

Docket: 2012-4957(EI)

BETWEEN:

MICHEL THERRIEN,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

Appeal heard on April 15, 2013, at Kingston, Ontario.

Before: The Honourable Justice David E. Graham

Appearances:

For the Appellant: The Appellant Himself
Counsel for the Respondent: Christopher Kitchen

JUDGMENT

The Appellant's appeal from the decision of the Minister of National Revenue that he was not engaged in insurable employment for the purpose of the *Employment Insurance Act* for the period July 15 to December 4, 2011 is dismissed.

Signed at Ottawa, Canada, this 22nd day of April 2013.

“David Graham”

Graham J.

Citation: 2013 TCC 116

Date: 20130422

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MICHEL THERRIEN,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

REASONS FOR JUDGMENT

Graham J.

[1] Michel Therrien is a highly trained executive chef. From July 15 until December 4, 2011 he was the executive chef at Hastings Resort Inc. (“Hastings Resort”). After he stopped working at Hastings Resort, Mr. Therrien applied for employment insurance benefits. As a result of that application, the Department of Human Resources and Skills Development Canada requested a ruling as to whether Mr. Therrien was engaged in insurable employment with Hastings Resort. The Minister of National Revenue ruled that Mr. Therrien was not engaged in insurable employment and that ruling was upheld on appeal. Mr. Therrien has now appealed the ruling to this Court.

[2] The sole issue in this Appeal is whether Mr. Therrien was engaged in insurable employment with Hastings Resort. Mr. Therrien takes the position that he was an employee. The Respondent takes the position that Mr. Therrien was an independent contractor.

Ontario Ministry of Labour Ruling

[3] The Ontario Ministry of Labour conducted an audit of Mr. Therrien’s working relationship with Hastings Resort and concluded that he was an employee. Mr. Therrien attached a copy of the Ontario Ministry’s Reasons For Decision to his

Notice of Appeal and sought to rely heavily on that document as proof that he was an employee. While I accept that the Ontario Ministry conducted an audit and came to the conclusion that Mr. Therrien was an employee, that conclusion is not binding on me nor are the facts set out in the Reasons For Decision evidence. I have not reviewed the Reasons For Decision. I explained to Mr. Therrien at trial that if there was any factual evidence contained therein that he felt was important he needed to testify as to that evidence himself.

Law

[4] In its recent decision in *1392644 Ontario Inc. v. M.N.R.*, 2013 FCA 85, [2013] F.C.J. No. 327, (“*Connor Homes*”), the Federal Court of Appeal clarified the test that is to be applied in determining whether a worker is an employee or an independent contractor. At paragraphs 39 to 42 of *Connor Homes*, the Court stated that the correct test to be applied is a two-step test:

[39] Under the first step, the subjective intent of each party to the relationship must be ascertained. This can be determined either by the written contractual relationship the parties have entered into or by the actual behaviour of each party, such as invoices for services rendered, registration for GST purposes and income tax filings as an independent contractor.

[40] The second step is to ascertain whether an objective reality sustains the subjective intent of the parties. As noted by Sharlow J.A. in *TBT Personnel Services Inc. v. Canada*, 2011 FCA 256, 422 N.R. 366 at para. 9, “it is also necessary to consider the *Wiebe Door* factors to determine whether the facts are consistent with the parties’ expressed intention.” In other words, the subjective intent of the parties cannot trump the reality of the relationship as ascertained through objective facts. In this second step, the parties [sic] intent as well as the terms of the contract may also be taken into account since they colors [sic] the relationship. As noted in *Royal Winnipeg Ballet* at para. 64, the relevant factors must be considered “in light of” the parties’ intent. However, that being stated, the second step is an analysis of the pertinent facts for the purpose of determining whether the test set out in *Wiebe Door* and *Sagaz* has been in fact met, *i.e.* whether the legal effect of the relationship the parties have established is one of independent contractor or of employer-employee.

