Docket: 2009-911(EI)

BETWEEN:

A & T TIRE & WHEEL LIMITED,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent,

and

JUSTIN BUNN,

Intervener.

Appeal heard on common evidence with the appeal of
A & T Tire & Wheel Limited (2009-912(CPP))
on November 26 and 27, 2009 at Toronto, Ontario

Before: The Honourable N. Weisman, Deputy Judge

Appearances:

Counsel for the Appellant:	Leigh Somerville Taylor
Counsel for the Respondent:	Thang Trieu
For the Intervener:	The Intervener himself

JUDGMENT

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

Signed at Toronto, Ontario, this 24th day of December 2009.

"N. Weisman"

Weisman D.J.

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"N. Weisman"

Weisman D.J.

Citation: 2009 TCC 640
Date: 20091224
Dockets: 2009-911(EI)
2009-912(CPP)

BETWEEN:

A & T TIRE & WHEEL LIMITED,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent,

and

JUSTIN BUNN,

Intervener.

REASONS FOR JUDGMENT

Weisman D.J.

[1] When he was eighteen years of age, Justin Bunn ("Justin") dropped out of high school and went to work for A & T Tire and Wheel Limited (the "Appellant") which was in the business of selling, installing, and repairing wheels and tires. Justin worked on the Appellant's premises from August 29, 2006 into September of 2008. The relationship ended abruptly when Justin telephoned the Appellant's offices one morning and informed them that he was not coming in to work any more.

[2] The Respondent Minister of National Revenue (the "Minister") concluded that Justin was employed by the Appellant under a contract of service during the period under review, and assessed the Appellant for outstanding unemployment insurance premiums and Canada Pension Plan contributions accordingly. The Appellant now appeals those assessments on the grounds that, at all material times Justin was an independent contractor. Justin has intervened in the proceedings.

[3] When Justin first reported for work, he had no prior experience in working with tires. As a matter of fact, he did not then know what a wrench was. He was

offered automobile repair shops in high school, but chose to skip the classes. Accordingly, his working time was originally occupied with cleaning up the Appellant's shop, sweeping the floors, clearing snow, painting the premises, taking out the garbage, and sorting tires.

[4] The Appellant's President, Mr. Dan Smith ("Smith"), and its manager, Mr. Michael Young ("Young"), found Justin to be a likeable and hard-working youngster, so they embarked upon an on-the-job training program whereby Justin would learn the trade by observing the Appellant's experienced workers, and by receiving practical tips from Smith and Young.

[5] After a month or so, Justin progressed to the point where he became adept at grinding wheel rims and installing tires on motor vehicles. At no time during his two year association with the Appellant, however, was he ever entrusted with the more complicated, delicate, or heavier tasks involved in working on tires with chrome rims, reverse mounts, heavy construction equipment tires, or those on "high profile" vehicles which could cost as much as $5,000.00 apiece.

[6] In order to resolve the issue before the Court, the total relationship of the parties and the combined force of the whole scheme of operations must be considered.[1] To this end, the evidence in this matter must be subjected to the four-in-one test laid down as points of reference[2] by Lord Wright in *Montreal City* and adopted by MacGuigan J.A. in *Wiebe Door*. The four guidelines are the payer's right to control the worker, and whether the worker is therefore in a position of subordination;[3] whether the worker or the payer owns the tools required to fulfil the worker's function; and the worker's chance of profit; and risk of loss in his or her dealings with the payer.

Right to Control:

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[1] *Montreal City v. Montreal Locomotive Works Ltd. et al.*, [1947] 1 D.L.R. 161 (JCPC), ("*Montreal City*"); *Wiebe Door Services Ltd. v. M.N.R.*, (1986), 87 D.T.C. 5025 (FCA), ("*Wiebe Door*")

[2] *Charbonneau v. M.N.R.*, [1996] F.C.J. No. 1337 (FCA); *Le Livreur Plus Inc. v. M.N.R.*, [2004] F.C.J. No. 267 (FCA), ("*Le Livreur Plus*"). Note that the tests are also termed "useful subordinates" in *Moose Jaw Kinsmen Flying Fins Inc. v. M.N.R.*, [1988] F.C.J. No. 21 (FCA), ("*Moose Jaw*"); and "guidelines" in *Ranger v. M.N.R.*, [1997] F.C.J. No. 891 (FCA)

