

Docket: 2010-2192(CPP)

BETWEEN:

SOUTHLAND LIVESTOCK FEEDERS LTD.,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

Appeal heard together on common evidence with the appeal of
Southland Livestock Feeders Ltd., (2010-2193(EI))
on March 28, 2011, at Regina, Saskatchewan

Before: The Honourable Justice G. A. Sheridan

Appearances:

Agent for the Appellant: Brent Cammer
Counsel for the Respondent: Bryn Frape

JUDGMENT

In accordance with the attached Reasons for Judgment, the appeal from the assessment is allowed on the basis that in 2007 Walter Penner was not engaged in pensionable employment pursuant to paragraph 6(1)(a) of the *Canada Pension Plan*. The decision of the Minister of National Revenue is hereby vacated.

Signed at Toronto, Ontario, this 12th day of April 2011.

“G. A. Sheridan”

Sheridan J.

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Appearances:

Agent for the Appellant: Brent Cammer
Counsel for the Respondent: Bryn Frape

JUDGMENT

In accordance with the attached Reasons for Judgment, the appeal of the assessment is allowed on the basis that in 2007 Walter Penner was not engaged in insurable employment pursuant to paragraph 5(1)(a) of the *Employment Insurance Act*. The decision of the Minister of National Revenue is hereby vacated.

Signed at Ottawa, Canada, this 12th day of April 2011.

“G. A. Sheridan”

Sheridan J.

Citation: 2011TCC209
Date: 20110412
Dockets: 2010-2192(CPP)
2010-2193(EI)

BETWEEN:

SOUTHLAND LIVESTOCK FEEDERS LTD.,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

REASONS FOR JUDGMENT

Sheridan J.

[1] The Appellant, Southland Livestock Feeders Ltd. (“Southland”) is appealing the decision of the Minister of National Revenue that in 2007 Walter Penner was an employee engaged in pensionable and insurable employment under paragraph 6(1)(a) of the *Canada Pension Plan* and paragraph 5(1)(a) of the *Employment Insurance Act*, respectively.

[2] The only witness to testify was the principal of Southland, Brent Cammer. He was direct and concise in his testimony and gave me no reason to doubt his evidence. For the reasons set out below, I am satisfied that Mr. Penner was working as an independent contractor.

[3] Mr. Cammer is a rancher. In 2007, he in his capacity as the principal of Southland was also running a feedlot. The essence of a feedlot business is to fatten cattle for market. The cattle are owned by third parties who pay a fee to the feedlot operator to provide that service. One of Mr. Cammer’s responsibilities was to monitor each animal’s development and adjust its nutrition to ensure the production of a healthy profitable beast.

[4] Mr. Penner was an experienced feedlot worker. His role was to carry out the feeding of the cattle in accordance with Southland's specifications while also exercising his own good judgment regarding the cattle's condition. In performing such services, he used Southland's tractors, feed-mixing wagon and grain augers. The other component of his work was to maintain and repair Southland's feedlot equipment. For this work, he provided his own tools. He had access to a welder and air compressor on the Southland property. He was reimbursed by Southland for any replacement parts he purchased.

[5] It is common ground that Mr. Penner set his own schedule and worked as many hours as were required to get the job done. The amount of work depended on the number of cattle on hand as well as the weather; for example, during January's deep freeze, the feedlot was a much busier place than in August when grazing land was readily available. Because of the unpredictability of the amount of work that might be required at any given time, the parties agreed that Mr. Penner would invoice Southland bi-monthly according to the number of hours worked at a rate of \$13 per hour¹. The sample invoices before the Court showed that Mr. Penner's hours ranged from 141 hours at the beginning of January to 75 at the end of April.

[6] Contrary to the Minister's assumptions, Mr. Penner did not receive any training and did not require supervision. Because of his experience and competence in feedlot work, once he had been shown around the Southland feedlot, he simply got on with the tasks required.

[7] I accept Mr. Cammer's evidence that during their negotiations, Mr. Penner represented himself to Southland as a self-employed worker and, for reasons of his own not all of which seem to have been good, insisted on being paid in cash. Southland agreed to his conditions and accordingly, no deductions were made from Mr. Penner's invoiced amounts for income tax, employment insurance or Canada Pension Plan premiums. Southland issued receipts for cash payments to Mr. Penner of \$27,000.

[8] In addition to his feedlot work, Mr. Penner was engaged in other commercial endeavours, including the raising of purebred dogs and goats. As a result, he dedicated about a third of his time to the Southland feedlot. If Mr. Penner was not available, Southland had to make other arrangements for the cattle which, in practical terms, meant Mr. Cammer did the work himself. On some occasions, Mr. Penner brought a friend along with him to help with his work. While Mr. Cammer was

¹ Exhibit A-1.

unable to say if Mr. Penner paid her for her efforts, the important fact is that Southland did not.

