

Dockets: 2012-1027(EI)
2012-1028(CPP)

BETWEEN:

ANA C. DEAN, o/a ANA'S CARE & HOME SUPPORT,
Appellant,
and
THE MINISTER OF NATIONAL REVENUE,
Respondent,
and
MILANI S. NIDOY,
Intervenor.

Appeal heard on September 26, 2012 at Vancouver, British Columbia

By: The Honourable Justice J.M. Woods

Appearances:

Agent for the Appellant:	Antonio Mejia
Counsel for the Respondent:	Kristin McHale (student-at-law) Shankar Kamath
For the Intervenor:	The Intervenor herself

JUDGMENT

The appeal with respect to the decision of the Minister of National Revenue (1) that Virginia Sison, Eliadora Clores, Evangeline Abalos and Charlene Apalon Garzon were engaged by the appellant in insurable and pensionable employment

during the period from January 1, 2008 to October 31, 2009, and (2) that Milani Nidoy was engaged by the appellant in insurable and pensionable employment during the period from June 1, 2009 to October 31, 2009, is dismissed, and the decision is confirmed. Each party shall bear their own costs.

Signed at Ottawa, Ontario this 19th day of October 2012.

“J. Woods”

Woods J.

Citation: 2012 TCC 370
Date: 20121019
Dockets: 2012-1027(EI)
2012-1028(CPP)

BETWEEN:

ANA C. DEAN, o/a ANA'S CARE & HOME SUPPORT,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent,

and

MILANI S. NIDOY,

Intervenor.

REASONS FOR JUDGMENT

Woods J.

[1] Ana's Care & Home Support is a sole proprietorship operated by Ana Dean which provides in-facility and home care services for seniors. It has been in business for approximately 19 years. Ms. Dean enters into contracts with caregivers to supply services as required by her clients. The caregivers are compensated at an hourly rate and Ms. Dean charges a higher rate to the clients.

[2] This appeal concerns a decision made by the Minister of National Revenue under the *Employment Insurance Act* and the *Canada Pension Plan* regarding five of the caregivers engaged by Ms. Dean. At issue is the determination by the Minister that Milani Nidoy was employed by Ms. Dean during the period from June 1, 2009 to October 31, 2009, and that Virginia Sison, Eliadora Clores, Evangeline Abalos, and Charlene Apalon Garzon were employed by Ms. Dean during the period from January 1, 2008 to October 31, 2009. Ms. Dean submits that these individuals were not employees but independent contractors.

[3] Ms. Nidoy filed a notice of intervention to this proceeding.

[4] The individuals whose engagement is at issue will be referred to in these Reasons as the “Workers.”

Preliminary comments

[5] Ms. Dean, who was represented at the hearing by her son, testified on her own behalf. She also sought to enter into evidence affidavits by two of the Workers to support that they were independent contractors. I declined to enter these documents into evidence. For evidence of this nature to have value, it is important that the Workers be present at the hearing in order to be cross-examined. It is unfortunate that they were not present.

[6] Accordingly, the only *viva voce* evidence in support of Ms. Dean is her own testimony which is self-interested. I found that her evidence was at times quite self-serving.

[7] The Crown’s witnesses were Ms. Nidoy and Ms. Abalos. They were credible witnesses, but I did have a concern that their opinions as to the relationship with Ms. Dean may have been coloured by an unfavourable view of her business practices.

[8] Accordingly, I have viewed all of the testimony with some caution.

Factual background

[9] I will begin by setting out the factual assumptions made by the Minister, which is supported by the evidence except to the extent referred to in the analysis below. The assumptions are reproduced from the Crown’s Reply in the *Canada Pension Plan* appeal.

10. In determining that the Workers were employed in pensionable employment with the Appellant during the Period, the Minister relied on the following assumptions of fact:
- a) the Appellant was in the business of providing in-home or in-facility care and personal support services;
 - b) the Appellant has been in business for approximately 18 years;
 - c) the Appellant did not use written contracts in the course of engaging the Workers;
 - d) the Appellant determined what days and hours of work were required for the Workers;
 - e) the Appellant was the contact person for the clients in need of home-care;
 - f) the clients receiving home-care services were the Appellant's clients;
 - g) the Appellant determined the costs charged to her clients for services provided by the Workers;
 - h) the Appellant instructed the Workers on the duties to be provided;

The Workers

- i) the Workers were paid on an hourly basis;
- j) the Workers were paid every two weeks, by cheque;
- k) the Workers were required to complete time sheets to record their hours worked;
- l) the Workers did not invoice the Appellant;
- m) the Workers were paid between \$12.00 per hour and \$13.00 per hour;
- n) the Workers did not receive any benefits such as overtime, vacation entitlement or vacation pay;
- o) the Workers did not charge the Appellant GST on the services they provided;
- p) the Workers did not provided the tools or equipment necessary to

perform their services;

- q) the Workers did not incur expenses;
- r) the Workers did not hire their own helpers; and
- s) the Appellant put all workers on payroll effective November 1, 2009.