[41] The central question at issue remains whether the person who has been engaged to perform the services is, in actual fact, performing them as a person in business on his own account. As stated in both *Wiebe Door* and *Sagaz*, in making this determination no particular factors is dominant and there is no set formula. The factors to consider will thus vary with the circumstances. Nevertheless, the specific factors discussed in *Wiebe Door* and *Sagaz* will usually be relevant, such as the level of control over the worker’s activities, whether the worker provides his own

equipment, hires his helpers, manages and assumes financial risks, and has an opportunity of profit in the performance of his tasks.

The application of the test

[42] ... The first step of the analysis should always be to determine at the outset the intent of the parties and then, using the prism of that intent, determining in a second step whether the parties' relationship, as reflected in objective reality, is one of employer-employee or of independent contractor. ...

[5] Based on the foregoing, I will first examine the intentions of Mr. Therrien and Hastings Resort and then consider whether the objective reality of their relationship was consistent with those intentions.

Intention

[6] Mr. Therrien testified that he first met with the owner of Hastings Resort and his son on July 14, 2011¹. At that meeting, the parties negotiated the terms of Mr. Therrien's contract. One of those terms was that Mr. Therrien would be retained as an independent contractor. Mr. Therrien began work immediately. I accept this evidence as proof of Mr. Therrien's intention at the time the relationship began. Given that Hastings Resort continued to take the position that Mr. Therrien was an independent contractor, I also accept that it too intended the relationship to be an independent contractor relationship.

[7] Mr. Therrien testified that the terms of the contract were that Hastings Resort was to pay him \$700 per week after taking any deductions required by law. Mr. Therrien was unable to describe what deductions he thought would be required to be taken from him as an independent contractor. The only conceivable deductions would be the source deductions normally taken from an employee (i.e. income tax, EI and CPP). I cannot imagine why Hastings Resort would have agreed to pay Mr. Therrien an amount net of source deductions. It is illogical that the parties would enter into a contract intending for Mr. Therrien to be an independent contractor and, at the same time, contemplate statutory deductions being taken. Either Hastings Resort and Mr. Therrien had a joint intention at the beginning of the contract that Mr. Therrien would be an employee or no such term regarding source deductions existed. Since I have already concluded that their joint intention at the beginning of

¹ I accept Mr. Therrien's testimony of this date. However, since the ruling appealed from covers the period beginning July 15, 2011, my decision will cover the period from July 15 to December 4, 2011.

the contract was that Mr. Therrien be an independent contractor, I must conclude that there was, in fact, no term requiring source deductions. Based on the foregoing, I accept that the agreement was for Mr. Therrien to be paid \$700 per week but do not accept that the agreement called for that amount to be net of any deductions.

[8] Mr. Therrien testified that Hastings Resort also agreed that after 2 months it would increase his weekly pay by \$200 after deductions. He stated that he was never given the increase. I accept that the agreement called for an increase of \$200 and that he did not receive that increase but, for the reason set out above, I do not accept that the increase was to be net of statutory deductions. I also do not accept that the increase was to occur after 2 months although nothing turns on this timing².

[9] Finally, Mr. Therrien testified that Hastings Resort agreed to provide him with transportation from his home to the resort. He stated that this transportation was never provided. I accept his evidence on this point.

[10] Mr. Therrien concedes that, from July 14 to August 14, 2011 the intentions of both parties were that he be an independent contractor. However, he testified that that intention later changed.

[11] Mr. Therrien testified that the parties agreed to put their agreement into writing within 2 weeks of July 14, 2011. He stated that when 2 weeks passed without any written contract being produced, he began pressuring Hastings Resort to provide one. Approximately one month after Mr. Therrien began work, the contract had still not been produced. As a result, Mr. Therrien testified that he unilaterally decided that the contract by which he agreed to become an independent contractor was void and that he would thereafter be working as an employee. Mr. Therrien stated that he did not inform Hastings Resort of his unilateral decision at that time. I do not accept Mr. Therrien's evidence on most of the foregoing. I accept that a written contract was supposed to have been provided and was not but I do not accept that Mr. Therrien decided to change his status from independent contractor to employee nor do I accept that he ever said anything to Hastings Resort about a change in status prior to his quitting work in December 2011 nor do I even accept that his intention to be an

