

Dockets: 2018-3097(CPP)
2018-3354(EI)

BETWEEN:

ALL SPORTS MARKETING INC.,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent,

and

BRUCE SWINDEN,

Intervenor.

Appeal heard on January 24, 2023, at Toronto, Ontario

Before: The Honourable Justice Robert J. Hogan

Appearances:

Agent for the Appellant: Peter Donato

Counsel for the Respondent: Jessica Bishara

For the Intervenor: The Intervenor himself

JUDGMENT

The appeals with respect to the decisions of the Minister of National Revenue made under the *Canada Pension Plan* and the *Employment Insurance Act* for the

period from January 1, 2017 to July 11, 2017 are dismissed, and the decisions of the Minister are confirmed, without costs.

Signed at Ottawa, Canada, this 16th day of March 2023.

“Robert J. Hogan”

Hogan J.

Citation: 2023 TCC 32
Date: 20230316
Dockets: 2018-3097(CPP)
2018-3354(EI)

BETWEEN:

ALL SPORTS MARKETING INC.,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent,

and

BRUCE SWINDEN,

Intervenor.

REASONS FOR JUDGMENT

Hogan J.

I. Overview

[1] These are appeals from determinations made by the Minister of National Revenue (the “Minister”) under the *Canada Pension Plan* (“CPP”) and the *Employment Insurance Act* (“EIA”) that Mr. Swinden, the Intervenor in these appeals (the “Intervenor”), was employed by All Sports Marketing Inc. (“All Sports Marketing” or “the Appellant”) in insurable and pensionable employment during the period from January 1, 2017 to July 11, 2017 (the “Relevant Period”).

II. Factual Background

[2] I heard from two witnesses: Mr. Swinden, who agrees with the Minister’s determination, and Mr. Donato, who does not.

[3] Mr. Donato testified first. He is the founder and shareholder of All Sports Marketing. All Sports Marketing provides targeted digital marketing services to

organizers of outdoor sporting events such as marathons. These events are often staged to raise funds for charitable purposes.

[4] All Sports Marketing uses emails and social media to promote events. Mr. Donato testified that he was also the owner and founder of Good Times Running Inc., an event planning organization that owns and operates three sporting events in Toronto.

[5] Mr. Donato insisted that the Intervenor was hired as an independent contractor. The Intervenor could determine how and when he provided services to the Appellant. He could work from home, from coffee shops or from his car. How the Intervenor provided his services did not matter. What counted for Mr. Donato was results. According to Mr. Donato, that is why the Intervenor was compensated for his services under a commission-based pay structure.

[6] It was quickly established that Mr. Donato's evidence was irreconcilable with the agreement he drafted and signed with the Intervenor on behalf of the Appellant in November of 2015 (the "Agreement"). Mr. Donato became argumentative when this was pointed out to him by the Respondent's counsel on cross-examination. I attach little weight to his evidence for the reasons that follow.

[7] What stands out from a clause-by-clause review of the Agreement is that it reads like an employment contract. Notably, the Agreement is defined as an employment contract. The Appellant is referred to as "the Employer", and the Intervenor is referred to as "the Contractor", although this is inconsistent and at times he is also referred to as "the Employee".

[8] For example, article 3 of the preamble provides:

[T]he Employer desires to employ the Contractor and the Employee has agreed to accept and enter such employment upon the terms and conditions set out in the Agreement.

[Emphasis added.]

[9] Article 2 of the Agreement provides that the Intervenor was hired to provide his services on a full-time basis.

[10] Article 4 of the Agreement provides:

The Employer agrees to employ the Contractor as a Sales Rep, and the Contractor agrees to be employed on the terms and conditions set out in this Agreement. The Contractor agrees to be subject to the general supervision of and act pursuant to the orders, advice and direction of the Employer.

Similarly, article 6 of the Agreement provides:

The Contractor agrees to abide by the Employer's rules, regulations and practices, including those concerning work schedules, vacation and sick leave, as they may from time to time be adopted or modified.

Article 5 specifies:

The Contractor will perform any and all duties now and later assigned to the Contractor by the Employer.

This included securing sales for related parties and/or domain names owned directly or indirectly by Mr. Donato such as MyNextRace.com, RoadRaceResults.com and Good Times Running Inc.

Article 10 of the contract provides:

The Employer will reimburse the Contractor for all necessary expenses incurred by the Employee while travelling pursuant to the Employer's directions and approval.

[11] There are additional provisions that are incompatible with a contract for services. For example, article 15 provides:

The Contractor agrees to devote full-time efforts to his or her duties as Contractor of the Employer.

This is not a clause that would be agreed to by someone providing services as an independent contractor.