[3] *Vulcain Alarme Inc. v. M.N.R.*, [1999] F.C.J. No. 749 (FCA); *D & J Driveway Inc. v. M.N.R.*, [2003] F.C.J. No.1784, ("*D & J Driveway*"); *Le Livreur Plus*, supra

[7] In this regard, the Appellant raises two legal issues, either of which could potentially lead to the conclusion that Justin was an independent contractor during the period under review. First, the Appellant alleges that Justin had the right to hire helpers and assistants. This is relevant because of the following trenchant assertion by MacKenna J. in *Ready Mixed Concrete (South East) Ltd. v. Minister of Pensions and National Insurance*[4]:

> Freedom to do a job either by one's own hands or by another's is inconsistent with a contract of service …

The problem with the Appellant's position is that the evidence establishes that this supposed right was never communicated to Justin by the Appellant; was not part of the contract that defined their working relationship; and was fanciful in any event as Justin could hardly afford to hire helpers out of the minimal $8.00-$10.00 per hour he was paid to perform his various tasks.

[8] The second argument is that Justin had the right to decline or refuse assigned tasks, which would indicate that his relationship with the Appellant was one of independence and not subordination. There is evidence that Justin refused to load scrap tires on a trailer he thought was contaminated by mould; to work on a coffee truck driven by a person he disliked; and to perform functions he did not feel competent enough to do.

[9] There are three decisions by the Federal Court of Appeal that deal with a closely-related concept. First, in *Precision Gutters Ltd. v. M.N.R.* ("*Precision Gutters*")[5] the Court says:

> In my view, the ability to negotiate the terms of a contract entails a chance of profit and risk of loss in the same way that allowing an individual the right to accept or decline to take a job entails a chance of profit and risk of loss.

[10] Second, *D & J Driveway*[6] involved truck drivers who were on call and were entirely free to refuse offers made to them from time to time to drive delivery trucks to various distant destinations. So far as the legal effect of this right is concerned, the Court says:

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[4] [1968] 1 All E.R. 433 (Q.B.D.)

[5] [2002] F.C.J. No. 771 at paragraph 27

[6] Supra

> In fact, drivers could agree or refuse to make a delivery when called upon by the applicant, which certainly is not characteristic of a person bound by a contract of employment.[7]

The Court then adds:

> We feel it is legally incorrect to conclude that a relationship of subordination existed, and that there was consequently a contract of employment, when the relationship between the parties involved sporadic calls for the services of persons who were not in any way bound to provide them and could refuse them as they saw fit.[8]

[11] Finally, in *Le Livreur Plus*[9] the Court recounts:

> Together with the right to refuse or decline offers of services, these are factors which this Court has regarded as indicating a contract of enterprise or for services rather than one of employment.

[12] What is not established by this line of authorities is whether the principles enunciated therein are equally applicable to cases where a worker accepts a working relationship with a payer, but declines or refuses to perform a task within that relationship, when so duly directed. In this regard, two relevant cases have been brought to my attention. In *821743 Ontario Inc. (c.o.b. Midas Muffler) v. M.N.R.*[10] the Court dealt with the status of mechanics who were given the option of being independent contractors or employees; were free to work elsewhere and remove their tools for that purpose; set their own schedules; decide the volume of work they wanted to do; and, of importance for our purposes, had the right not to work for a certain customer if they so chose. Unfortunately, this case is not particularly helpful since the Court found that the mechanics were independent contractors, based on the clear common intention of the parties to form such a relationship, and because it doubted the payer's credibility.

[13] The fact that the mechanics had the right not to work for a certain customer if they so chose, does not seem to form part of the Court's *ratio decidendi*. In addition, these peripatetic mechanics, that were free to work for others sporadically and then return to the appellant, had a considerably different working relationship with their payer than did Justin who was steadily engaged by the Appellant for over two years.

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[7] Ibid., paragraph 11

[8] Ibid., paragraph 15

[9] Supra, at paragraph 41

[10] [2003] T.C.J. No. 166 (TCC)

[14] In my view, a worker who refuses to perform an assigned task within a working relationship is distinguishable from a worker who refuses an offer of a working relationship in the first place. The latter is indicative of independence, while the former resonates with the oft-cited case of *Hennick v. M.N.R.* ("*Hennick*")[11] This case involved a teacher at The Royal Conservatory of Music (the "Conservatory") who was a free spirit in that she had carried on her work without respect or consideration for the structure created by the Conservatory. Specifically, she had not fulfilled the minimum teaching time requirement stipulated in the operative collective agreement.

