

Docket: 2002-4469(EI)

BETWEEN:

JOESEPH TESIOROWSKI,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

Appeal heard on May 26 and 27, 2003 at London, Ontario

Before: The Honourable J.F. Somers, Deputy Judge

Appearances:

For the Appellant:

Vince Sinclair (agent)
The Appellant himself

Counsel for the Respondent:

Stephen Leckie

JUDGMENT

The appeal is dismissed and the decision of the Minister is confirmed in accordance with the attached Reasons for Judgment.

Signed at Ottawa, Canada, this 2nd day of September 2003.

"J.F. Somers"

Somers, D.J.

Citation: 2003TCC520
Date: 20030902
Docket: 2002-4469(EI)

BETWEEN:

JOESEPH TESIOROWSKI,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

REASONS FOR JUDGMENT

Somers, D.J.

[1] This appeal was heard in London, Ontario on May 26 and 27, 2003.

[2] The Appellant is appealing from a decision made by the Minister of National Revenue (the "Minister") that he was not employed by 1463863 Ontario Limited o/a DSD Inc. (the payer) in insurable employment during the period at issue, from November 4, 2001 to March 28, 2002, pursuant to paragraph 5(1)(a) of the *Employment Insurance Act* (the "Act").

[3] Paragraph 5(1)(a) of the *Act* reads as follows:

5. (1) Subject to subsection (2), insurable employment is

(a) 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;

...

[4] The burden of proof is on the Appellant. He must show on a balance of probabilities that the Minister erred in fact and in law in his decision. Each case stands on its own merits.

[5] In making his decision, the Minister relied on the following assumptions of facts which were admitted or denied:

- (a) the Payer's business is the year-round distribution of baked goods; (admitted)
- (b) the Appellant was hired as "independent distributor" under a written agreement; (denied)
- (c) the Appellant purchased baked goods and distributed them to cash accounts and national accounts (house client) on a cash on delivery or charge basis; (denied)
- (d) the Appellant performed his duties in a territory assigned by the Payer; (admitted)
- (e) the Appellant was able to choose his hours and days of work; (denied)
- (f) the Appellant was able to establish his own clientele; (denied)
- (g) the Appellant was paid different percentage of commissions depending on the products purchased; (denied)
- (h) the Appellant purchased his own inventory; (denied)
- (i) the Appellant paid for the lease of the vehicle and the gas to operate the vehicle; (denied)
- (j) the Appellant was not required to wear a uniform; (admitted)
- (k) the Appellant was responsible for his own clients; (denied)
- (l) the Appellant could set his own prices, choose his own clients and was able to control his expenses; (denied)

- (m) the Appellant was not paid any vacation pay nor statutory holidays; (denied)
- (n) the Appellant's pay was not tied into hours worked but products sold; (denied)
- (o) the Appellant was not supervised by the Payer. (denied)

[6] The payer's business operated year round at the distribution of baked goods. The payer started the business in the region in October 2001 as a result of the closure of Lewis' Bakery.

[7] The Appellant worked for Lewis' Bakery during a period of 21 years as an unionized employee.

[8] The payer decided to have independent distributors and offered such to the former employees of Lewis' Bakery.

[9] According to Mr. Kenneth Skellett, Manager of the payer, testified that approximately 21 former employees including the Appellant signed the agreement on October 31, 2001 to become independent distributors (Exhibit A-1).

[10] However, the Appellant testified that he was not hired as an independent distributor and during his cross-examination stated he applied to become an owner-operator. He then added that he no longer wanted to be an owner-operator because the Payer did not hold up to the agreement.

[11] Under the said agreement, the Appellant was assigned a territory to distribute the baked goods.

[12] The Appellant testified that he did not buy the goods from the payer and he did not have his own clientele. He said he was supervised by the payer and had to answer to the payer if he lost a client.

[13] According to the Appellant, he worked regular hours, 6:00 a.m. to 3:00 p.m., 5 days a week and was paid \$500 plus commission. The Appellant deposited five copies of cheques in the amount of \$500 each for the period from February 26, 2002 to the end of March 2002. The commissions were not paid except for the first two months.

[14] The Appellant denied that he was paid a different percentage of commission depending on the products purchased and denied having purchased his own inventory.

[15] He stated he submitted receipts for the purchase of gas and the insurance premiums for the vehicle used to make deliveries. He added that he did not own the vehicle.

[16] In cross-examination he stated that he used the same route established in 1991 by Lewis' Bakery. There was no change in the route after the transition.

[17] He admitted that he did not use a punch clock at the beginning or the end of his day's work nor did he report to the manager. He wore a Lewis' Bakery uniform which he had before the transition. He reported to the head office the name of new customers.

[18] The Appellant admitted that he used a different truck from the one he was driving while working for Lewis' Bakery.

[19] According to the Appellant, the Payer wanted him to be an owner-operator and offered him and the other distributors help along the way by guaranteeing a weekly payment of \$500 until as he said "worked on our own".

[20] He said he had a price list determined by the payer.

[21] Mr. Kenneth Skellett, the payer's manager since September 2001, testified at the request of the Minister. This witness testified that he did not work previously for Lewis' Bakery and the payer did not retain the Lewis' name.

[22] The agreement (Exhibit A-1) was entered into by other distributors including the Appellant. The Appellant worked for the payer from November 1st, 2001 to March 31, 2002 when the Appellant discontinued his employ as a distributor without giving a notice contrary to the 60-day written notice in the agreement.

