Citation: 2013TCC220
Date: 20130708
Docket: 2012-3713(EI)
2012-3712(CPP)

BETWEEN:

STEVE MURRAY,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

REASONS FOR JUDGMENT

(Delivered orally from the bench on June 13, 2013, in Toronto, Ontario.)

V.A. Miller J.

[1] This issue in these appeals is whether Michael Shawn English was employed in insurable and pensionable employment when he worked with the Appellant during the period June 9, 2011 to September 25, 2011.

[2] The witnesses at the hearing were the Appellant and Michael Shawn English.

[3] The Appellant had a construction business which he operated as a proprietorship under the name of By Design Contracting. In his business, he builds new homes and makes renovations and additions to existing homes.

[4] In 2011, he was successful in obtaining a contract with PMT Development ("PMT") to work on the construction of a duplex and a five-plex (the "Buildings") in Qikiqtarjuaq, Nunavut. PMT was the general contractor on this construction project and its contract was with the Nunavut Housing Corporation.

[5] The Appellant's contract with PMT provided that he would construct the architectural component of the Buildings. In the original contract with PMT, the Appellant was supposed to have his portion of the construction completed within 16

weeks. However, the contract was extended to 17 weeks with the finish date being October 7, 2011.

[6] To fulfill his contract, the Appellant hired six workers and Michael Shawn English (the "Worker") was one of those workers. I will refer to the six workers collectively as the crew.

[7] PMT paid the transportation costs for the Appellant and his crew to travel from Ottawa to Nunavut. It also paid for the crew's housing while they were in Nunavut.

[8] The Worker was hired to work on all aspects of the architectural components of the Buildings. According to the Appellant, this included framing the Buildings and installing the siding, windows, roofing and drywall.

[9] According to both witnesses, the Worker was to be paid $40,000. The Appellant stated that the Worker was to receive this amount in instalments based on a percentage of the draws which the Appellant received from PMT. It was the Worker's evidence that he was to be paid $1,000 weekly while he was in Nunavut and he would received the balance owing on the $40,000 when the project was finished.

[10] Both witnesses stated that when the Worker was hired, they intended that he was hired as an independent contractor.

[11] PMT provided a foreman and a project coordinator for construction of the Buildings. The Appellant testified that when he arrived in Nunavut, he was told by PMT's project coordinator that his crew had to be paid in the same manner as the Inuit workers who were also working on the project. The Inuit workers were paid as employees. He was told that this was a requirement in the *Employment Standards Act* of Nunavut.

[12] The Appellant stated that he felt he had no choice but to accept this requirement. It was either that he accepted it or he would lose the contract. He communicated this information to his crew and told them that if they did not accept the new terms of employment they would have to return to Ontario. According to the Appellant, he told the crew that under these new terms, they would still receive $40,000 but it would be paid to them as an hourly wage. They were to be paid $20 per hour for all hours worked up to 44 hours per week and they would receive $30 per hour for overtime. Each member of the crew would also receive $750 weekly as a per diem. However, the Worker testified that he was told that under the new terms he

would received a weekly wage of $40,000 divided by the number of weeks required to finish the contract. By my calculations that would have been $2,352.94 weekly.

[13] The Appellant stated that he later found out that the information he had received from PMT's project coordinator was incorrect. There was no such requirement in the *Employment Standards Act* of Nunavut and he has since filed a claim with the Labour Standards Board of Nunavut. He is awaiting their decision.

[14] To determine whether the Worker was employed in insurable and pensionable employment while working for the Appellant, it is necessary to determine if the Worker was performing his services as a person in business on his own account: *671122 Ontario Ltd v Sagaz Industries Canada Inc* [2001] 2 SCR 983. The intention of the parties is important and the factors from *Wiebe Door Services Ltd v MNR* [1986] 3 FC 553 (FCA) are used to analyze the work relationship between the Worker and the Appellant with a view to ascertaining whether their working relationship is consistent with their intention. The factors from *Wiebe Door* are control, ownership of tools, chance of profit and risk of loss.

Intention

[15] The original intention of both the Worker and the Appellant was that the Worker would be employed as an independent contractor. After they arrived in Nunavut, their intentions changed. The Worker stated that after he was faced with the ultimatum from the Appellant, it was then his intention to be employed as an employee. The Appellant stated that his intention did not change; the Worker continued to be employed as an independent contractor. It was only the method of payment that changed and this was a "forced payroll".

Control

[16] It was the Worker's evidence that he and the other members of the crew were supposed to work Monday to Saturday for 10 hours daily. This schedule was set by the Appellant, PMT's project coordinator and foreman. However, the crew decided to also work on Sunday so that they worked 7 days a week for 10 hours daily. The Worker's hours of work were recorded by PMT's project coordinator.

