

Dockets: 2011-3341(CPP)
2011-3342(EI)

BETWEEN:

875527 ONTARIO LTD.,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

Appeal heard on June 4, 2012 at London, Ontario

By: The Honourable Justice Judith Woods

Appearances:

Agent for the Appellant: Michael Van Raay

Counsel for the Respondent: Paul Klippenstein

JUDGMENT

The appeal, with respect to decisions of the Minister of National Revenue that Lise St. Germain was engaged by the appellant in insurable and pensionable employment under the *Employment Insurance Act* and *Canada Pension Plan* for the period from August 2 to October 24, 2010, is dismissed; and the decisions are confirmed.

Signed at Ottawa, Ontario this 14th day of June 2012.

“J. Woods”

Woods J.

Citation: 2012 TCC 214
Date: 20120614
Dockets: 2011-3341(CPP)
2011-3342(EI)

BETWEEN:

875527 ONTARIO LTD.,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

REASONS FOR JUDGMENT

Woods J.

[1] The appellant, 875527 Ontario Ltd., manufactures and sells attractive wooden signs bearing children's names. Sales are made through kiosks which are set up in shopping malls on a short term basis. Customers can purchase either customized signs that have been painted, or they can purchase kits which enable them to do the assembling and painting themselves. The business is aptly named "Loose Letters."

[2] In 2010, the appellant entered into an arrangement for Lise St. Germain to act as a sales agent at Loose Letters kiosks throughout Ontario. The question to be determined is whether Ms. St. Germain was engaged as an employee or independent contractor for purposes of the *Employment Insurance Act* and *Canada Pension Plan*.

[3] Following an application by Ms. St. Germain for employment insurance benefits, the Minister determined that she was engaged as an employee for the period from August 2 to October 24, 2010. The appellant disputes that determination.

Background facts

[4] The appellant is the brainchild of Michael Van Raay, an entrepreneur with a broad background, including furniture design. Mr. Van Raay is the sole owner and manager of the business which employs a small staff in manufacturing and sales.

[5] The appellant enters into contracts with shopping malls to rent kiosk space for short periods, such as two weeks. Under the contracts, the kiosks are required to be open during mall hours, which are approximately 11 hours during weekdays and less on weekends.

[6] Ms. St. Germain responded to an advertisement for someone to travel to retail malls in Ontario and operate a Loose Letters kiosk. There was no guarantee of regular work. She would be engaged on a per mall basis when there was work available. During an engagement, it was anticipated that she would work four days on and four days off, with someone else taking over on the off days.

[7] Ms. St. Germain worked for about 10 weeks in malls which were located in three Ontario cities, North Bay, Ottawa and London. Unfortunately, the relationship then soured and ended.

Analysis

[8] The applicable legal principles are set out in *TBT Personnel Services Inc. v. The Queen*, 2011 FCA 256:

[8] The leading case on the principles to be applied in distinguishing a contract of service from a contract for services is *Wiebe Door Services Ltd. v. M.N.R.*, [1986] 3 F.C. 553 (C.A.). *Wiebe Door* was approved by Justice Major, writing for the Supreme Court of Canada in *67112 Ontario Ltd. v. Sagaz Industries Canada Inc.*, 2001 SCC 59, [2001] 2 S.C.R. 983. He summarized the relevant principles as follows at paragraphs 47-48:

47. [...] 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.

[9] In *Wolf v. Canada*, 2002 FCA 96, [2002] 4 F.C. 396 (C.A.), and *Royal Winnipeg Ballet v. Canada (Minister of National Revenue - M.N.R.)*, 2006 FCA 87, [2007] 1 F.C.R. 35, this Court added that where there is evidence that the parties had a common intention as to the legal relationship between them, it is necessary to consider that evidence, but it is also necessary to consider the *Wiebe Door* factors to determine whether the facts are consistent with the parties' expressed intention.

[9] In applying these principles to the case at bar, I will first consider the intention of the parties.

