

Docket: 2002-4240(EI)

BETWEEN:

630393 SASKATCHEWAN LTD. O/A DOVE HOME CARE SERVICES,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

Appeal heard on October 1, 2003, at Regina, Saskatchewan

Before: The Honourable Justice Beaubier

Appearances:

Agent for the Appellant: Shannon Chapple

Counsel for the Respondent: Anne Jinnouchi

JUDGMENT

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

Signed at Saskatoon, Saskatchewan, this 15th day of October 2003.

"D.W. Beaubier"

Beaubier, J.

Docket: 2002-4241(CPP)

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Before: The Honourable Justice Beaubier

Appearances:

Agent for the Appellant: Shannon Chapple

Counsel for the Respondent: Anne Jinnouchi

JUDGMENT

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

Signed at Saskatoon, Saskatchewan, this 15th day of October 2003.

"D.W. Beaubier"

Beaubier, J.

Citation: 2003TCC731

Date: 20031015

Docket: 2002-4240(EI)

BETWEEN:

630393 SASKATCHEWAN LTD. O/A DOVE HOME CARE SERVICES,
Appellant,

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AND BETWEEN:

Docket: 2002-4241(CPP)

630393 SASKATCHEWAN LTD. O/A DOVE HOME CARE SERVICES,
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REASONS FOR JUDGMENT

Beaubier, J.

[1] These appeals were heard together on common evidence at Regina, Saskatchewan on October 1, 2003. Shannon Chapple, a Registered Nurse, and the operating officer of the Appellant, was the only witness.

[2] The particulars in the appeal are set out in paragraphs 4 to 11 inclusive of the Reply to Notice of Appeal Number 2002-4240 (EI). They read:

4. In response to the appeal, the Minister decided that Elizabeth Beggs, Luce Delaurier, Christine Davies, Shriley Gentles, Jean Kerr, Andrea Muldrige and Rose Phillips were not employed under a contract of service with the Appellant but were in insurable employment pursuant to paragraph 6(g) of the *Employment Insurance Regulations* for the periods as follows:

| | |
|------------------|-----------------------------------|
| Elizabeth Beggs | January 1, 2001 to July 16, 2001 |
| Luce Delaurier | January 1, 2001 to June 5, 2001 |
| Christine Davies | January 1, 2001 to June 11, 2001 |
| Shriley Gentles | January 1, 2001 to June 5, 2001 |
| Jean Kerr | January 1, 2001 to June 4, 2001 |
| Andrea Muldrige | January 1, 2001 to April 30, 2001 |
| Rose Phillips | January 1, 2001 to June 4, 2001 |

5. By Notice of Assessment dated February 27, 2002, the Appellant was assessed for, among other things, employment insurance premiums in the amount of \$14,216.42 for the 2001 year, in respect of the individuals listed in *Schedule "A"* attached to and forming part of the Reply to the Notice of Appeal.

6. The Appellant appealed to the Minister for a reconsideration of the 2001 assessment.

7. In response to the appeal, the Minister confirmed the assessment for the 2001 year as the individuals listed in *Schedule "A"* attached to and forming part of the Reply to the Notice of Appeal (collectively hereinafter "the Workers") were not employed under a contract of service but were in insurable employment pursuant to paragraph 6(g) of the *Employment Insurance Regulations*.

8. In so assessing as he did with respect to the Workers, the Minister relied on the following assumptions of fact:

- (a) the Appellant is in the business of arranging health care providers to care for its clients in homes, hospitals and institutions;
- (b) the Appellant obtains contracts with clients (hereinafter "the Client") to provide health care personnel;
- (c) the Appellant screens and places qualified personnel;
- (d) the Appellant charges the Client for providing the health care personnel;
- (e) the Workers were hired as care providers and their services ranged from nursing which was provided by Workers who were registered nurses to companionship which was provided by Workers with no special training;
- (f) the Workers earned a set hourly wage;
- (g) the wages ranged from \$8.00 to \$22.00 per hour depending on the Workers' qualifications;
- (h) the Appellant set the Workers' pay rates;
- (i) the Appellant paid the Workers;
- (j) the Workers' personal service was required;
- (k) the Client or someone acting on the Client's behalf determined the type of care the Client required;
- (l) the Client or someone acting on the Client's behalf could direct or instruct the Workers;
- (m) the services provided by the Workers was subject to the approval of the Client or someone acting on the Client's behalf;
- (n) some of the Workers performed services at a methadone clinic;
- (o) a Board of Directors directed the operation of the methadone clinic;

