

Dockets: 2014-2092(EI)
2014-2093(CPP)

BETWEEN:

GREENSHIELD WINDOWS AND DOORS LTD.,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

Appeals heard on common evidence on March 9 and 10, 2015
at Toronto, Ontario

Before: The Honourable Justice Judith Woods

Appearances:

Agent for the Appellant: Guy Solomon

Counsel for the Respondent: Leonard Elias

JUDGMENT

Upon appeal with respect to decisions of the respondent that Danica Trapara, Tarek Zabian, Cayleen Brandt, Mitchell Groenewegen and Phyllis Dumond were engaged in insurable and pensionable employment with the appellant for varying periods in 2012, the appeals are allowed and the decisions are vacated.

Each party shall bear their own costs.

Signed at Ottawa, Ontario this 20th day of March 2015.

“J.M. Woods”

Woods J.

Citation: 2015 TCC 70
Date: 20150320
Dockets: 2014-2092(EI)
2014-2093(CPP)

BETWEEN:

GREENSHIELD WINDOWS AND DOORS LTD.,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

REASONS FOR JUDGMENT

Woods J.

[1] These appeals under the *Employment Insurance Act* and the *Canada Pension Plan* relate to five individuals (“Workers”) who were engaged as telemarketers by Greenshield Windows and Doors Ltd. (“Greenshield”) during 2012.

[2] Following a CRA trust account review of Greenshield, the Minister of National Revenue (the “Minister”) determined that the Workers were engaged in insurable and pensionable employment. Greenshield disputes these decisions and takes the position that the Workers were engaged as independent contractors.

Background

[3] Greenshield is a small corporation based in London, Ontario which is in the business of installing windows and doors.

[4] As part of its marketing efforts, Greenshield engaged telemarketers to generate leads for its business through cold calling. All of the Workers were so engaged.

[5] The calls were automatically generated by a software program that the telemarketers accessed through computer terminals at Greenshield's premises. As I understand it, the telemarketers had to work in a group in order to minimize dropped calls.

[6] In respect of one Worker, Tarek Zabian, he approached Greenshield about advertising by way of door hangers in addition to his telemarketing services. Greenshield agreed with the proposal and arranged for flyers to be printed which Mr. Zabian distributed.

[7] Testimony at the hearing was provided on behalf of Greenshield by its president, Guy Solomon. Testimony on behalf of the Minister was provided by Danica Trapara, one of the Workers, who was subpoenaed.

[8] It would have been helpful to also have testimony from Ryan Hayes, who was employed by Greenshield as head of marketing and sales. Mr. Hayes had responsibility for the telemarketing function and he had day-to-day contact with the Workers. My impression from the evidence as a whole is that Mr. Solomon had limited direct knowledge of the day-to-day administration of the telemarketing operation.

[9] An adverse inference could be made against Greenshield, who has the burden of proof, for failure to call a key witness such as Mr. Hayes. I have not done so in the context of these informal appeals.

[10] As a result, the best that can be done is to make findings of fact based on the limited evidence that was presented.

[11] In assessing the evidence, I have found that some of Mr. Solomon's testimony was not reliable. I viewed Mr. Solomon's testimony with the typical caution that should be given to self-interested testimony, and Mr. Solomon's testimony was not as forthright as it needed to be to be reliable. In addition, much of Mr. Solomon's testimony was not based on actual knowledge. As for Ms. Trapara, I found her to be a forthright and credible witness.

Applicable legal principles

[12] The relevant legal principles for purposes of these appeals were usefully summarized by my colleague Justice Hogan in *Pareto Corp. v. M.N.R.*, 2015 TCC 47. I have reproduced the summary below.

[9] Distinguishing employment from an independent contractor arrangement can be challenging because working conditions and relationships are unique to every workplace and are constantly evolving.

[10] 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.

[11] The leading case on this issue is *Wiebe Door Services Ltd. v. M.N.R.* which was confirmed by the Supreme Court of Canada in *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.* The question is always whether or not the person “is performing [the services] as a person in business on his own account”. *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 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 no set formula as to their application. The relative weight of each will depend on the particular facts and circumstances of the case.

[Emphasis added.]

[12] In addition to these factors, the subjective intention of the parties must also be considered. Where one can establish a common intent of the parties with regard to the type of working relationship they wished to establish, this intent must be considered in the Court’s analysis of the foregoing factors.

[13] It is important to bear in mind, however, that the intention of the parties is only relevant to the extent that it is reflected in the facts of the case. The subjective intention of the parties is not determinative on its own. 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*:

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.

[14] *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 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. In this second step, the Court must apply the four *Wiebe Door* factors, namely: (i) control, (ii) ownership of tools, (iii) chance of profit and (iv) risk of loss, to determine whether the factual reality reflects the subjective intention of the parties.