² Mr. Therrien entered a letter from him to Hastings Resort into evidence. In the letter he terminates their agreement. The letter states that the increase was not to occur until 3 months after Mr. Therrien started work. As the letter was prepared contemporaneously with his resignation, I consider it to be a more accurate reflection of the timing of the promised raise than his testimony in Court. In his Request For Record Of Employment, Mr. Therrien also refers to an increase that was supposed to have happened after 3 months.

independent contractor changed. I do not accept Mr. Therrien's evidence on these points for the following reasons:

- (a) One cannot unilaterally change the terms of a contract. Either one terminates the contract by notifying the other party or one amends the contract through negotiations with the other party.
- (b) Even if one could unilaterally change the terms of a contract, nothing actually changed in Mr. Therrien's relationship with Hastings Resort on August 14, 2011. Mr. Therrien continued working in the same manner that he had done throughout the first month of the contract and continued being paid in the same manner as he had always been paid. He was unable to point to any way in which his working relationship had changed.
- (c) Mr. Therrien sent an email dated December 7, 2011 to Hastings Resort in which he stated "IT AS BEAN 6 MONTHS THAT I AM WAITING FOR THAT PROMISSE CONTRACT NO RESOLT". If Mr. Therrien had truly changed his status to that of an employee then he would not still have been waiting for his independent contractor contract in December.
- (d) When asked on cross-examination when he informed Hastings Resort about his supposed unilateral decision Mr. Therrien was evasive. He suggested that he had told the owner's son about his decision at a party but said he could not recall when the party occurred.

[12] The Respondent filed an affidavit sworn by the CRA Litigation Officer in this matter. While I accepted the affidavit for filing, I have given much of its contents no weight. Attached as exhibits to the affidavit were copies of various CRA letters and electronic reports relating to previous disputes involving Mr. Therrien. My understanding is that the Respondent was relying on the affidavit for 3 purposes.

- (a) The first purpose for filing the affidavit was that the Respondent wanted me to accept that the documents attached thereto showed that Mr. Therrien has, on 3 previous occasions, been in disputes with restaurants where he took the position that he was an employee and the restaurant took the position that he was an independent contractor. I am willing to accept this evidence for two reasons. First, letters attached to the affidavit support the fact that 3 rulings have previously been issued in respect of Mr. Therrien. Second, Mr. Therrien himself admitted on cross-examination that he had been in 3 previous disputes with restaurants

where he took the position that he was an employee and the restaurants had refused to give him a record of employment. Mr. Therrien stated that he was unable to recall the position taken by the restaurants in the disputes. I do not believe him as he showed willingness to have a selective memory when it suited him. Logically, the only reason that a restaurant would have refused to provide a record of employment in the circumstances was if the restaurant believed that Mr. Therrien was an independent contractor. Therefore, I accept that the restaurant took the position that Mr. Therrien was an independent contractor but I accept that fact not because of the affidavit but rather because of Mr. Therrien's testimony.

- (b) The second reason for filing the affidavit was that the Respondent wanted me to note an alleged similarity between the positions taken by Mr. Therrien in his disputes with the restaurants and the position taken by him in this Appeal as well as the similarities between the positions taken by the restaurants and the positions taken by Hastings Resort in this Appeal. I am not prepared to do so. Those positions were outlined in reports attached to the affidavit. The types of reports in question are typically prepared by CRA employees based on information gathered by them personally or on information gathered by other CRA employees or on information provided to the CRA by the payors. None of those people was available for cross-examination. The affidavit was filed under subsection 102(9) of the *Employment Insurance Act*. That subsection states that:

An affidavit of an officer of the Canada Revenue Agency stating that

- (a) the officer has charge of the appropriate records, and
- (b) a document annexed to it is a document or a true copy of a document made by or for an employer, the Minister or a person exercising the powers of the Minister,

is evidence of the nature and contents of the document and is admissible as evidence and has the same probative force as the original document would have if it were proven in the ordinary way.