Applicable legal principles

[10] The general legal principles to be applied were most recently set out by Sharlow J.A. in *TBT Personnel Services Inc. v The Queen*, 2011 FCA 256, at para. 8 and 9:

[8] The leading case on the principles to be applied in distinguishing a contract of service from a contract for services is *Wiebe Door Services Ltd. v. M.N.R.*, [1986] 3 F.C. 553 (C.A.). *Wiebe Door* was approved by Justice Major, writing for the Supreme Court of Canada in *67112 Ontario Ltd. v. Sagaz Industries Canada Inc.*, 2001 SCC 59, [2001] 2 S.C.R. 983. He summarized the relevant principles as follows at paragraphs 47-48:

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 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. The relative weight of each will depend on the particular facts and circumstances of the case.

[9] In *Wolf v. Canada*, 2002 FCA 96, [2002] 4 F.C. 396 (C.A.), and *Royal Winnipeg Ballet v. Canada (Minister of National Revenue - M.N.R.)*, 2006 FCA 87, [2007] 1 F.C.R. 35, this Court added that where there is evidence that the parties had a common intention as to the legal relationship between them, it is necessary to consider that evidence, but it is also necessary to consider the *Wiebe Door* factors to determine whether the facts are consistent with the parties' expressed intention.

[11] The application of these general principles to a particular case is largely a fact-driven exercise. However, some principles have emerged from the cases which have been expertly summarized by Hershfield J. in a case dealing with in-home nursing

care: *Direct Care In-Home Health Services Inc. v The Queen*, 2005 TCC 173. The relevant parts are reproduced below.

Control

[11] Analysis of this factor involves a determination of who controls the work and how, when and where it is to be performed. If control over work once assigned is found to reside with the worker, then this factor points in the direction of a finding of independent contractor; if control over performance of the worker is found to reside with the employer, then it points towards a finding of an employer-employee relationship. However, in times of increased specialization this test may be seen as less reliable, so more emphasis seems to be placed on whether the service engaged is simply "results" oriented; i.e. "here is a specific task - you are engaged to do it". In such case there is no relationship of subordination which is a fundamental requirement of an employee-employer relationship. Further, monitoring the results, which every engagement of services may require, should not be confused with control or subordination of a worker.

Tools and Equipment

[13] The question to be asked in relation to this factor is who, of the employer or the worker, owns the assets or equipment that is necessary to perform the work. This factor points to a finding of independent contractor if it is the worker who controls the assets or equipment. Conversely, a finding of employee is likely if it is the employer who controls them.

Risk of Loss/Opportunity for Profit

[16] This factor examines the worker's potential of profit or loss. An independent contractor normally assumes the risk of loss and chance for profit resulting from the performance of work, while in the case of an employee it is the employer who bears that burden and has that opportunity.

Whose Business Is It?

[22] One ought not, however, fall into the trap of thinking that only that which has the trappings of a "business" qualifies as such for the purposes of this analysis. I refer to paragraph 13 of *D & J Driveway*:

... It is important to guard against a reflex of thinking solely of a business corporation or an organized commercial undertaking when one is dealing with work which is done or services which are provided other than under a contract of employment. The examples of electrical, plumbing or building contractors immediately spring to mind in such a context. However, there is a whole range of services which are offered under a contract for services. In fact, article 2098 of the Civil Code of Quebec was very careful to place on an equal footing a

"contract of enterprise" and a "contract for services" and to describe as a "contractor" the person who performs a contract of enterprise and a "provider of services" the person who carries out a contract for services.

[23] Although the *Civil Code of Quebec* does not apply in this case, I nonetheless find the words of Letourneau J. instructive.[...]

Analysis

[12] As a preliminary comment, the Crown suggested that I make general inferences as to the engagement of all five Workers based on the evidence presented by Ms. Dean, Ms. Nidoy and Ms. Abalos. This is appropriate in this particular case.

[13] I would also comment about paragraph 10(s) of the Reply which indicates that Ms. Dean began to treat all caregivers as employees effective November 1, 2009. This assumption does not assist the Crown because Ms. Dean took this action only in response to the position taken by the Canada Revenue Agency.

[14] I now turn to the application of the legal principles to the facts of this case. I will start with the factors described in *Wiebe Door*.