[23] According to the agreement, the Appellant had to provide his own vehicle with the appropriate insurance. The Appellant paid for the upkeep and gasoline consumption of the vehicle.

[24] Since the Appellant did not have the funds to buy a vehicle it was leased by a person by the name of Terry Dumas but the charges were paid by the Appellant as indicated in Exhibit R-1.

[25] The Appellant did not have to wear a uniform during the distribution of the baked goods.

[26] Mr. Kenneth Skellett admitted that there was a price list for some of the payer's clients being the national account. As for the other clients the Appellant could establish his own price list.

[27] There were no paid vacations or statutory holidays and the hours of work were not recorded. There was no supervision of the distributor.

[28] In cross-examination, Mr. Kenneth Skellett said that the truck in question was leased by Terry Dumas, but the payer billed the Appellant for the lease payments, insurance charges and fuel as indicated in Exhibit R-1.

[29] The Appellant himself cross-examined Mr. Skellett by referring to paragraph 4 of the Reply to the Notice of Appeal.

[30] The witness testified that most of the drivers, including the Appellant, of Lewis Bakery signed the agreement (Exhibit A-1). According to this agreement the Appellant was not hired as an employee.

[31] He stated that the Appellant put in signed orders of purchase and he was billed accordingly as it appears in Exhibit A-1.

[32] The witness did not keep a record of the hours worked, not knowing the time of day the Appellant worked.

[33] The manager admitted there were different prices; one for the national account and the other set by the Appellant himself. He stated that the Appellant was allowed a subsidy to help him get started as an owner-operator.

[34] He said that the route covered by the Appellant was profitable to the latter.

[35] A contract of service necessarily implies that the employee works for the profit of the employer. The essential characteristics of a contract of service include

features involving the nature of the services to be provided; fixed periodic wage; pre-arranged working hours and specific directions as to the work to be done.

[36] In determining whether the parties have established an employer-employee relationship, the total relationship of the parties must be considered. The test to be used to distinguish a contract of service from a contract for services is a four-in-one test with emphasis on the one combined force of the whole scheme of operations.

[37] Case law consistently admits four basic factors in distinguishing a contract of service from a contract for services.

[38] In the case of *Wiebe Door Services Ltd. v. M.N.R.*, 87 DTC 5025, the Federal Court of Appeal enumerated the four basic tests:

1. The degree of control.
2. Ownership of tools.
3. Chance of profit and risk of loss.
4. Integration.

[39] Control: Mr. Skellett said that he had no control on the hours. The Appellant decided on his own his hours of work. If the Appellant had an appointment elsewhere he was free to go. Once the Appellant came in to work at 9:00 a.m. without any objection on the part of the Payer.

[40] The Appellant established his own clientele. However the Appellant used the same route as he followed with his former employer Lewis' Bakery. There was no supervision by the payer. Under this criteria, there was no employee-employer relationship.

[41] Ownership of tools: The Appellant had his own vehicle which he chose and leased through some other person because his credit was not good, but he had to pay for the lease of the truck, for the upkeep, the insurance premiums, gasoline and other expenses. The accountability of these expenses was done through the payer (Exhibit R-1). On this criteria we can conclude that the Appellant was an independent contractor.

[42] Chance of profit and loss: The payer paid the Appellant \$500 on a weekly basis, in order to help him get started (Exhibit R-1 indicates the sales, commissions, etc.).

[43] The Appellant ordered the products from the payer. He was invoiced and had to pay for the products ordered. The Appellant could establish his own price list except for the national account. Some products the payer allowed a right off as for other products the Appellant had to assume the loss for bad returns.

[44] The evidence has shown that the Appellant could make a profit or suffer a loss. On this criteria the Appellant should be considered as an independent contractor.

[45] Integration: The Appellant bought his products and sold them at a profit or loss; he decided the price list to his clients.

[46] The Appellant applied for a GST number, which indicates his acceptance of being an independent contractor. The Appellant admitted in his testimony that he applied to become an owner-operator. He said he no longer wanted to be an owner-operator because the payer did not respect the terms of the agreement. According to the Appellant the payer owed him \$1,300 which he claimed in another Court.

[47] The Appellant, according to this criteria, was not integrated into the payer's business. He was acting as an independent contractor.

[48] The intentions of the parties were incorporated in the agreement signed on October 31, 2001.

[49] Considering the evidence as a whole the Appellant was not engaged by the payer in insurable employment pursuant to paragraph 5(1)(a) of the *Act*.

[50] The appeal is dismissed and the decision of the Minister is confirmed.

Signed at Ottawa, Canada, this 2nd day of September, 2003.

"J.F. Somers"

Somers, D.J.

CITATION: 2003TCC520
COURT FILE NO.: 2002-4469(EI)
STYLE OF CAUSE: Joeseph Tesiorowski and M.N.R.
PLACE OF HEARING: London, Ontario
DATE OF HEARING: May 26, 2003
REASONS FOR JUDGMENT BY: The Honourable J.F. Somers
Deputy Judge
DATE OF JUDGMENT: September 2, 2003

APPEARANCES:

For the Appellant: Vince Sinclair (Agent)
The Appellant himself

Counsel for the Respondent: Stephen Leckie

COUNSEL OF RECORD:

For the Appellant:

Name:

Firm:

For the Respondent: Morris Rosenberg
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