Analysis

[13] In the analysis below, the following factors will be discussed: intention of the parties, ability to control, tools and equipment, opportunity for profit, and risk of loss.

A. Intention of the parties

[14] Greenshield submits that it entered into written agreements with the Workers and that the common intention was to enter into an independent contractor relationship.

[15] The Crown does not take issue with this submission and I accept it. In light of this, the essential question in this case is whether the “verifiable objective reality” was consistent with the common intention.

B. Ability to control

[16] The control factor is often important in determining whether a worker is an employee. The question to be decided is whether Greenshield had the ability to control the manner in which the work was done. Based on the evidence as a whole, I conclude that the control factor is consistent with the parties' intention of an independent contractor relationship.

[17] The telemarketing position did not require specialized knowledge and it was often filled by students who wanted part-time work. There was a very high rate of turnover, with approximately 50 percent of telemarketers leaving within the first month.

[18] As mentioned earlier, the work was done in groups. Accordingly, weekly work schedules were prepared by Greenshield in accordance with the telemarketers' requests. There were two four-hour shifts each day, 10 to 2 and 5 to 9, with one 15 minute break.

[19] It is likely that the telemarketers were expected to notify Greenshield if they subsequently were not able to attend at the scheduled time. I accept Mr. Solomon's testimony that many telemarketers did not do this.

[20] In addition, since the work had to be performed in groups Mr. Hayes or a senior telemarketer decided when they should take their 15 minute break.

[21] As for tracking hours worked, the hours had to be tracked in some fashion because the Workers were paid partly on an hourly basis and partly on commission.

[22] The work entailed trying to obtain the consent of homeowners to have an estimate prepared. Greenshield's sales department would then follow up. The Workers received minimal training for this. I accept Mr. Solomon's testimony that it did not make sense to invest time in training when there was a high turnover rate.

[23] The evidence reveals that Workers were given a sample of a "pitch" that they could use, but that they were not required to use it and they typically developed their own techniques. It is likely that the Workers learned from each other in this regard.

[24] As for supervision, there was general oversight and censure if Workers were doing personal activities on the job, but there is no evidence that the Workers were told how to do their job. Ms. Trapara was informed that Mr. Hayes could listen in on calls, but there is no evidence that Greenshield could, or would, interfere with the manner in which pitches were made.

[25] The only meetings with Workers consisted of a 5 minute presentation at the start of each shift in which relevant information, such as special sales promotions, were provided to the Workers.

[26] When the evidence is considered as a whole, I find that it is more consistent with Greenshield not having the ability to control how the work was done. The Workers could choose their hours of work and the manner in which the work was done. This factor favours an independent contractor relationship.

C. Tools and equipment

[27] Greenshield provided all the equipment that was required for the job, in particular, a desk, a computer, and a headset.

[28] Some of the telemarketers preferred to use their own headsets.

[29] Mr. Zabian used his own car to distribute the flyers.

[30] Mr. Solomon testified that each telemarketer received \$5 per month for the use of Greenshield's facilities. This fact was also assumed by the Minister and I accept that \$5 per month was deducted from the Workers' pay.

[31] Despite Mr. Solomon's argument that the \$5 charge was significant, I find that this fee was really window dressing and not a significant factor.

[32] Overall, I find the supply of equipment to be a neutral factor. Although the equipment was supplied by Greenshield, I accept Mr. Solomon's testimony that the equipment had minimal cost to Greenshield. The provision of tools and equipment is not a significant factor in these appeals.

D. Chance of profit and risk of loss

[33] The factor of chance of profit and risk of loss looks to whether there is an entrepreneurial element to the job. In this case, there is no greater entrepreneurial element than would be common with an employed commission salesman. The opportunity that Workers had for increased pay through commissions or working more hours was consistent with an employee relationship. There was no material risk of loss.

[34] This factor favours an employee relationship.

E. Conclusion

[35] In weighing the evidence as a whole, I find that the relationship between Greenshield and the Workers was consistent with their common intention that the Workers be independent contractors.

[36] The factor that dominates in this case is control. The Workers were able to determine their own work schedules and their own telemarketing pitches. In such a loose relationship, I find that the Workers were engaged as independent contractors.

[37] The appeals will be allowed, and the decisions of the Minister will be vacated.

Signed at Ottawa, Ontario this 20th day of March 2015.

“J.M. Woods”

Woods J.

CITATION: 2015 TCC 70

COURT FILE NO.: 2014-2092(EI)
2014-2093(CPP)

STYLE OF CAUSE: GREENSHIELD WINDOWS AND
DOORS LTD. and THE MINISTER OF
NATURAL REVENUE

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: March 9 and 10, 2015

REASONS FOR JUDGMENT BY: The Honourable Justice Judith Woods

DATE OF JUDGMENT: March 20, 2015

APPEARANCES:

Agent for the Appellant: Guy Solomon

Counsel for the Respondent: Leonard Elias

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