Dockets: 2016-1748(EI), 2016-1749(CPP),
2016-5369(CPP), 2016-5370(EI)

BETWEEN:

MATCH ACTION INC.,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

Appeals heard on April 27, 2018, at Toronto, Ontario.

Before: The Honourable Justice Réal Favreau

Appearances:

Counsel for the Appellant:	Gregory J. Power Edward O’Dwyer
Counsel for the Respondent:	Kanga Kalisa

JUDGMENT

The appeals from the Minister of National Revenue’s decision under the *Employment Insurance Act* and the *Canada Pension Plan* dated September 29, 2016 in the case of Rohit Kuthiala and dated January 26, 2016 in the case of Caitlin Cook-Yeo are allowed and the decisions of the Minister are vacated, the whole in accordance with the attached Reasons for Judgment.

Signed at Ottawa, Canada, this 30th day of August 2018.

“Réal Favreau”

Favreau J.

Citation: 2018 TCC 171
Date: 20180830
Dockets: 2016-1748(EI), 2016-1749(CPP),
2016-5369(CPP), 2016-5370(EI)

BETWEEN:

MATCH ACTION INC.,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

REASONS FOR JUDGMENT

Favreau J.

[1] This litigation concerns four appeals heard on common evidence from decisions of the Minister of National Revenue (the "Minister"), determining that Rohit Kuthiala and Caitlin Cook-Yeo (the "Workers"), were employed by the appellant in pensionable employment within the meaning of the *Canada Pension Plan*, R.S.C., 1985, c. C-8 (the "*CPP* ") and in insurable employment within the meaning of the *Employment Insurance Act*, S.C. 1996, c. 23 (the "*EIA*") from January 1, 2013 to December 31, 2013 (the "Period").

[2] The Minister's decision in the case of Rohit Kuthiala was dated September 29, 2016 and, in the case of Caitlin Cook-Yeo, dated January 26, 2016.

[3] In making his decision in the case of Caitlin Cook-Yeo, the Minister relied on the following assumptions of fact:

(a) the Appellant was a corporation located in Toronto, Ontario;
(b) 8011303 Canada Inc. was the sole shareholder of the Appellant corporation;
(c) the Appellant operated an experiential marketing and sales services organization;
(d) the Appellant's primary objective was matching brand partners to consumers;

(e) the executive vice president, Antoine Adams, controlled the day-to-day operations of the Appellant and made the major business decisions;
(f) the Worker applied for the job via the Appellant's website and provided her resume;
(g) the Appellant screened the Worker to determine whether the Worker would be suitable for certain services;
(h) once approved, the Appellant placed the Worker into a pool of workers available for work;
(i) the Worker was hired by the Appellant under a written contract in the province of Ontario;
(j) the written contract was accepted electronically;
(k) the Worker did not have the ability to negotiate the terms and conditions of her agreement with the Appellant;
(l) the Worker began working for the Appellant on April 15, 2011 and ceased working on April 26, 2014;
(m) the Worker was hired as a product demonstrator;
(n) the Worker's duties included carrying out demonstrations and promoting products for the Appellant's clients;
(o) all of the clients belonged to the Appellant;
(p) the Worker did product demonstrations mostly for the Nespresso coffee machine at The Bay and Home Outfitters;
(q) the Worker occasionally did demonstrations for other products, usually on short notice and upon the Appellant's request;
(r) the Worker completed her duties at the Appellant's clients' locations;
(s) the Appellant provided the Worker with paid training upon her hiring;
(t) the Appellant supervised the Worker;
(u) a representative of the Appellant would come to check on the Worker during her shifts;
(v) the Appellant had an online database where they posted the available jobs/shifts;
(w) each job had a set location, set hours and a set rate of pay, which was determined by the Appellant based on the Appellant's clients expectations and requirements;
(x) the Worker had access to the online database and had the ability to select her jobs/shifts;
(y) the Appellant often called the Worker directly to offer her additional shifts;
(z) the Worker worked mostly evenings and weekends;
(aa) the Worker could not alter the start and end times of her shifts;
(bb) the Worker was required to contact the Appellant if she was going to be late or absent from her scheduled shift, or if her school schedule and/or exams conflicted with her shifts;
(cc) the Worker had the choice to either approach other workers within the Appellant's pool of approved coworkers to request that they work in her place, or ask the Appellant directly to change her work schedule;