- (p) the Board of Directors of the methadone clinic set guidelines, policies and procedures, and could issue instructions and direction to the Workers;
- (q) all of the tools and equipment required were provided by the Client or the facility the Client was in;
- (r) the Workers did not incur any expenses in the performance of their duties;
- (s) the Workers did not have a chance of profit or risk of loss;
- (t) the Appellant placed the Workers in employment to perform services for the Client;
- (u) the Appellant acted as a placement or employment agency;
- (v) the Workers were under the direction and control of the Client;
- (w) the Appellant remunerated the Workers, and
- (x) wages paid by the Appellant to the Workers are detailed on *Schedule "B"* attached to and forming part of the Reply to the Notice of Appeal.

B. ISSUES TO BE DECIDED

9. The issue to be decided is whether the Workers were in insurable employment, for the 2001 year, pursuant to section 6(g) of the *Employment Insurance Regulations*.

C. STATUTORY PROVISIONS, GROUNDS RELIED ON AND RELIEF SOUGHT

10. The Respondent relies on subsection 2(1) and paragraph 5(1)(a) of the *Employment Insurance Act* and paragraph 6(g) of the *Employment Insurance Regulations*.

11. He submits that the Workers were engaged in insurable employment, for the 2001 year, within the meaning of paragraph 6(g) of the *Employment Insurance Regulations* as:

- (a) the Appellant placed the Workers in employment to perform services for the Client,
- (b) the Appellant acted as a placement or employment agency,
- (c) the Workers were under the direction and control of the Client, and
- (d) the Appellant remunerated the Workers.

[3] Assumptions 8(a), (b), (c), (d), (f), (g), (i), (j), (m), (n), (q), (u) and (w) were not refuted by the evidence.

[4] The Court accepts all of Ms. Chapple's testimony as true.

[5] In particular, she testified that the Appellant and its clients distinguished between the professional workers, Registered Nurses (R.N.s) and Licensed Practical Nurses (L.P.N.s), and its other workers. The professional workers were placed with patients without any inspection or direction by the Appellant other than the contractual instructions it received that an R.N. or L.P.N. was required. They accepted that as the "Type of Service" (Exhibit R-3) to be provided and the professional placed with the client did the entire assessment of the client's needs without any input or supervision from the Appellant. Often these professional services were paid by some form of health insurance.

[6] The majority of the patients were Level 3, Level 4, or required palliative care.

[7] The remaining placements, Nurses Aides, often had no training except what the Appellant provided. They had no licensing or other form of certification. Before placing them with a client, Ms. Chapple would personally assess the client's needs

and situations and would prescribe the care to the worker and contract it with the client.

[8] Ms. Chapple testified that the pay rates for the professionals were substantially higher because of their qualifications and because they were not controlled by the Appellant or the client. Rather, as professionals, they made the decisions. The Court accepts this as true, because they were customarily in the client's home and were not under the direction of a hospital or a doctor. They were hired independently and their reports to the Appellant and the Health Region are professional reports and not those of someone under direction. This finding distinguishes these professionals from registered nurses in hospitals (*Sheridan v. Canada*, [1985] F.C.J. No. 230 (F.C.A.)) and from those controlled by a patient's doctor (*Health Assist Registry of Toronto Inc. v. Canada* [1996] T.C.J. No. 203).

[9] It is in light of these findings that the remaining assumptions are reviewed as follows:

8(e) The question to be decided is who "hired" the workers -- the client or the Appellant. Apparently the client contacts the Appellant for an appropriate worker and the Appellant sends whoever is available with the appropriate qualifications according to the order of its list. Non-professionals are screened. The client pays the Appellant, who in turn pays the worker.