Analysis

[9] What seems to have pricked the Minister's interest in this matter was Mr. Penner's having reported his Southland earnings as "other employment income" and his not having ever reported any business income in past years². Mr. Cammer said he had tried to track down Mr. Penner in the hope of resolving his problems with the Canada Revenue Agency but had had no success. Without Mr. Penner's evidence, it was left to Mr. Cammer to rebut the assumed facts upon which the Minister based his decision to assess Southland for employment insurance and CPP premiums. This he has done.

[10] In determining whether a worker is an employee or an independent contractor, the Court must be guided by the four-fold test in *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*³ and may, in certain circumstances, take into account the intentions of the parties; *Royal Winnipeg Ballet v. Minister of National Revenue*, [2008] 1 C.T.C. 220. In the present matter, the evidence in respect of the *Sagaz* criteria is not particularly helpful in assessing Mr. Penner's status; of greater assistance is the evidence of the parties' intentions.

[11] Turning, first, to the *Sagaz* factors, the evidence regarding the degree of control is not necessarily consistent with Mr. Penner's having been an employee. Though Mr. Penner was obliged to meet the expectations of Southland in providing his services, he was not under Southland's "control" as that term is normally understood. Mr. Cammer had similar expectations of Southland's accountants and lawyers, neither of whom would be considered employees of the company. The fact is that Mr. Penner effectively worked on his own, without training or supervision, during the hours he chose to complete the work. What dictated his schedule were the alimentary needs of the cattle; subject to that reality, he was free to work for himself or others and in fact, was engaged in his own business ventures while working at Southland. As for tools, the large equipment and the small tools required for the maintenance and repair work were provided by Southland and Mr. Penner, respectively. The evidence in respect of tools is neutral except for the Minister's assumption that Mr. Penner used his own vehicle to get to and from the Southland feedlot. Assuming that the Minister considered the vehicle to be a "tool", that fact is

² Reply to the Notice of Appeal, paragraphs 5(x)-(z).

³ [2001] 4 C.T.C. 139.

more consistent with Mr. Penner's having been an independent contractor than an employee. Normally, it is in circumstances where the payor provides transportation to the worker that he is found to be an employee.

[12] Regarding the chance of profit and risk of loss, here, the evidence tips ever so slightly in favour of Mr. Penner's having been an independent contractor. Given the control he exercised over how and when he performed his work and his ability to bring in additional help, he had some opportunity to maximize his earnings. There was no clear evidence as to whether Mr. Penner would have had to make good any losses, say, for example, if one of the cattle had died as a result of his ministrations because that never happened. I am able to infer from the tenor of Mr. Cammer's testimony, however, that had Mr. Penner caused Southland any economic loss, it is more likely than not he would have had to make up for it. That leaves only the integration test – always difficult to apply in any practical way and all the more so in the present circumstances. Counsel for the Respondent quite rightly argued that feeding the cattle was essential to Southland's business. It does not follow, however, that Mr. Penner was integral to the business and therefore, an employee. As was recognized by Décary, J.A. in *Wolf v. Canada*, 2002 FCA 96, these days, work that is a fundamental component of a payor's business is often performed by contract workers:

[120] In our day and age, when a worker decides to keep his freedom to come in and out of a contract almost at will, when the hiring person wants to have no liability towards a worker other than the price of work and when the terms of the contract and its performance reflect those intentions, the contract should generally be characterised as a contract for services. If specific factors have to be identified, I would name lack of job security, disregard for employee-type benefits, freedom of choice and mobility concerns.

[13] All in all, Mr. Cammer's evidence leans more towards the conclusion that Mr. Penner was an independent contractor than an employee. To the extent there remains any doubt, the intention of the parties tips the balance in Southland's favour. In *Royal Winnipeg Ballet*, the Federal Court of Appeal cited another of Justice Décary's comments from *Wolf*:

Taxpayers may arrange their affairs in such a lawful way as they wish. No one has suggested that Mr. Wolf or Canadair or Kirk-Mayer are not what they say they are or have arranged their affairs in such a way as to deceive the taxing authorities or anybody else. When a contract is genuinely entered into as a contract for services and is performed as such, the common intention of the parties is clear and that should be the end of the search. Should that not be enough, suffice it to add, in the case at bar, that the circumstances in which the contract was formed, the

interpretation already given to it by the parties and usage in the aeronautic industry all lead to the conclusion that Mr. Wolf is in no position of subordination and that Canadair is in no position of control.⁴

[14] Justice Noël concurred in the result but qualified the above statement by saying:

... I acknowledge that the manner in which parties choose to describe their relationship is not usually determinative particularly where the applicable legal tests point in the other direction. But in a close case such as the present one, where the relevant factors point in both directions with equal force, the parties' contractual intent, and in particular their mutual understanding of the relationship cannot be disregarded.