[10] The arrangement was negotiated by Mr. Van Raay and Ms. St. Germain over the telephone. There was nothing in writing. Mr. Van Raay testified that it is always his intention to hire independent contractors and he thought this was the common understanding with Ms. St. Germain. I accept this testimony. No source deductions were taken from Ms. St. Germain's pay and Ms. St. Germain did not say anything about this.

[11] Ms. St. Germain testified that she did not put her mind to the nature of the relationship until later and she simply assumed that she was an employee. The fact that Ms. St. Germain did not say anything about the lack of source deductions might suggest that she accepted to be an independent contractor. However, because the relationship lasted such a short period, I accept her testimony that she did not put her mind to it.

[12] I conclude that the parties did not have a mutual intention as to the nature of the relationship.

[13] I now turn to the *Wiebe Door* factors of control, tools, chance of profit, and risk of loss.

[14] As for control, the relevant question is whether the appellant had the ability to control the manner in which the work was performed.

[15] I find that Mr. Van Raay exercised relatively little control over the manner in which the work was performed. There was control over hours worked, but this is not

a significant factor for purposes of the *Wiebe Door* analysis because this was a requirement of the malls.

[16] The test, however, is not whether control was actually exercised, but whether the appellant had the ability to control.

[17] Mr. Van Raay testified that he was aware of the CRA guidelines as to the difference between an employee and independent contractor and that he did not intend to exercise control. In his objection letter to the CRA, Mr. Van Raay stated that he would have been more particular about Ms. St. Germain's sales methods if she had been an employee.

[18] I accept that Mr. Van Raay understood the difference between an employee and independent contractor, but I am not satisfied that he took sufficient steps to ensure that there was lack of control. Of particular concern are training manuals that were kept at the kiosks. The manuals are quite detailed as to sales techniques and proper operation of the kiosk. Some of the sales techniques are listed as "tips" rather than directives, but I do not find this to be significant. The documents as a whole leave the impression that the appellant had the right to exercise considerable authority over how the work of the sales agents was to be performed.

[19] Although Mr. Van Raay was aware that control is a factor in determining independent contractor status, the fact that manuals were employed suggests that the ability to control was considered necessary for the business.

[20] Mr. Van Raay testified that the manuals were prepared by an independent consultant, and suggested that they do not represent an intention on his part to exercise control. The problem that I have with this is that it was the appellant's decision to place the manuals at the kiosks.

[21] On balance, I would conclude that the control factor points in favour of an employment relationship.

[22] As for tools, chance of profit and risk of loss, I find that these are all neutral factors that are commonplace in both employment and independent contractor relationships.

[23] As for tools, Ms. St. Germain used her own car and cell phone, but there were no significant other tools required.

[24] As for profit and loss, Ms. St. Germain was paid on an hourly basis and she was not entitled to benefits except for a reimbursement of expenses.

[25] Taking all the *Wiebe Door* factors into account, I would conclude that although the appellant wished to engage Ms. St. Germain as an independent contractor, it did not take sufficient steps to ensure that it would not have the ability to control how the work was performed. The factors as a whole point more towards an employment relationship.

[26] The appeal will be dismissed.

Signed at Ottawa, Ontario this 14th day of June 2012.

“J. Woods”

Woods J.

CITATION: 2012 TCC 214

COURT FILE NOS.: 2011-3341(CPP)
2011-3342(EI)

STYLE OF CAUSE: 875527 ONTARIO LTD. v. THE MINISTER
OF NATIONAL REVENUE

PLACE OF HEARING: London, Ontario

DATE OF HEARING: June 4, 2012

REASONS FOR JUDGMENT BY: The Honourable Justice J.M. Woods

DATE OF JUDGMENT: June 14, 2012

APPEARANCES:

Agent for the Appellant:	Michael Van Raay
Counsel for the Respondent:	Paul Klippenstein

COUNSEL OF RECORD:

For the Appellant:

Name:	n/a
Firm:	

For the Respondent:

Myles J. Kirvan Deputy Attorney General of Canada Ottawa, Ontario
