Docket: 2010-3627(EI)

BETWEEN:

NORMAN MURCHESON,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent,

and

D & D DELIVERY SERVICE LTD.,

Intervenor.

Appeal heard on April 29, 2011, at Vancouver, British Columbia

Before: The Honourable Justice G. A. Sheridan

Appearances:

Counsel for the Appellant:	Rolf Harrison
Counsel for the Respondent:	Whitney Dunn
Agent for the Intervenor:	Dorothy Kavadias

JUDGMENT

The appeal from the decision made under the *Employment Insurance Act* for the period January 15, 2009 to February 26, 2010 is dismissed and the decision of the Minister of National Revenue is confirmed.

Signed at Ottawa, Canada, this 18th day of May 2011.

"G. A. Sheridan"

Sheridan J.

Citation: 2011TCC266
Date: 20110518
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BETWEEN:

NORMAN MURCHESON,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent,

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D & D DELIVERY SERVICE LTD.,

Intervenor.

REASONS FOR JUDGMENT

Sheridan J.

[1] The Appellant, Norman Murcheson, is appealing the determination of the Minister of National Revenue that work performed for D & D Delivery Service Ltd. during the period January 15, 2009 to February 26, 2010 (the "Period") was not insurable employment under paragraph 5(1)(*a*) of the *Employment Insurance Act.*

[2] Mr. Murcheson testified at the hearing. The Payor, D & D Delivery Service Ltd., intervened in the appeal to take the same position as the Minister. D & D Delivery Service Ltd. was represented by its principal, Dorothy Kavadias, who also testified at the hearing. Both witnesses were credible. As counsel for the Appellant correctly pointed out, however, it is not so much the facts as their interpretation that is at issue in this appeal.

[3] In determining that the Appellant was an independent contractor and therefore, not engaged in insurable employment, the Minister relied on the assumptions of fact set out in paragraph 8 of the Amended Reply to the Notice of Appeal:

a. the Payor was in the business of mail and parcel delivery service in Nanaimo, British Columbia;

b. the Payor had a contract with Canada Post Corporation for the delivery of commercial parcels, regular residential mail pick up and delivery;

c. the Payor's sole shareholder was Dorothy Kavadias;

d. prior to the Period, the Appellant was employed as a manager of the Payor's business;

e. the Appellant had been employed by the previous owner when the Payor took over the Contract with Canada Post in November of 2006;

f. prior to the Period, the Appellant managed the Payor's delivery drivers, deal with route issues and delivery issues, and to be the liaison between the Payor and the Canada Post;

g. during the Period, the Appellant was classified as an owner/operator by the Payor;

h. as an owner/operator the Appellant was a member of the Canadian Auto Workers Union;

i. the Appellant and the Payor entered into a written agreement which set out the terms of the position;

j. during the Period, the Appellant's duties were to be at the distribution centre at 6:30 a.m. to start loading his van and was required to be back at the centre by 9:20 a.m. to pick up the mail bags and take them to the carriers;

k. Canada Post set the routes and times schedules and neither the Payor or the Appellant had control over this aspect of the job;

l. the Appellant was required to provide a van, cell phone, clipboard and pens;

m. the Appellant was paid on a piece work, commission basis at the rate of 75% on his deliveries;

n. the Appellant leased his van from the Payor;

o. the Appellant paid the insurance on the van;

p. the Appellant was required to have his own WCB number for coverage under the plan;

q. the Appellant was responsible for the fuel costs in addition to the repairs and maintenance on the van;

r. the Payor did not make source deductions for the Appellant's remuneration during the Period;

s. the Appellant did not receive any benefits from the Payor during the Period;

t. the Appellant's hours were not recorded;

u. the Appellant was not supervised;

v. the Appellant could hire a replacement worker or a helper if he chose to;

w. the Appellant was not paid any vacation pay or statutory holiday pay;

x. the Appellant has not filed tax returns since 2005;

y. under the terms of the written agreement, the Appellant was required to provide a qualified relief driver when the owner/operator is absent or on leave; and

z. the Appellant's tenure with the Payor ended when the business was sold and the contract with Canada Post was cancelled on February 26, 2010.

[4] Of the above assumptions, the Appellant took particular issue with subparagraphs (g), (i), (n), (o), (u) and (y), which are considered below. The gist of the Appellant's challenge to these assumptions is that while, technically, he may have been an owner/operator driver, the nature of his work and the terms upon which it was performed did not, in fact, differ from that of the other drivers who were hired as employees. Thus, his work for D & D Delivery Service Ltd. during the period ought to be insurable.

Analysis

[5] Turning first to assumptions (i) and (y), I accept the Appellant's contention that there was no written agreement between him and D & D Delivery Service Ltd. That does not, however, materially change anything in this appeal as I am satisfied that after some negotiation, the parties reached an oral agreement that he would take on Route CUS6 as an owner/operator as assumed in subparagraph (g).