(dd) the Appellant was responsible for remunerating all workers, including the replacement workers;
(ee) the Appellant had control over who was doing the work at all times;
(ff) the Worker recorded and reported her hours into an online time and attendance tracker called Natural Insight;
(gg) access to Natural Insight was provided to the Worker by the Appellant;
(hh) the Worker was paid between $15.00 and $16.00 per hour;
(ii) the Worker's rate of pay was determined by the Appellant based on the Appellant's partnership with its specific clients as well as the Appellant's budget.
(jj) the Worker's rate of pay was not negotiated between the parties;
(kk) the Worker's rate of pay varied depending on the services and the hours involved with the specific jobs;
(ll) the Worker was paid by direct deposit on a bi-weekly basis;
(mm) the Appellant determined the method and frequency of the Worker's remuneration;
(nn) the Worker was not required to supply any tools or equipment in order to carry out her duties of the Appellant;
(oo) the Appellant provided the Worker with all of the tools and equipment required to do her job;
(pp) the Appellant provided the Worker with the Nespresso coffee machine, the coffee pods, paper cups, stir sticks, sugar, an apron and a table cloth;
(qq) the Appellant shipped the supplies to the Worker's home as she needed them;
(rr) the Worker was responsible for picking up the milk and cream as they needed to be fresh;
(ss) the Applicant reimbursed the Worker for the cost of the milk and cream upon providing the receipts;
(tt) the Worker was required to detail her use of the supplies on her timesheets;
(uu) the Worker was not charged for the use of the Appellant's tools, equipment and/or supplies;
(vv) the Worker did not incur any expenses related to the services provided to the Appellant;
(ww) the Worker was required to dress in a certain manner while working for the Appellant, wearing black clothing and the branded apron provided to her by the Appellant and the Appellant's clients;
(xx) the Worker's duties were integral, and beneficial, to the Appellant's business;
(yy) the Worker was a university student during the Period;
(zz) the Worker was not operating a business during the Period;
(aaa) the Worker did not have a registered business name or number while providing her services to the Appellant;
(bbb) the Worker did not invoice the Appellant for her services;
(ccc) the Worker did not advertise her services;
(ddd) the Worker did not provide similar services to other payers;

(eee) the Appellant issued the Worker a T4A slip for the Period;
(fff) the Appellant issued the Worker's T4A slip with her earnings included in box 28, "Other income";
(ggg) the Worker reported her 2013 earnings from the Appellant as "Other Income";
(hhh) the Appellant had other workers during the Period;
(iii) the Appellant originally issued a total of 242 T4 slips for 2013; and
(jjj) the Appellant originally issued a total of 2,267 T4A slips for 2013.

[4] In the case of Rohit Kuthiala, the Minister made similar assumptions of fact, except for the following assumptions which mainly took into account the particularities of the work that he performed for the appellant:

. . .
(b) Appellant incorporated on January 1, 2005;
. . .
(f) the Appellant controlled the day-to-day operations and made the major business decisions;
. . .
(l) the Worker began working for the Appellant on August 17, 2012 and ceased working on December 21, 2013;
(m) the Worker was hired as a brand demonstrator;
. . .
(p) the Worker did product demonstrations for products such as Samsung Smart Televisions in large stores like Best Buy;
. . .
(u) during the spot checks, a representative of the Appellant would:

(i) make sure that the Worker was present at the location;
(ii) make sure that the Worker was performing the work; and
(iii) pretend to be an interested client in order to evaluate the worker's work;

(v) the Worker was required to submit reports to the Appellant, summarizing his shifts (i.e. a summary of successes, the customer traffic, etc.);
(w) the reports were submitted through the Appellant's online system;
. . .
(dd) the Worker could not subcontract his work or hire helpers at his discretion;
(ee) in the event that the Worker needed to switch a shift, the Worker could approach other workers within the Appellant's pool of approved workers to ask them to perform the work in his place;
(ff) the Appellant was responsible for hiring all workers;
. . .
(rr) the Appellant usually delivered the required material directly to the Appellant's clients' locations;
(ss) the Worker was not charged for the use of the Appellant's tools, equipment and/or supplies;

(tt) the Appellant reimbursed the Worker for mileage, in the event that the Worker was required to travel further than his local region;

(u) the Worker did not incur any expenses related to the services provided to the Appellant;

(vv) depending on the job, the Worker was required to wear branded apparel;

(ww) the branded apparel was provided by the Appellant;

(xx) the working relationship between the Appellant and the Worker was continuous in nature;

. . .

[5] Mr. Michael Holmes, the director of operations of the appellant since 2011, testified at the hearing. He explained that the appellant is a full-service marketing firm that produces corporate videos, conducts market researches and provides services on the field such as marketing initiatives (i.e. giving out coupons at special events), merchandising (i.e. ensuring that clients' products are on store shelves) and sales assistance (i.e. making presentations on their clients' products in stores).