8(h) The pay rates for the professionals are negotiated between the Appellant and the professionals.

8(k) Where a professional is sent, that professional determines the type of care the client requires. Otherwise Ms. Chapple and the client determine the type of care the client requires.

8(l) The professionals are not directed or instructed by the client; the non-professionals are.

8(o) Is not true.

8(p) Is subject to the foregoing findings as between professional and non-professional workers.

8(r) Is wrong insofar as any uniforms, professional fees and other normal professional disbursements or travelling may be required.

8(s) Is subject to 8(r).

8(t) Workers can refuse placements.

8(v) Is subject to the foregoing findings.

8(x) Ms. Chapple's testimony disputed the concept of "wages" in this assumption.

[10] Using the concepts contained in *Wiebe Door Services Ltd. v. MNR*, 87 DTC 5025, the Court finds:

Control

The professionals were not controlled. The non-professionals were controlled by the Appellant and the client.

Tools

The Appellant did not supply any tools; nor did the client provide "tools". The professionals had whatever tools they needed for their professional duties; the others had none.

Chance of Profit, Risk of Loss

On the whole, the risk of loss was that of not being placed. The profit was whatever was earned for the professionals less their normal expenses.

Integration

Seventy-six percent of those placed worked elsewhere on a full time basis. Thus the workers could come and go and were not dependant on the Appellant and the Appellant was not dependant on the workers. Each could replace the other.

[11] The issue in each of these appeals is:

1. In the employment insurance appeal it is whether the workers were in insurable employment for the 2001 year pursuant to subparagraph 6(g) of the *Employment Insurance Regulations* which reads:

6. Employment in any of the following employments, unless it is excluded from insurable employment by any provision of these Regulations, is included in insurable employment:

...

(g) employment of a person who is placed in that employment by a placement or employment agency to perform services for and under the direction and control of a client of the agency, where that person is remunerated by the agency for the performance of those services.

2. In the Canada Pension Plan appeal it is whether the workers were in pensionable employment for the 2001 year pursuant to section 34 of the *Canada Pension Plan Regulations* which reads:

34. (1) Where any individual is placed by a placement or employment agency in employment with or for performance of services for a client of the agency and the terms or conditions on which the employment or services are performed and the remuneration thereof is paid constitute a contract of service or are analogous to a contract of service, the employment or performance of services is included in pensionable employment and the agency or the client, whichever pays the remuneration to the individual, shall, for the purposes of maintaining records and filing returns and paying, deducting and remitting contributions payable by and in respect of

the individual under the Act and these Regulations, be deemed to be the employer of the individual.

(2) For the purposes of subsection (1), "placement or employment agency" includes any person or organization that is engaged in the business of placing individuals in employment or for performance of services or of securing employment for individuals for a fee, reward or other remuneration.

[12] Thus, the Regulations differ. The Court finds that the Appellant is liable to pay the *Canada Pension Plan* contributions for all of the placements in question based upon section 34 quoted.

[13] However, the Court accepts Ms. Chapple's testimony that the R.N.s and the L.P.N.s were not placed in employment to perform service for and under the direction of a client or the agency and therefore the Appellant is not liable for the Employment Insurance premiums respecting them.

[14] These matters are referred to the Minister of National Revenue for reconsideration accordingly.

Signed at Saskatoon, Saskatchewan, this 15th day of October 2003.

"D.W. Beaubier"

Beaubier, J.

CITATION: 2003TCC731

COURT FILE NO.: 2002-4240(EI)
2002-4241(CPP)

STYLE OF CAUSE: 630393 Saskatchewan Ltd. o/a Dove
Home Care Services v. MNR

PLACE OF HEARING: Regina, Saskatchewan

DATE OF HEARING: October 1, 2003

REASONS FOR JUDGMENT BY: The Honourable Justice Beaubier

DATE OF JUDGMENT: October 15, 2003

APPEARANCES:

For the Appellant: Shannon Chapple

Counsel for the Respondent: Anne Jinnouchi

COUNSEL OF RECORD:

For the Appellant:

Name:

Firm:

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Ottawa, Canada