[6] Because of his former employment as the manager of D & D Delivery Service Ltd., the Appellant was aware that, at least in theory, Route CUS6 was more

profitable than the other routes because of its location in Nanaimo's downtown core: the deliveries were concentrated in a small area typically requiring a greater number of deliveries thus allowing a driver to increase earnings while minimizing delivery vehicle expenses. After some time on that route, however, the Appellant concluded that he could have made more money under the terms offered to employee drivers. Even though as an owner/operator his commission per piece delivered was 75% rather than the 50% commission paid to employee drivers, they had no expenses. The Appellant found that the costs he incurred for fuel, repair and maintenance, insurance and the delivery van lease payments cut deeply into his earnings[1] leaving him worse off than his employee counterparts.

[7] The Appellant testified that while he may have been hired as an owner/operator, he felt he had no choice but to accept D & D Delivery Service Ltd.'s conditions. I find more likely, however, Ms. Kavadias's version of events: that based on his observations as manager of the company, the Appellant approached her about taking on Route CUS6 as an owner/operator, a proposal which fit perfectly with the company's expectations for that route. I also accept her evidence that the additional 25% commission paid to owner/operators was intended to take into account the fact that they, unlike employee drivers, had to cover their own expenses and tax obligations.

[8] The Appellant's obligation to pay for insurance and the van lease are dealt with in assumptions (n) and (o). Although he admitted that D & D Delivery Service Ltd. deducted an amount monthly for "lease of the van", the Appellant denied that he was the lessee of that vehicle because it was in the name of D & D Delivery Service Ltd. and the company was responsible for the payments. I accept, however, Ms. Kavadias's evidence that notwithstanding the legal structure employed, the reality was that the Appellant and D & D Delivery Service Ltd. had agreed that the company would sublease the van to him and that when the lease had been paid, he would become the legal owner of the van. Furthermore, I do not doubt her evidence that had he so chosen, the Appellant could have received his full pay and then remitted a cheque back to D & D Delivery Service Ltd. for the lease payment; absent such a request, it made sense simply to deduct the amount at source. Nor does the fact that the lease was ultimately terminated for reasons not relevant to this appeal change the fact of his sub-lessee status during the Period. As for the insurance, while coverage was provided through the company, the Appellant was shown as an owner/operator and could have obtained coverage for other work he might have taken on by providing to the insurer the information necessary for the amendment of the policy.

[1] Exhibit A-1, Tab 1.

This option was not available to employee drivers who were prohibited from using D & D Delivery Service Ltd. vans for anything other than company purposes.

[9] I agree with counsel for the Appellant that given the nature of the Appellant's work, the factor of "control" under the four-fold test established in *671122 Ontario Ltd. v. Sagaz Industries Canada Inc*., [2001] 4 C.T.C. 139 (S.C.C.) is essentially neutral. The Appellant was able to plan how he made the deliveries as long as he met the deadlines imposed equally upon him and D & D Delivery Service Ltd. by the third party client, Canada Post. While the Appellant testified that contrary to assumption (u), he had been supervised by one Teri Smith (citing as an example one occasion where Ms. Smith spoke to him about certain missed deliveries), it seems to me her comments were more in the nature of passing on a client complaint than a reprimand from employer to employee.

[10] Another aspect of *Sagaz* is the worker's chance to profit and risk of loss in respect of the work done. Here, as the owner/operator of the leased vehicle, the Appellant had the right to perform delivery services for other clients and to use the leased van for that purpose. Indeed, he took on an optional delivery service for Canada Post picking up the mail deposited in letter boxes during the day and returning them to headquarters in the evening. The Appellant testified he did this to try to make ends meet – no fault in that and I commend him for his work ethic. But that does not put him on an equal footing with the employee drivers whose duties and capacity to use company equipment were confined to their employment.

[11] In all the circumstances, it seems to me that what the Appellant is really trying to do is to recharacterize the nature of the work originally agreed to because he later came to feel he had made a bad bargain. While I can appreciate his disappointment in finding Route CUS6 less profitable than expected, that does not justify interfering with the Minister's determination of his status as an independent contractor; accordingly, the appeal must be dismissed.

Signed at Ottawa, Canada, this 18th day of May 2011.

"G. A. Sheridan"

Sheridan J.

CITATION:	2011TCC266
COURT FILE NO.:	2010-3627(EI)
STYLE OF CAUSE:	NORMAN MURCHESON AND M.N.R. AND D & D DELIVERY SERVICE LTD.
PLACE OF HEARING:	Vancouver, British Columbia
DATE OF HEARING:	April 29, 2011
REASONS FOR JUDGMENT BY:	The Honourable Justice G. A. Sheridan
DATE OF JUDGMENT:	May 18, 2011

APPEARANCES:

Counsel for the Appellant:	Rolf Harrison
Counsel for the Respondent:	Whitney Dunn
Agent for the Intervenor:	Dorothy Kavadias

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