[12] Similarly, articles 16 and 17, which appear under the heading "Avoiding Conflict of Opportunities", are not clauses that would be agreed to by someone in business for himself or herself. These clauses specify that any business opportunity relating to or similar to the Employer's current or anticipated business opportunities belongs to the Employer. The Intervenor was barred from pursuing such opportunities without the written consent of the Appellant.

[13] The impression I am left with is that an employment contract was used by Mr. Donato as a model to prepare the Agreement. From the evidence, I infer that Mr. Donato simply substituted the term “Contractor” for the term “Employee” without modifying the substance of the employment agreement, which he used as a template to prepare the Agreement.

[14] In summary, the use of the term “contractor” rather than “employee” appears to be little more than ineffective window dressing.

III. Analysis

[15] Distinguishing employment from an independent contractor arrangement can be challenging because working relationships are subject to constant change. The distinction turns on the following definitions of “employment”:

a) Paragraph 5(1)(a) of the EIA defines it as:

employment in Canada by one or more employers, under any express or implied contract of service or apprenticeship, written or oral, whether the earnings of the employed person are received from the employer or some other person and whether the earnings are calculated by time or by the piece, or partly by time and partly by the piece, or otherwise.

b) Subsection 2(1) of the CPP provides as follows:

“employment” means the state of being employed under an express or implied contract of service or apprenticeship, and includes the tenure of an office.

[16] The leading case on this issue is *Wiebe Door Services Ltd. v. M.N.R.*,¹ which was confirmed by the Supreme Court of Canada in *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*² The question is always whether or not the person “is performing [the services] as a person in business on his own account”.³ *Sagaz* summarizes the test enunciated in *Wiebe Door* as follows:

. . . 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

¹ [1986] 3 F.C. 553.

² 2001 SCC 59, [2001] 2 S.C.R. 983.

³ *Ibid.*, at para. 47.

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.

It bears repeating that the above factors constitute a non-exhaustive list, and there is not set formula as to their application. The relative weight of each will depend on the particular facts and circumstances of the case.⁴

[Emphasis added.]

[17] It is important to bear in mind, however, that the intention of the parties is also relevant to the extent that it is reflected in the facts of the case. The expressed intention of the parties is not determinative of this issue. Justice Mainville of the Federal Court of Appeal made the following clarification in *1392644 Ontario Inc. o/a Connor Homes v. Minister of National Revenue*:⁵

37 . . . the legal status of independent contractor or of employee is not determined solely on the basis of the parties['] declaration as to their intent. That determination must also be grounded in a verifiable objective reality.

[18] This statement reflects common sense legal reasoning. In some cases, particularly those involving new entrants to the workplace or lower-skilled employees, an inequality in bargaining power often exists. A person seeking employment may be faced with a take it or leave it approach to contractual negotiation.

[19] The evidence demonstrates that this was the case in the matter at hand. I agree with the observation that was made on this point by the Respondent's counsel in her closing arguments. Mr. Donato, as the owner of the Appellant, sought to gain the advantages of two very different situations. On the one hand, the Intervenor was subject to the behavioural and financial control of the Appellant based on the actual terms and conditions of his employment as spelled out in the Agreement. On the other hand, in the absence of a challenge and a contrary determination, the Appellant could avoid the costs of mandatory payroll taxes for CPP contributions and employment insurance premiums, and of mandatory employment benefits and other minimum statutory benefits.

[20] To protect against situations like those described above, *Connor Homes* mandates a two-step analysis. First, the intention of the parties must be ascertained in order to determine what kind of relationship they wished to create. In the light of

⁴ *Ibid.*, at paras. 47 and 48.

⁵ 2013 FCA 85.

that intent, the second step is to analyze the facts of the case to determine whether the expression of the parties' intent conforms to the objective reality of their relationship. The purpose of this examination is to determine whether or not the worker "is performing [the services] as a person in business on his own account." In this second step, the Court must apply the following *Wiebe Door* factors, namely (i) control, (ii) ownership, (iii) chance of profit, and (iv) risk of loss, to determine whether the factual reality reflects the subjective intention of the parties.

[21] Mr. Donato insisted that Mr. Swinden agreed to provide his services as a contractor. To assist the Intervenor in satisfying his tax reporting obligations, Mr. Donato instructed the Intervenor to consult with the Appellant's external tax advisor, who instructed him on how to bill the Appellant for his services and file his tax returns as an independent contractor.

[22] Mr. Donato is undoubtedly a good and experienced salesperson. I infer from the evidence that Mr. Swinden agreed to sign the Agreement without independent legal advice, acting solely on Mr. Donato's representations of the benefits that could be enjoyed by the Intervenor as an independent contractor.