[17] PMT's project coordinator and foreman directed the Worker in the tasks he was to perform and instructed the Worker so that the specifications of the job were met. It was the Worker's evidence that he had no input into how the work was to be completed. He followed the instruction of PMT's foreman and project coordinator

and he was supervised in his duties by them. PMT's foreman assigned the tasks each week and determined the Worker's priorities and deadlines.

[18] When PMT thought that the project was behind schedule, it contacted the Appellant who travelled to Nunavut to check on the crew's progress with the project.

[19] I find that the Appellant and his client, PMT, controlled the Worker in the performance of his duties.

Ownership of Tools and Equipment

[20] The Worker was required to provide his own tool belt, small hand tools, safety belt and safety boots. PMT or the Nunavut Housing Corporation provided all other tools and equipment which the Worker needed to perform his duties.

[21] It has been held that if the worker owns the tools of the trade which it is reasonable for him to own, this factor will point to the conclusion that the worker is an independent contractor even though the major tools necessary to perform his job are provided to him: *Precision Gutters Ltd v Canada*, 2002 FCA 207 at paragraph 25.

[22] As a consequence, I find that this factor favours the Worker as being an independent contractor.

Subcontracting Work and Hiring Assistants

[23] It was the Appellant's evidence that the Worker could hire an assistant as long as he paid for the assistant. Whereas, the Worker said that he and the Appellant never discussed this topic.

[24] The Worker quit his job on September 25 which was prior to the completion of the project. The Appellant hired another person to replace him.

[25] On a review of the evidence, I find that the Worker did not have the authority to hire an assistant or his replacement. This factor indicates that the Worker was an employee.

Chance of Profit/Risk of Loss

[26] The Appellant and the Worker agreed that the Worker was to receive $40,000. However, their evidence conflicted on how the Worker was to be paid this amount. Regardless, it was the Appellant who determined the Worker's rate of pay. According to the Worker's evidence, he did not learn that he was paid an hourly wage until he received his pay stubs and these he did not receive until after he had returned to Ontario.

[27] According to the payroll evidence, the Worker was to be paid $20 hourly for all hours worked up to 44 hours per week. He was supposed to receive $30 per hour for overtime. The Worker was supposed to be paid on a weekly basis but he was paid sporadically. He was paid gross wages of $5,657.60 on July 21 and September 8. Taxes, employment insurance and Canada Pension Plan premiums were withheld from his wages.

[28] During the period, the Worker also received total per diem payments in the amount of $10,750 and 4% vacation pay on each pay.

[29] The Appellant determined the frequency and method of payments to the Worker. The Worker quit his work with the Appellant because he was not paid on a regular basis.

[30] It was the Appellant's evidence that the Worker could have made a profit if he had worked harder and finished the project earlier. He would have still received $40,000 even if he finished the project in less than 16 weeks.

[31] I disagree with the Appellant. The phrases "chance of profit and risk of loss" are to be understood in the entrepreneurial sense. In the present situation, the Worker was not able to negotiate his salary. He did not negotiate the contract.

[32] The Worker may have suffered a loss because he was not paid the wages promised but he had no risk of loss in the entrepreneurial sense. He had no investment at stake. The Appellant provided the guarantee on work performed by the Worker and he was responsible for resolving complaints from his client, PMT. If work had to be redone, the Appellant had to cover the related cost. PMT found that there were deficiencies in the work done by the Appellant's crew and the Appellant bore the cost of correcting these deficiencies.

[33] I conclude that the Worker had no chance of profit or risk of loss. These factors favour a finding that the Worker was an employee.

[34] When I consider all of the factors, I conclude that the Worker was not in business on his own accord. Although the Worker and the Appellant may have originally intended that the Worker was to be engaged as an independent contractor, the terms of their relationship, when analyzed against the *Wiebe Door* factors, do not support that intention. Rather, the terms of their relationship support the changed intention of the Worker to be an employee.

[35] The appeals are dismissed.

Signed at Ottawa, Canada, this 8th day of July 2013.

"V.A. Miller"

V.A. Miller J.

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COURT FILE NO.:	2012-3713(EI) 2012-3712(CPP)
STYLE OF CAUSE:	STEVE MURRAY AND M.N.R.
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	June 10, 2013
REASONS FOR JUDGMENT BY:	The Honourable Justice Valerie Miller
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ORAL REASONS SIGNED ON:	July 8, 2013
DATE OF JUDGMENT:	June 18, 2013

APPEARANCES:

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