I accept that that subsection allows the affidavit to be filed for the purpose of proving that the reports in question were prepared and contained the information that they purport to contain. I do not accept that the subsection

requires me to accept the contents of the documents as being true. Counsel for the Respondent wanted me to focus on statements made in the reports that described the positions taken by the restaurants in question. He stated that I did not need to accept the restaurants' positions as being true but simply that they were the positions that the restaurants had taken. Subsection 102(9) does not permit me to do even that. The positions described in the reports were not written by the restaurants themselves. They were written by a CRA employee. While they are presumably an accurate description of that employee's understanding of the restaurants' positions, I have no way of knowing whether they are an accurate representation and no one was available to be cross-examined on that point³.

- (c) The third purpose for filing the affidavit was that the Respondent wanted me to note that the Minister had issued rulings on all 3 of the disputes well before Mr. Therrien worked at Hastings Resort. I accept that the affidavit establishes that fact.

[13] Based on the affidavit evidence and on Mr. Therrien's testimony on the disputes covered in the affidavit, I find that at the time Mr. Therrien entered into his agreement with Hastings Resort he had a good working knowledge of the difference between being an independent contractor and being an employee. While I do not believe that such knowledge is necessary for a worker to have intended to be an independent contractor, it is a factor which, if present, supports the worker's intention. I do not draw any conclusions from Mr. Therrien's history of disputes with restaurants as I have insufficient evidence of the facts of those disputes to do so. For the same reason, I do not draw any conclusions from the outcomes of those disputes.

[14] Based on all of the foregoing, I find that Mr. Therrien and Hastings Resort shared a common intention that Mr. Therrien be an independent contractor. Since I also find that that intention continued throughout the term of Mr. Therrien's work, I do not need to consider whether a change in intention by one party during the period in which the work takes place can vitiate the intention of the parties at the time the contract was entered into.

³ On cross-examination the Respondent asked Mr. Therrien about the positions that he had taken in these disputes and the positions that the restaurants had taken. Mr. Therrien was able to clearly recall the positions that he had taken but claimed to have no recollection at all about the positions taken by the restaurants. While this does not change the fact that I cannot accept the contents of the documents as being true, it strongly influences my opinion of Mr. Therrien's credibility.

[15] Having found that the parties intended an independent contractor relationship, I must now consider whether that subjective intention was supported by the objective reality of their relationship.

Control

[16] Mr. Therrien was in charge of the entire restaurant operation at Hastings Resort. He oversaw not only the preparation of the food, but also the hiring and training of all employees (both kitchen and service), the creation of the menu, the selection of suppliers, the ordering of the food from those suppliers and the negotiation of the terms of payment with those suppliers. In his words, he was “running the show”. He testified that the owner of Hastings Resort had never been in the restaurant business and thus did not know how to run a high-end restaurant. While the complete control that Mr. Therrien was given over the operations of the restaurant and the lack of supervision of his activities are not inconsistent with an independent contractor relationship, Mr. Therrien is a highly trained and experienced executive chef. Given the owner’s lack of experience, it would not have been possible for him to supervise Mr. Therrien even if he had wanted to. Thus I do not consider the lack of supervision and control to be useful in determining Mr. Therrien’s status.

[17] Due to Mr. Therrien’s high level of training, it would similarly have been impossible for Hastings Resort to train Mr. Therrien so I do not consider this factor to be useful in determining his status.

[18] I do not consider the location where the work was performed to be a useful factor as, due to the nature of the work, it was required to be performed at the restaurant regardless of the working relationship.

[19] Mr. Therrien did not hire any assistants. He indicated that he could not afford to do so. This suggests that he had the ability to do so but chose not to. This is consistent with an independent contractor relationship.