Control

[15] In general, the arrangement between Ms. Dean and each Worker was loose in the sense that there was no guarantee of work by Ms. Dean, and no obligation on the part of the Workers to accept a particular engagement. In addition, both the Workers and Ms. Dean could terminate an arrangement at any time. The Workers could also do other work, including providing other caregiving services.

[16] As for the work schedule, I find that Ms. Dean assigned shifts, but that the actual hours fluctuated somewhat depending on the needs of the clients. This suggests that the Workers were expected to work extra hours as required. I also find that, if a Worker was not available for a shift, the Worker could find a replacement or she could contact Ms. Dean to find one.

[17] As for duties, Ms. Dean suggests that she was not required to give direction to the Workers as they were all experienced caregivers who knew what to do. It may have been the case that direction was not often necessary, but this is not the test. What is relevant is whether Ms. Dean had the ability to control, not whether it was actually exercised.

[18] Common sense suggests that in this type of work the client (or the person responsible for the client, such as family or a trustee) has the ability to dictate the type of work to be done and the manner in which it is done. Since the Workers contracted with Ms. Dean, and not with the clients, any directions given by clients amounted to control exercised by Ms. Dean.

[19] I would also note that Ms. Dean also continued to be involved with the clients. She would visit on a regular basis and pick up the Workers' timesheets. Through this contact, she would be able to monitor the caregivers' work.

[20] On balance, the control factor points more towards an employment relationship. The fact that there was no obligation for Ms. Dean to offer work or for the Workers to accept work is a contrary factor, but it is of less importance in this case because the evidence suggests that the assignments, once accepted, tended to be long term arrangements.

[21] I would comment in particular about Ms. Nidoy's engagement because it had unique elements. Ms. Nidoy provided services for an individual who required 24 hour care. Ms. Nidoy had this relationship before Ms. Dean was engaged and Ms. Nidoy was one of three individuals who were named by the client, while she was able, to be her caregivers.

[22] Ms. Dean subsequently became involved because the retirement home required the involvement of an agency. In addition, a trustee had at this point responsibility for the client's care and the trustee wished to deal with Ms. Dean. Ms. Nidoy had very little contact with Ms. Dean and her work hours were determined by one of the other two caregivers.

[23] The fact that Ms. Dean dealt with a trustee who had responsibility for the client's care tips the scales towards Ms. Dean having the ability to control the manner in which Ms. Nidoy's work was done. As for the work schedule being determined by another caregiver, this should be viewed as a delegation by Ms. Dean. The control factor points to an employment relationship.

[24] Ms. Dean described the arrangement as a bridge between the trustee and the three caregivers which she did as a favour. This does not change the fact that the contractual arrangement was with Ms. Dean and not the caregivers. It is the contractual arrangement that defines the relationship.

Tools and equipment

[25] This factor is neutral. The Workers had to pay for their own transportation to and from work but this would be expected of both employees and independent contractors for this type of assignment. There was minimal equipment required and it was provided by the client.

Risk of loss/Opportunity for profit

[26] Based on the evidence that was led, I would assign this as a relatively neutral factor. The Workers were paid on an hourly basis, and were not promised regular work. These types of arrangements are common in both employment and independent contractor relationships.

Intention

[27] The application of the facts to the *Wiebe Door* factors leads to the conclusion that the Workers were engaged as employees. Given this finding, it is not necessary to consider the intention of the parties.

[28] In any event, the evidence suggests that there was no common intention between the parties. There is little evidence that the Workers put their mind to the nature of the relationship or that Ms. Dean discussed it with them. The Workers who testified were not sophisticated in business matters and they may not have understood that Ms. Dean was treating them as independent contractors by not taking source deductions. Intention is not a relevant factor in this case.

[29] In the result, the appeal with respect to the decision that Virginia Sison, Eliadora Clores, Evangeline Abalos, Charlene Apalon Garzon and Milani Nidoy were engaged in insurable and pensionable employment during the periods set out above is dismissed, and the decision is confirmed. Each party shall bear their own costs.

Signed at Ottawa, Ontario this 19th day of October 2012.

“J. Woods”

Woods J.

CITATION: 2012 TCC 370

COURT FILE NOS.: 2012-1027(EI) and
2012-1028(CPP)

STYLE OF CAUSE: ANA C. DEAN o/a ANA'S CARE & HOME
SUPPORT and THE MINISTER OF
NATIONAL REVENUE and MILANI S.
NIDOY

PLACE OF HEARING: Vancouver, British Columbia

DATES OF HEARING: September 26, 2012

REASONS FOR JUDGMENT BY: The Honourable Justice J.M. Woods

DATE OF JUDGMENT: October 19, 2012

APPEARANCES:

Agent for the Appellant: Antonio Mejia

Counsel for the Respondent: Kristin McHale (student-at-law)
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