to as the business integration, association or entrepreneur criteria. There is no predetermined way of applying the relevant factors and their relative importance and their relevance will depend upon the particular facts and circumstances of each case.

[27] The decision of the Federal Court of Appeal in *The Royal Winnipeg Ballet v. M.N.R.*, 2006 FCA 87, 2006 DTC 6323, highlights the particular importance of the parties' intentions and the control criterion in these determinations. This is consistent with the Federal Court of Appeal's later decisions in such cases as *National Capital Outaouais Ski Team v. Canada (The Minister of National Revenue)*, 2008 FCA 132, *Combined Insurance Company of America v. Canada (The Minister of National Revenue)*, 2007 FCA 60, and *City Water International Inc. v. Canada (The Minister of National Revenue)*, 2006 FCA 350. The Reasons of this Court in *Vida Wellness Corporation (Vida Wellness Spa) v. M.N.R.*, 2006 TCC 534, also provide a helpful summary of the significance of the Royal Winnipeg Ballet decision.

[28] In this case the degree of supervision and control over the work done by Mr. Kitchener, and the fact that such supervision and control is mandated in the case of apprentices, compellingly points in favour of employment and not independent contractor status.

[29] Similarly, the complete absence of any financial upside or downside makes Mr. Kitchener appear to be a typical wage-earning employee.

[30] The tools necessary to get the job done were in large measure provided by Mr. Isaac. While that is far from determinative, it is entirely consistent with the relationship being one of employment and, combined with the other considerations, leans somewhat in this case towards employment.

[31] The intention of the parties is not a helpful factor in a case such as this where there was no shared common intention at the outset or during the work period.

[32] None of the factors or considerations leans in favour of an independent contractor relationship.

[33] Overall, Mr. Kitchener would not be considered by anyone, as a matter of law or in common parlance, to be in business for himself while working as an apprentice under the constant supervision of qualified electricians at Sunrise Electrical. The Court finds that Mr. Kitchener was engaged in insurable employment for EI purposes and in pensionable employment for CPP purposes by virtue of being employed under

a contract of service. Further, the Court finds that Mr. Kitchener was engaged in insurable employment for EI purposes by virtue of him having been employed under a contract of apprenticeship within the meaning of that term in paragraph 5(1)(*a*) of the *Employment Insurance Act* as applied by this Court in *Eastern Ontario Health Unit v. M.N.R.*, [2002] T.C.J. No. 170, and *Charron v. M.N.R.*, [1994] T.C.J. No. 47.

[34] It appears to the Court that Mr. Kitchener may have been concerned that, depending upon the outcome of these appeals or his testimony, he might not be able to get credit for his 808 hours worked for Mr. Isaac's Sunrise Electrical towards his certification apprenticeship requirements. This Court can state categorically that it is entirely satisfied that Mr. Kitchener did work 808 hours under the supervision of a journeyman electrician in his period at Sunrise Electrical. Mr. Isaac did not dispute the 808 hours and, according to the evidence, he was the source of that total hours worked number. I am hopeful that, if the matter is ever questioned, Mr. Kitchener will get full credit for these hours apprenticeship worked towards his certification requirements.

IV. Disposition

[35] The appeals are dismissed.

[36] This Court does not have general authority to award costs in an EI or CPP appeal and the respondent did not ask for costs in respect of the trial on an extraordinary basis. The Court makes no further order of costs in respect of the hearing of the appeals.

[37] The appellant is ordered to pay $250 costs to the Crown in respect of his motion for adjournment to reflect the many costs thrown away to accommodate his requested delay. While this Court is not given a general power to award costs against a party in the EI and CPP legislation, the Federal Court of Appeal has confirmed in *Fournier v. Canada*, 2005 FCA 131, [2006] G.S.T.C. 52, that, even absent such a general power, the Tax Court of Canada has the inherent jurisdiction to award costs in appropriate circumstances to regulate its process.

Signed at Ottawa, Canada, this 3rd day of May 2010.

"Patrick Boyle"

Boyle J.

CITATION:	2010 TCC 225
COURT FILE NOS.:	2009-2409(EI), 2009-2410(CPP)
STYLE OF CAUSE:	HAROLD ISAAC OP SUNRISE ELECTRICAL v. THE MINISTER OF NATIONAL REVENUE
PLACE OF HEARING:	Kelowna, British Columbia
DATES OF HEARING:	March 23 and 26, 2010
REASONS FOR JUDGMENT BY:	The Honourable Justice Patrick Boyle
DATE OF JUDGMENT:	May 3, 2010

APPEARANCES:

Agent for the appellant:	Harold David Isaac
Counsel for the respondent:	Matthew Canzer Amandeep Sandhu

COUNSEL OF RECORD:

For the appellant:

Name:	
Firm:	

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