

Citation: 2012 TCC 290
Date: 20120809
Docket: 2010-2155(CPP)

BETWEEN:

VICTOR HAUSAUER O/A THE MARKET CENTRE,
Appellant,
and
THE MINISTER OF NATIONAL REVENUE,
Respondent.

Docket: 2010-2156(EI)

AND BETWEEN:

VICTOR HAUSAUER O/A THE MARKET CENTRE,
Appellant,
and
THE MINISTER OF NATIONAL REVENUE,
Respondent.

REASONS FOR JUDGMENT

(Edited from the transcript of Reasons for Judgment delivered orally from the Bench on March 20, 2012 at Lethbridge, Alberta)

Campbell J.

[1] First before I start with the appeals which are scheduled for this morning, I'm going to read my reasons into the record with respect to the CPP and EI appeals of Victor Hausauer which I heard yesterday. And, I believe, Mr. Hausauer is not in the courtroom so I'll read the reasons in his absence.

[2] These are appeals heard together on common evidence from a ruling by the Minister of National Revenue (the "Minister") that the worker, Christopher

Nicholson, was engaged in pensionable and insurable employment with the Appellant for the period May 25th, 2008, through to March 4th, 2009. For the purposes of these reasons, I will refer mainly to the employment insurance appeal.

[3] The Appellant operates a market store, known as The Market Centre, which sells, among other things, fresh produce and bedding plants. The business operated year round, but was busier in the spring and summer seasons. The worker was engaged to pick up plants and vegetables, set-up produce stands, water plants, provide customer service and sell Christmas trees. The majority of those duties were performed at the Appellant's premises.

[4] The worker earned \$10 per hour during the period. Prior to this period under appeal, the worker earned \$9 per hour while engaged by the Appellant to perform similar work.

[5] The Appellant agreed that he determined the worker's hourly rate of pay. The worker did not invoice the Appellant, but according to the worker's evidence he kept track of the hours he worked and submitted them to the Appellant. He assumed the Appellant also tracked his hours, but the Appellant testified that he never kept a record of the worker's time. The worker was engaged during the hours of operation of The Market Centre.

[6] The Appellant also stated that the worker was experienced in this type of work and therefore required little direction in his work activities. The Appellant provided all tools and equipment and owned the truck that was used to pick up product.

[7] The Appellant's position is that the worker was engaged as an independent contractor and that this was evidenced by the numerous cheques issued to the worker on which the Appellant wrote, "Contract," at the lower left-hand side of the cheque, and a short, one-page, undated, handwritten agreement signed by the worker in which he acknowledged that his work was contract work for which he was responsible for his own deductions.

[8] The worker testified that he always considered himself to be an employee and that he felt forced to sign the aforesaid agreement.

[9] There is abundant case law in this area. Clearly, there was no meeting of minds between the parties with respect to their intention. When this occurs the terms and conditions of their legal work relationship becomes even more important and this is where the *Wiebe Door Services Ltd. v. Minister of National Revenue* (1986), 87 D.T.C. 5025 ("*Wiebe Door*") factors are vital to an analysis of the issue. Parties may

attach any term they wish to their relationship, but the terms and conditions of that relationship must support and reflect the label which they so attach.

[10] In the circumstances of these appeals, the *Wiebe Door* factors support the Minister's position that the worker is an employee and this is so, despite the fact that the worker was less than impressive as a witness. The test was clearly stated in *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, 2001 S.C.C. 59 at paragraphs 47 and 48, and I quote:

47 ... The central question is whether the person who has been engaged to perform the services is performing them as a person in business on his own account. 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 the investment and management held by the worker, and the worker's opportunity for profit in the performance of his or her tasks.

48 It bears repeating that the above factors constitute a non-exhaustive list, and there is no set formula as to their application....

[11] The Appellant clearly exercised control over the worker and the performance of his work activities. The Appellant set the hourly wage and the hours worked. He guaranteed the worker's work. If the worker was unavailable, the Appellant completed his duties. Since the worker was experienced in performing these types of activities, he required little supervision. However, the Appellant testified that in some cases the worker required the Appellant's approval for certain tasks. In any event, it is the right to control and not the actual control that may have been exercised and the facts here support my conclusion that the Appellant retained the ultimate right to control the worker in his activities if he thought it necessary.

[12] The factor of tools and equipment also supports the conclusion that the worker was an employee simply because everything necessary for the worker's activities was supplied by the Appellant at his business premises. This included a vehicle, which was owned by the Appellant and used in the business and for which the Appellant paid gas, maintenance and insurance.

[13] The worker had no opportunity for financial profit or risk of loss. He received a set hourly wage according to his hours worked which were established by the Appellant. He was not financially invested in the business or its management and he bore no responsibility for any of the expenses of the business. These factors again support the worker being an employee.

[14] In addition to these factors, there was no evidence that the worker worked for anyone else during this period, that he advertised to obtain work, that he had a business name or a business or a GST number. The Appellant's evidence was also that the worker could not hire replacements.

[15] The worker is not operating a business on his own account in these circumstances. The facts do not support the Appellant's position that the worker was an independent contractor despite the stated intention on the cheques, the agreement and the oral evidence of the Appellant. For these reasons, I am dismissing the appeal because the evidence supports my conclusion that the worker was engaged in pensionable and insurable employment during the period under appeal.

[16] And that concludes my reasons in the two appeals from yesterday.

Signed at Summerside, Prince Edward Island, this 9th day of August 2012.

"Diane Campbell"

Campbell J.