[6] Mr. Holmes explained that the marketing programs are established in consultation with the appellant's clients. The duration of the programs are determined by the appellant's clients. They can last from a few hours to weeks or months and they can be done locally, regionally, provincially or across Canada. During 2013, the appellant had approximately twenty clients but the flow of incoming contracts was not steady that year. The volatility of the business prevents the use of employer/employee relationship model. The workers retained by the appellant are often university students or older persons who have flexible working hours.

[7] Mr. Holmes summarized the recruitment process of new workers. Job offers are posted on the Indeed Website with a general description of the jobs and the geographical locations where services will be rendered. The persons interested in the jobs must provide their resume and indicate their availability in terms of territory and their preferred working days.

[8] The applicants are then screened by the appellant in a face-to-face internet interview or simply by an e-mail exchange to determine whether the applicant will be suitable for certain services to a group of clients. When an applicant is approved, he has to electronically enter into an Independent Contractor Agreement by way of which he accepts to perform services for the appellant as an independent contractor. When the Independent Contractor Agreement is signed, the appellant places the applicant in a pool of workers available to work on contracts. The workers in the appellant's pool can then log on to Match View, the appellant's

web-based system, to identify the available contracts. Information on the clients, the exact nature of the work, the location of the work, the number of days of work and the proposed remuneration are then disclosed to the workers. The dates, times and locations of the contracts are normally determined by the appellant's clients.

[9] A copy of the Independent Contractor Agreement accepted by Caitlin Cook-Yeo on April 4, 2011 and a copy of the Independent Contractor Agreement accepted by Rohit Kuthiala on August 9, 2012 were entered into evidence as exhibits. The disclaimer attached to each agreement confirms acceptance of the terms and conditions by checking the following:

- variable rates of pay in accordance with the type of project;
- independent contractor only with no entitlement to any rights or benefits afforded to employees of Match Marketing Group Inc. including but not limited to unemployment insurance, workers compensation, etc.;
- responsibility for personal loss/injury insurance coverage;
- responsibility for taxation remittance on all compensation received from Match Marketing Group Inc.;
- non-disclosure agreement; and
- confidentiality agreement.

[10] The Independent Contractor Agreement specifies that the worker is free to provide services to other clients, so long as such other clients are not in competition with Match Marketing Group Inc. and so long as there is no interference with the worker's contractual obligations to Match Marketing Group Inc. Mr. Holmes explained that the prohibition is to protect the appellant's clients' brand names and that neither the appellant nor its clients can prevent a worker from working for the appellant's competitors.

[11] Concerning the possibility for the workers to negotiate compensation, Mr. Holmes filed as an exhibit, a document showing that Caitlin Cook-Yeo was paid an hourly rate that was different from that paid to other workers working on the same assignment.

[12] Mr. Holmes also pointed out that the workers receive some training before they start working on an assignment. The training includes information on the clients' products, the work to be performed, the territory, the stores, the requirements in terms of timing and how to access Match View to do the reporting of their work.

[13] Mr. Holmes provided evidence that on December 3, 2013, the Canada Revenue Agency issued rulings on the insurability and pensionability of four workers' employment with *1289151 Ontario Inc.* for the period from January 1, 2011 to June 8, 2012 and ruled that for the period under review, the four workers were considered self-employed and their services were neither insurable nor pensionable. *1289151 Ontario Inc.* was part of the Match Marketing Group and these workers were offering services similar to the services offered by the Workers.

[14] Mr. Holmes also provided detailed information on the assignments the Workers worked on in 2013.

[15] Caitlin Cook-Yeo worked for three companies acting as a product demonstrator. In 2013, her assignment with Nespresso Canada was the most important and consisted of 46 demonstrations in stores. Consequently, she made 46 claims for a total of 256 hours and 15 minutes and was paid $16 per hour 42 times, $15 one time, $21 one time and $22 two times.

[16] The Nespresso Canada's assignment consisted of showing the public the various types of coffee machines, how the machines work and offering a free coffee. It was a sale assist assignment performed mainly in stores such as The Bay, Home Outfitters and Williams-Sonoma. The coffee machines, coffee capsules and sugar were provided by Nespresso Canada. She had to buy the milk and cream and was reimbursed for them.

[17] Her performance was evaluatated by the number of coffee machines sold and she was entitled to receive a bonus based on sales made during a quarter. In 2013, she received bonuses totalling $612.

[18] Nespresso Canada set the working hours based on traffic in the stores.

[19] The SVM Inc.'s assignment was very similar to the Nespresso's assignment. SVM Inc. is a seller of coffee makers and coffee. It wanted to popularize its products by having people try their coffee in grocery stores. She was paid $16 per hour for this assignment.