[20] The owner’s son was the manager of the resort. Mr. Therrien testified that on a number of occasions he told the son to stop speaking on his cell phone in the restaurant, to stop swearing in the restaurant and to dress more appropriately when coming into the restaurant. Counsel for the Respondent wanted me to conclude from this that Mr. Therrien was treating the son as an equal rather than as a supervisor. While I would normally agree with counsel on this point, Mr. Therrien struck me as an abrasive individual who would not hesitate to speak his mind regardless of any

hierarchical relationship between him and the person to whom he was speaking. As a result, I do not find this factor helpful.

[21] Mr. Therrien testified that he was permitted to provide his services to others at the same time that he was working at Hastings Resort. He stated that he did not exercise that right. This is consistent with an independent contractor relationship.

[22] Mr. Therrien stated that he worked 6 days a week providing lunch and dinner from opening until closing. He explained that he was free to come and go from the restaurant as he wished but, since he had not yet had the chance to train the staff adequately, the restaurant could not function without him so he was effectively required to be there at all times. The potential to come and go is consistent with an independent contractor relationship.

[23] Mr. Therrien recorded his work hours in his personal calendar. He did not give this information to Hastings Resort. Hastings Resort did not require him to keep these records. As it is unclear why he recorded the hours, I do not find this factor helpful. The best that can be said is that it does not indicate an employment relationship.

[24] The Respondent submitted that the fact Mr. Therrien simply quit rather than giving 2 week's notice to Hastings Resort was indicative of an independent contractor relationship. Mr. Therrien testified that his relationship with Hastings Resort had deteriorated to a point where he could no longer continue to work there. In those circumstances, while an employee may have been required to give notice, it would not be unusual for him or her not to do so. Therefore this evidence is not helpful.

[25] Mr. Therrien created a number of "signature dishes" for Hastings Resort. These were menu items that he had created that were not available anywhere else. Mr. Therrien maintained ownership of these signature dishes. When he quit, he demanded that Hastings Resort stop using those dishes and demanded that the Resort pay him a fee of \$300 a day for the use of his name and the signature dishes. This evidence strongly supports an independent contractor relationship.

[26] Overall, the level of control is objectively consistent with the parties' intention that Mr. Therrien be an independent contractor.

Tools

[27] Mr. Therrien provided his own very expensive set of knives. He also provided his own chef's uniform.

[28] If Mr. Therrien was in business for himself, it was the business of providing chef services, not the business of running a restaurant. Thus the premises, furniture, fixtures and equipment are not tools that he would have been expected to supply. There are, in fact, very few tools that would have been required to provide that service.

[29] Overall, while the provision of tools is objectively consistent with the parties' intention that Mr. Therrien be an independent contractor, I give little weight to this factor when considering the objective evidence as a whole as so few tools were actually required.

Chance of Profit

[30] Mr. Therrien was paid a flat amount per week. However, his hours were not set. His calendar shows that he worked fewer and fewer hours as the months progressed. As he testified that the restaurant's business grew during his time at Hastings Resort, I can only conclude that Mr. Therrien found a way to be more efficient and thus to earn the same money with less effort.

[31] Mr. Therrien testified that there was supposed to be some sort of bonus paid to him based on the performance of the restaurant although he did not provide any details.

[32] Overall, Mr. Therrien's chance of profit is objectively consistent with the parties' intention that he be an independent contractor.

Risk of Loss

[33] Mr. Therrien entered evidence showing that suppliers billed Hastings Resort, not him. I do not find this evidence helpful. If Mr. Therrien was an independent contractor, he was retained to provide executive chef services, not to operate a restaurant and thus would not have been expected to purchase the food with his own money.

[34] Other than his costs of maintaining his uniform and his knives, Mr. Therrien had no expenses.

[35] Overall, Mr. Therrien's risk of loss is not objectively consistent with the parties' intention that he be an independent contractor.

Conclusion

[36] Considering the above factors as a whole, I find that the parties' intention that Mr. Therrien be an independent contractor was supported by the objective evidence of his relationship with Hastings Resort. Accordingly, Mr. Therrien's appeal is dismissed.

Signed at Ottawa, Canada, this 22nd day of April 2013.

“David E. Graham”

Graham J.

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