[15] The trial Judge found the teacher to be an independent contractor because the Conservatory could not control her. In reversing that decision, the Court of Appeal said:

> … what is relevant is not so much the actual exercise of control as the right to exercise a control.[12]

More importantly, the Court also found as follows:

> It is obvious that the status of a person cannot depend on her character as an individual. The test to be followed is an objective one which is determined on the facts of each case by weighing the relevant factors.[13]

[16] I find that once a working relationship is agreed upon, control issues arising within the context of that relationship, such as the worker's refusal to perform an assigned task, do not indicate that he or she was an independent contractor. An insubordinate worker can still be in a subordinate relationship with his or her payer.

[17] In any event, I am not satisfied that Justin had the alleged right of refusal. He denies the coffee truck allegation, and was prudent to decline to put his health at risk by working in a mouldy environment. Further, Smith admitted that he would not permit Justin to attempt tasks which he was not qualified to do. Finally, when Justin was asked what would happen if he was assigned a task and, like Melville's *Bartleby, the Scrivener*, he simply stated "I would prefer not to", Justin replied: "If I just refused, I'd probably get fired".

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[11] [1995] F.C.J. No. 294 (FCA)

[12] Ibid., paragraph 7

[13] Ibid., paragraph 12

[18] So far as the right to control is concerned, Smith, who was occupied with other business interests at the time, brought in Young as General Manager of the Appellant's operations "to ensure that all is done the way I want it to be done", which meant safely and properly "so that things don't happen if they are not watched". Smith's mantra, "Don't put it on a customer's car if you wouldn't put it on your mom's car", exemplifies the exacting standards he expected of his workers.

[19] The above analysis satisfies me that both Smith and Young had the right to direct and control both what tasks the callow Justin did, and how he did them.[14]

[20] In sum, I find that Justin was not a highly skilled or professional worker; that the Appellant had the right to direct and control not only what Justin did, but how he did it; that he was in a subordinate position to the Appellant; that if Justin declined or refused to perform a task within his working relationship with the Appellant, he would be fired; and that there was no agreement between the parties that he could hire helpers. The control point of reference accordingly indicates that Justin was an employee.

Ownership of Tools:

[21] The second *Wiebe Door* guideline is the ownership of tools. Smith testified that Justin possessed the tools that it was usual for a tire repairer/installer to own, namely tire pressure and tread depth gauges. He further indicated that all workers were encouraged to bring their own tools so they would not persist in damaging or losing the Appellant's. On the other hand, he admitted that the customers were lined up at 8:00 a.m. when the shop opened, and that whenever necessary, the Appellant would provide any and all required tools since "The work had to be done". Justin credibly testified that he owned no tools save for his safety boots, and that all the tools he used were duly supplied by the Appellant. The tools factor accordingly indicates that Justin was an employee.

Chance of Profit:

[22] Justin was paid at an hourly rate as aforesaid. This rate increased as did his proficiency. There was talk of eventually putting him in charge of a proposed used tire sales division. Counsel for the Appellant argued that all these possibilities of

[14] *Logitek Technology Ltd. v. M.N.R.*, [2008] T.C.J. No. 309

increased earnings and advancement constituted a chance of profit. In my view, however, employees are equally eligible for precisely such incentives. Moreover, the Court in *Hennick*[15] points out that any profits made by the business belonged to the Appellant; and that Justin's opportunity to increase his earnings by working longer hours, or by receiving raises in pay, does not a chance of profit make.

[23] Smith was under the impression that Justin was carrying on business on his own account after hours, using the Appellant's premises and equipment. The evidence, however, is that Justin did only minor tire repairs for a few friends and relations, free of charge. The chance of profit guideline therefore also indicates that Justin was an employee during the period under review.

Risk of Loss:

[24] Justin had to purchase his own safety boots, and was also financially responsible for any damages occasioned on the job due to his fault or negligence. He had to rectify his errors on his own time although all necessary parts were supplied by the Appellant. In actual fact, in over two years of working with the Appellant, Justin was never charged for any such loss, damage, or deficiency. I therefore find that Justin's risk of loss was more theoretical than real and that this factor also indicates that he was employed under a contract of service.