[20] The Rogers Communications Inc.'s assignment consisted of showing their clients the new process to activate their smart phones. She usually worked from 11 a.m. to 6 p.m. at various Rogers stores, the list of which was provided to her by Rogers Communications Inc. She earned $17 per hour on this assignment while the

range was between $16 and $20 per hour. She had to wear a shirt provided by Rogers Communications Inc.

[21] In 2013, Mr. Rohit Kuthiala worked on six assignments and earned $8,029.50 in total. The four most important assignments were for: Labatt Brewing Company Ltd. (“Labatt”), Robert Bosch, Samsung Electronics Canada (“Samsung”) and Rogers Communications Inc. (“Rogers”).

[22] The Labatt assignment was a national audit assignment which consisted of visiting 2,300 stores over a six-month period to count the facing of beers. A total of 143 workers worked on this assignment. He chose the stores he wanted to visit from the list provided by the appellant. He was given 45 minutes for at a Liquor Control Board of Ontario store and 15 minutes at other stores. No mileage or meals were paid for his travels. He was paid a flat rate of $17.50 per call (store) although the range of pay was between $17.50 and $35 per hour. He was provided with an audit booklet and had to report the data collected on Match View.

[23] The Rogers assignment was the same as the one Caitlin Cook-Yeo worked on.

[24] The Robert Bosch assignment was also an audit assignment for the power tools division. It consisted of determining the number of stores that carried a two-drill package and counting the number of tools on display and in stock in each store. He was paid a flat rate of $16 per call (store) and was not reimbursed for his travelling expenses.

[25] The Samsung assignment consisted of visiting cellphone stores to show the features of the new Samsung device, GS-4, which was not yet on the market. He chose the stores that he wanted to visit from the list on Match View. He was paid a flat rate of $20 per call (store) and was given one hour per store to do the job. In only one day, on April 15, 2013, the Worker visited 30 stores and earned $600 that day alone.

<u>Applicable Legal Test</u>

[26] The test that is to be applied in determining whether the Workers were engaged in an employer/employee relationship is summarized in *1392644 Ontario Ltd. v. Minister of National Revenue*, 2013 FCA 85 at paragraphs 38 to 41:

> [38] Consequently, *Wolf and Royal Winnipeg Ballet* set out a two step process of inquiry that is used to assist in addressing the central question, as established in *Sagaz* and *Wiebe Door*, which is to determine whether the individual is performing or not the services as his own business on his own account.
>
> [39 Under the first step, the subjective intent of each party to the relationship must be ascertained. This can be determined either by the written contractual relationship the parties have entered into or by the actual behaviour of each party, such as invoices for services rendered, registration for GST purposes and income tax filings as an independent contractor.
>
> [40] The second step is to ascertain whether an objective reality sustains the subjective intent of the parties. As noted by Sharlow J.A. in *TBT Personnel Services Inc. v. Canada*, 2011 FCA 256, 422 N.R. 366 at para. 9, "it is also necessary to consider the *Wiebe Door* factors to determine whether the facts are consistent with the parties' expressed intention." In other words, the subjective intent of the parties cannot trump the reality of the relationship as ascertained through objective facts. In this second step, the parties intent as well as the terms of the contract may also be taken into account since they colors the relationship. As noted in *Royal Winnipeg Ballet* at para. 64, the relevant factors must be considered "in the light of" the parties' intent. However, that being stated, the second step is an analysis of the pertinent facts for the purpose of determining whether the test set out in *Wiebe Door* and *Sagaz* has been in fact met, i.e whether the legal effect of the relationship the parties have established is one of independent contractor or of employer-employee.
>
> [41] The central question at issue remains whether the person who has been engaged to perform the services is, in actual fact, performing them as a person in business on his own account. As stated in both *Wiebe Door* and *Sagaz*, in making this determination no particular factor is dominant and there is no set formula. The factors to consider will thus vary with the circumstances. Nevertheless, the specific factors discussed in *Wiebe Door* and *Sagaz* will usually be relevant, such as the level of control over the worker's activities, whether the worker provides his own equipment, hires his helpers, manages and assumes financial risks, and has an opportunity of profit in the performance of his tasks.

Application to the Facts

[27] Mr. Holmes was the only witness called at bar and I found him to be credible.

Intention

[28] The first question to consider is the intent of the parties. I find that the parties clearly intended an independent contractor relationship based on the

Independent Contractor Agreements entered into by the parties and on the Disclaimer accepted by each Worker. The evidence reveals that the parties continuously treated their relationship as an independent contractor relationship. No source deduction was made on earnings received from the appellant. The Workers were not entitled to benefits afforded to the appellant's employees and their respective income was reported on a T4A slip.