[23] I question whether Mr. Donato received independent tax advice with respect to the pros and cons of an employment relationship versus an independent contractor relationship. Undoubtedly, the Appellant's tax advisor was aware of the fact that the Appellant wished to avoid the costs of payroll taxes and statutory employment benefits. I infer from this that the only advice the Intervenor received was how to report his income as an independent contractor and to collect HST if and when required.

[24] A final observation is merited here. Whether the Intervenor claimed expenses deductible only if he qualifies as an independent contractor has no bearing on the outcome of this appeal as that matter is not before me. Furthermore, paragraph 8(1)(f) of the *Income Tax Act* provides that a salesperson earning commissions may deduct expenses related to his or her employment when the preconditions outlined in that provision are satisfied. In many cases, expenses that are eligible for deduction under paragraph 8(1)(f) are similar to those deductible by persons in business for themselves in a similar situation.

[25] As noted earlier, while the term "Contractor" is used in the Agreement to designate the Intervenor's relationship as that of an independent contractor, the substance of the Agreement is irreconcilable with that designation. The actual terms

and conditions that the Intervenor agreed to are commonly found in a contract of service rather than a contract for services.

[26] I will now return to an application of the four *Wiebe Door* factors referenced earlier.

(1) Control

[27] Control, in the context of distinguishing employees from independent contractors, is often defined as the ability or right of a payer to exercise control over how and when a worker performs his or her duties. The more control the payer has over its personnel, the more the relationship will resemble that of employer-employee. Similarly, the more independence workers enjoy in determining how they will execute their tasks and when they will do so, the more they will appear to be in business for themselves.

[28] As noted earlier, I am satisfied that the Agreement allowed the Appellant to exercise behavioural and financial control over the Intervenor. Mr. Swinden's evidence confirms that the parties interacted with one another based on the terms and conditions of their Agreement. Nothing more is required to be said on this factor.

(2) Tools

[29] The evidence shows that Mr. Swinden worked on site 75 percent of the time. He used the corporation's stationery when required. He also printed out documentation on the corporation's printer. He had access to the Appellant's existing client information, which he accessed to solicit business.

[30] Mr. Swinden acknowledged that he used his own laptop, his own phone and his own car in the performance of his duties. He was reimbursed gas and some expenses when travelling to carry out his duties.

[31] On balance, this factor is neutral.

(3) Chance of Profit / Risk of Loss

[32] Mr. Swinden was required to carry out his duties personally. Unlike an independent salesperson, he could not subcontract his duties to others at his expense in the hope of increasing his commission sales revenue.

[33] Mr. Donato submitted that Mr. Swinden bore a risk of loss. No sales meant no commission revenue. While this is true to some degree, Mr. Swinden's risk of loss was substantially mitigated by his entitlement to a base salary of \$20 per hour for a 40-hour work week.

[34] Mr. Donato claimed that Mr. Swinden had more than one client. As noted earlier, article 4 of the Agreement provides that Mr. Swinden's duties included selling services for All Sports Marketing, MyNextRace.com, RoadRaceResults.com and Good Times Running Inc. As noted earlier, these domain names and entities are owned by Mr. Donato. If Mr. Swinden was truly an independent contractor, I believe that he would have preserved his ability to choose his own clients. This was not the case because he was required to provide his services to the Appellant on a full-time basis.

[35] In my opinion, this factor is indicative of a contract of service.

IV. Conclusion

[36] In my opinion, the *Wiebe Door/Sagaz* factors favour a finding that Mr. Swinden was an employee of the Appellant. The objective reality of the situation is that the Appellant exercised control over how and when Mr. Swinden carried out his duties. For these reasons, I dismiss the appeals and confirm the Minister's decision that Mr. Swinden was an employee of the Appellant for the purpose of the CPP and EIA for the Relevant Period.

Signed at Ottawa, Canada, this 16th day of March 2023.

“Robert J. Hogan”

Hogan J.

CITATION: 2023 TCC 32

COURT FILE NOS.: 2018-3097(CPP)
2018-3354(EI)

STYLE OF CAUSE: ALL SPORTS MARKETING INC. AND
MINISTER OF NATIONAL REVENUE
AND BRUCE SWINDEN

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: January 24, 2023

REASONS FOR JUDGMENT BY: The Honourable Justice Robert J. Hogan

DATE OF JUDGMENT: March 16, 2023

APPEARANCES:

Agent for the Appellant: Peter Donato
Counsel for the Respondent: Jessica Bishara
For the Intervenor: The Intervenor himself

COUNSEL OF RECORD:

For the Appellant:

Name:

Firm:

For the Respondent: François Daigle
Deputy Attorney General of Canada
Ottawa, Canada