...

This is not a case where the parties labelled their relationship in a certain way with a view of achieving a tax benefit. No sham or window dressing of any sort is suggested. It follows that the manner in which the parties viewed their agreement must prevail unless they can be shown to have been mistaken as to the true nature of their relationship. In this respect, the evidence when assessed in the light of the relevant legal tests is at best neutral. As the parties considered that they were engaged in an independent contractor relationship and as they acted in a manner that was consistent with this relationship, I do not believe that it was open to the Tax Court Judge to disregard their understanding ...⁵

[15] After considering these decisions and the related jurisprudence in some detail, Sharlow, J.A. went on to summarize the emerging principles and their application to the question of employee versus independent contractor:

... One principle is that in interpreting a contract, what is sought is the common intention of the parties *rather than the adherence to the literal meaning of the words*. Another principle is that in interpreting a contract, the circumstances in which it was formed, the interpretation which has already been given to it by the parties or which it may have received, and usage, are all taken into account. The inescapable conclusion is that the evidence of the parties' understanding of their contract must always be examined and given appropriate weight.⁶ [Underling added.]

⁴ *Royal Winnipeg Ballet*, above, at paragraph 51.

⁵ Above, at paragraph 52.

⁶ Above, at paragraph 60.

[16] Applying the above to the present circumstances, it should be noted that the Minister did not allege sham or improper purpose in respect of Southland's agreement with Mr. Penner. Because the contract between Southland and Mr. Penner was verbal, its terms and the circumstances hinged on the credibility of Mr. Cammer's evidence in this regard. As mentioned at the outset, he gave me no reason not to take him at his word. His direct evidence was not shaken on cross-examination. Having thus cast doubt on the accuracy of the Minister's assumptions, Mr. Cammer shifted the onus to the Minister to buttress his case. No witnesses were called by the Crown.

[17] Turning, then, to the context in which the oral agreement was made, it involved two cattlemen in southwest Saskatchewan's ranching country, both experienced and competent in the proper operation of a feedlot, each with other businesses on the go, in more or less equal positions of power to negotiate the rate and conditions for Mr. Penner's performance of certain services for Southland. If there was any inequality in bargaining power, it seems to me Southland was in the weaker position. In explaining one of the reasons why it would have been nonsensical for Mr. Penner to have provided his own tractor, wagon and grain augers, Mr. Cammer testified that it was difficult enough to find people willing to do feedlot work without imposing onerous (and redundant, since the very same equipment was already available at the feedlot) conditions on them. This suggests that had Mr. Penner wanted to, he could have negotiated for a position as an employee; whether Southland would have agreed to that is another matter.

[18] The invoices produced by Southland show that the parties acted in accordance with the verbal agreement described by Mr. Cammer. As for the Minister's assumptions that Mr. Penner reported his income from Southland as "other employee income" instead of business income and that he had never declared business income on his returns in the past, why he might have done so is beyond the knowledge of Southland and, in any case, is not in itself indicative of his not having intended to work as an independent contractor. Similarly, Mr. Penner's not having registered for GST does not mean he was an employee; his gross income from Southland was less than the threshold amount that would have triggered his obligation to register.

[19] More significant, for the purposes of an appeal of an assessment for unremitted employment insurance and CPP premiums, is the fact that the Minister's interest in the file arose in respect of Mr. Penner's income tax return rather than an application for employment insurance. From this I infer that he never applied for any benefits. His not having done so is also consistent with Mr. Cammer's evidence that Mr. Penner considered himself to be an independent contractor.

[20] In all of the circumstances, I am persuaded that Mr. Penner was working at the Southland feedlot in 2007 as an independent contractor. The appeal of the assessment of the Minister of National Revenue for employment insurance and Canada Pension Plan premiums is allowed and the assessment is vacated.

Signed at Toronto, Ontario, this 12th day of April 2011.

“G. A. Sheridan”

Sheridan J.

CITATION: 2011TCC209

COURT FILE NOS.: 2010-2192(CPP)
2010-2193(EI)

STYLE OF CAUSE: SOUTHLAND LIVESTOCK FEEDERS
LTD. AND M.N.R.

PLACE OF HEARING: Regina, Saskatchewan

DATE OF HEARING: March 28, 2011

REASONS FOR JUDGMENT BY: The Honourable Justice G. A. Sheridan

DATE OF JUDGMENT: April 12, 2011

APPEARANCES:

Agent for the Appellant: Brent Cammer
Counsel for the Respondent: Bryn Frape

COUNSEL OF RECORD:

For the Appellant:

Name:

Firm:

For the Respondent:

Myles J. Kirvan
Deputy Attorney General of Canada
Ottawa, Canada