[29] Furthermore, I consider that the intent of the parties is consistent with the objective reality.

Control

[30] The appellant did not control the manner in which the work was done. The training provided to the Workers was limited to knowledge of the clients' products for the purpose of explaining the defined framework of the assignments and how to do their reporting on Match View.

[31] The Workers worked without supervision. When an assignment was completed and the reporting on Match View was done, the appellant may follow-up with the worker who worked on the assignment. Occasionally, a local market manager of the appellant may decide to do a spot check at a store where the Workers are working.

[32] The Independent Contractor Agreement entered into by the appellant with each of the Workers contains no element of control on the part of the appellant. No exclusivity of services is required and a worker is free to provide his/her services to other clients. The only restriction being for competitors. The said agreement is silent on the possibility of sub-contracting a job to others. According to Mr. Holmes' testimony, a worker can subcontract a job to another worker who is in the pool set up by the appellant.

[33] In this case, no control was exercised over the Workers by the appellant or its clients. The appellant entered into contracts with its clients to count their products in stores or to demonstrate their products on certain days, at certain times and at certain places. This is the very essence of the work that the appellant contracted out to be done. Passing on its clients' requests and the specifications of the contracts to the Workers, was not an element of control being exercised over the Workers.

[34] The appellant does not require its workers to work a minimum number of hours weekly, monthly or yearly and there is no consequence if the workers do not accept any particular offer of work. No disciplinary measures are taken by the appellant if a complaint is filed against a worker.

[35] Based on the evidence, I am satisfied that there was no element of control by the appellant or its clients over the Workers and on how they had to perform their job to meet the terms of each assignment. This factor clearly points to an independent contractor status as opposed to an employer/employee relationship.

Provision of equipment

[36] The necessary equipment for the job was generally provided by the appellant's clients (i.e., coffee machines). The materials used for the job had to be returned at the end of assignment (i.e., shirt for the Rogers contract). The materials provided by the Workers (i.e., milk and cream for the Nespresso assignment) are reimbursed to the Workers. The Workers had to use their own mode of transportation to the locations of service and they were generally not reimbursed for the costs although Mr. Holmes stated that this was negotiable.

[37] Considering the fact that the Workers were not required to use their own tools to perform the job and the fact that it is not uncommon for an employee to use his or her own mode of transportation to his or her employer's office, I find that this factor favours an employment relationship.

Chance of profit and risk of loss

[38] In my view, there was an entrepreneurial aspect to the work done by the Workers. They could accept or refuse an assignment, they could choose the stores where they wanted to work at and they could negotiate their hourly rate or a flat rate from time to time. Theoretically, they could work alone or hire others to do the work for them although this never in fact seemed to have happened in this case. The Workers had the opportunity to do work for other agencies which were not in competition with the appellant. No minimum hours of work was required by the appellant and they never had to present themselves at the appellant's office.

[39] Furthermore, the Workers had to assume their own transportation, meals and insurance coverage for personal loss or injury.

[40] Clearly, the Workers had a chance of making a profit in doing their job. Caitlin Cook-Yeo received some bonuses on the sales of the Nespresso's coffee machines and Rohit Kuthiala made $600 in one day by choosing the 30 stores where he performed his job.

[41] Despite the fact that the Workers had to assume certain expenses to carry out their duties, I do not think that they could realistically realize a loss in doing this type of work.

[42] When I consider all these factors, I come to the conclusion that there was an entrepreneurial aspect to the work performed by the Workers and that they were in business on their own account. They had no job security and no ongoing commitment to either be engaged by the appellant or to provide services to the appellant. Each contract was a stand-alone assignment that a party was free to choose as he or she wished. The Workers could accept assignments from other agencies which were not in competition with the appellant to the extent that it did not interfere with the Workers' contractual obligations with the appellant.

Conclusion

[43] In this case, the facts support the appellant's intention that the Workers were engaged as independent contractors.

[44] Consequently, the appeals are allowed and the decisions of the Minister are vacated.

Signed at Ottawa, Canada, this 30th day of August 2018.

"Réal Favreau"

Favreau J.

CITATION:	2018 TCC 171
COURT FILE NOS.	2016-1748(EI), 2016-1749(CPP), 2016-5369(CPP), 2016-5370(EI)
STYLE OF CAUSE:	Match Action Inc. and M.N.R.
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	April 27, 2018
REASONS FOR JUDGMENT BY:	The Honourable Justice Réal Favreau
DATE OF JUDGMENT:	August 30, 2018

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