Total Relationship:

[25] The *Wiebe Door* tests are but points of reference, guidelines, or useful subordinates to help courts ascertain the true nature of the total relationship of the parties as aforesaid. The four factors involved will vary in weight according to the particular facts of each case.[16] In the matter before me, all four guidelines indicate that Justin was an employee under a contract of service during the period under review. I would afford increased weight to the absence of a chance of profit or a risk of loss since, in my view, these factors constitute the very essence of a business venture. Recall, for example, the legal definition of a partnership which describes two or more persons carrying on business in common with a view to profit. In *City Water International Inc. v. M.N.R.*[17], however, the Federal Court of Appeal found the workers involved to be independent contractors even though they had neither a chance of profit nor a risk of loss in their working relationship with the payer. Since

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[15] *Supra*

[16] *Moose Jaw*, supra; *Hennick*, supra; *Precision Gutters*, supra

[17] 2006 FCA 350

the *Wiebe Door* tests produced inconclusive results, the Court gave effect to the mutual intention of the parties.

[26] I have not dealt with the intention of the parties in the matter before me for two reasons: first, the *Wiebe Door* tests do produce conclusive results[18], and second, I am not satisfied that the parties were *ad idem* regarding Justin's status. When he was hired, Justin did not know the difference between an employee and an independent contractor. He went home and had his layman father explain the distinction as best he could.

[27] Of all the evidence adduced during this hearing, there were only two facts that tended to indicate that Justin was an independent contractor. He had to rectify his errors on his own time as aforesaid[19], and he could negotiate his rate of pay.[20]

[28] In these matters the burden is upon the Appellant to demolish the assumptions contained in the Minister's Reply to the Notice of Appeal.[21] Assumption 10(h) proved inaccurate in that the Appellant had no formal training program. Justin learned by on-the-job observation and experience, and by receiving helpful hints from the more seasoned mechanics, as well as from Smith and Young. Assumption (j) is incorrect as the evidence indicates that Justin enjoyed some flexibility in his work schedule, although there is strong evidence that the customers were lined up at 8:00 a.m. with their faulty tires, and that the workers had to be there to service them. Assumption (k) was not demolished. While the experienced mechanics might have attended to work orders as they came in, I was not satisfied that this process applied to Justin who was told what to do by Young so far as his cleaning, painting and sorting duties were concerned, and how to do it whenever customers' tires were involved. Assumption (o) was successfully demolished. Justin admitted that he knew he could negotiate his rate of pay, but did not bother. The evidence regarding assumption (s) was that Justin would work longer than the normal business hours in busy times, and fewer hours in slow times. The evidence also did not support assumption (x). Wearing the company apparel was not mandatory. Assumption (y) was erroneous. Justin had to rectify his errors on his own time. Assumption (cc) ignores the safety boots that Justin had to supply. While the Appellant has succeeded

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[18] *Kilbride v. Canada*, [2008] F.C.J. No. 1524 (FCA)

[19] *Precision Gutters*, supra; *Tremblay v. M.N.R.*, [2004] F.C.J. No. 802 (FCA) at paragraph 44

[20] *Precision Gutters*, supra

[21] *Johnston v. M.N.R.*, [1948] S.C.R. 486

in demolishing some of the Minister's assumptions, the remaining ones are more than sufficient to support the Minister's findings.[22]

[29] I have investigated all the facts with the parties and the witnesses called on behalf of the Appellant and the Intervener to testify under oath for the first time, and while there were new facts found, they primarily supported the Minister's decision. In addition, with minor exceptions, there was nothing to indicate that the facts inferred or relied upon by the Minister were unreal or were incorrectly assessed or misunderstood, having regard to the context in which they occurred. The Minister's conclusions are objectively reasonable.[23] I can find no business that Justin was in on his own account.

[30] In the result, the Minister's decisions are confirmed and the appeals are dismissed.

Signed at Toronto, Ontario, this 24th day of December 2009.

"N. Weisman"

Weisman D.J.

[22] *Jencan Limited v. M.N.R.*, [1997] F.C.J. No. 876 (FCA)

[23] *Légaré v. M.N.R.*, [1999] F.C.J. No. 878 (FCA); *Pérusse v. M.N.R.*, [2000] F.C.J. No. 310 (FCA)

CITATION:	2009 TCC 640
COURT FILE NOS.:	2009-911(EI) and 2009-912(CPP)
STYLE OF CAUSE:	A & T Tire & Wheel Limited and The Minister of National Revenue and Justin Bunn
PLACE OF HEARING:	Toronto, Ontario
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REASONS FOR JUDGMENT BY:	The Honourable N. Weisman, Deputy Judge
DATE OF JUDGMENT:	December 24, 2009

APPEARANCES:

Counsel for the Appellant:	Leigh Somerville Taylor
Counsel for the Respondent:	Thang Trieu
For the Intervener:	The Intervener himself

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