

Dockets: 2011-3019(EI)
2011-3018(CPP)

BETWEEN:

177398 CANADA LTD.,

appellant,

and

THE MINISTER OF NATIONAL REVENUE,

respondent.

Appeals heard on September 7, 2012, at Vancouver, British Columbia,
and on December 3, 2012 by way of telephone conference
originating in Ottawa, Ontario.

Before: The Honourable Justice Gaston Jorré

Appearances:

Counsel for the appellant:	Meldon Ellis David Roberts (student-at-law)
Counsel for the respondent:	Holly Popenia

JUDGMENT

The appeals from decisions made under the *Employment Insurance Act* and the *Canada Pension Plan* are dismissed, and the decisions rendered by the Minister of National Revenue on July 12, 2011 are confirmed on the basis that Bryan C. Rossiter was engaged in insurable and pensionable employment from November 12, 2003 to May 22, 2010 within the meaning of paragraphs 5(1)(a) of the *EIA* and 6(1)(a) of the *CPP*, in accordance with the attached reasons for judgment.

Signed at Ottawa, Ontario, this 31st day of May 2013.

“Gaston Jorré”

Jorré J.

Citation: 2013 TCC 177
Date: 20130531
Dockets: 2011-3019(EI)
2011-3018(CPP)

BETWEEN:

177398 CANADA LTD.,

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THE MINISTER OF NATIONAL REVENUE,

respondent.

REASONS FOR JUDGMENT

Jorré J.

Introduction

[1] The appellant appeals from decisions made by the Minister of National Revenue on July 12, 2011 that Bryan C. Rossiter was in insurable and pensionable employment of the appellant during the six-and-a-half-year period from November 12, 2003 to May 22, 2010 for the purposes of the *Employment Insurance Act* and the *Canada Pension Plan*.

[2] 177398 Canada Ltd. carries on business as Advantage Restoration Services, Advantage Plumbing & Drainage Company and Advantage Septic Services. For convenience I shall refer to 177398 Canada Ltd. as “Advantage”.

[3] I wish to take this opportunity to thank both counsel.

Facts

[4] In making his decision, the Minister relied on the following assumptions of fact:

- a) the Appellant operated under the name of Advantage Plumbing & Drainage;
- b) the Appellant's shares are owned equally by Frederik Van Hunenstijn ("Frederik") and his wife Ann Van Hunenstijn ("Ann");
- c) the Appellant was in the business of retail and wholesale plumbing, specializing in disaster restoration;
- d) the Appellant's office was located in Coquitlam, British Columbia;
- e) the Appellant operated year-round, Monday to Saturday from 8:00 a.m. to 6:00 p.m.;
- f) Frederik controlled the day to day operations of the Appellant;
- g) the Worker is an experienced plumbing technician;
- h) the Worker held a UCLI license as a Master Plumber from England;
- i) the Worker began working with the Appellant in 2003;
- j) the Worker and the Appellant signed a written agreement regarding the working arrangement between the two parties in 2003 (the "First Agreement");
- k) the First Agreement remained in force from 2003 to 2008;
- l) on February 10, 2008, the Worker and the Appellant entered into a second agreement (the "Second Agreement");
- m) the Worker was provided with business cards displaying the Worker's title and the Appellant's business name;
- n) the Worker provided his own hand tools;
- o) under the First Agreement, the Worker was paid on a commission basis at the rate of 28% of the aggregate gross sales;
- p) under the Second Agreement, the Worker was to be paid 40% of the aggregate gross sales;
- q) the Worker opened a GST account in April of 2008;
- r) the Appellant provided the Worker with the truck and the heavy duty tools and equipment at no cost to the Worker;
- s) the truck used by the Worker was equipped with a GPS so that the Appellant could track the Worker's time;
- t) the Appellant provided the Worker with a cell phone and pager at no cost to the Worker;
- u) the Worker was required to answer to a supervisor's dispatch calls;
- v) the Worker's personal service was required;
- w) the Worker could not hire a substitute or helpers;
- x) the Worker did not have any significant capital investment in his own business;
- y) the Worker performed additional duties as a team leader for which he received an additional \$150.00 per week;
- z) the Worker did not advertise his services;
- aa) the Appellant provided extended medical and dental coverage for all its workers;

- bb) the Appellant covered the Worker's medical and worker's compensation premiums and the Worker was covered under the Appellant's liability insurance; and
- cc) the Worker filed a claim with employment standards wherein it was ruled that the Worker was an employee of the Appellant.

Contractual Agreements

[5] The first agreement between Advantage and Mr. Rossiter is entitled "Exclusive Specific Service and Brokers Contract"¹ and is dated November 12, 2003. Mr. Van Hunenstijn testified that he had taken an employment contract previously drafted by counsel and modified it himself to create this contract.

[6] It uses the language of an independent contractor and has some contract terms which are consistent with an independent contractor, for example:

(a) Clause 4:

... [Advantage] may hire [Mr. Rossiter] for specific projects or for provision of specific services [Mr. Rossiter] may represent himself as Service Technician but at all material times shall be an independent contractor and specifically not an employee

(b) Clause 6 provides:

... [Mr. Rossiter] may refuse any work, project or services presented or brokered by [Advantage].

(c) Clause 8 states there is no guarantee as to the quantity or type of jobs offered.

[7] Other contractual terms seem incompatible with an independent contractor arrangement. For example, under clauses 9 and 12, Mr. Rossiter is basically precluded from working for any competitor of Advantage or from competing with Advantage. The only person he can do work for is Advantage either directly or indirectly as set out in the opening part of clause 9. Mr. Rossiter is also required to commit himself to full-time performance of the contract. Clauses 9 and 12 read as follows:

¹ Exhibit A-1, Tab 19.

(a) Clause 9:

[Mr. Rossiter] may perform work related services for other commissioned representatives of [Advantage] on a subcontract basis or on a required basis providing authorization is first obtained from [Advantage]. [Mr. Rossiter] shall not, during the term of this agreement, become employed, perform work or services, consultation or otherwise, own directly or indirectly any plumbing or disaster restoration or related business or compete directly or individually with [Advantage].

(b) Clause 12:

[Mr. Rossiter] shall not, during the term hereof, or extension thereof, without further consent of [Advantage], engage in any other business or occupation, or become a director, manager or agent of any other company, firm or individual, in the plumbing or restoration business and shall commit himself to full-time performance of this contract with [Advantage].

[8] At least according to the contract, Mr. Rossiter was subject to a seemingly high level of control.

Clause 11 says:

[Mr. Rossiter] shall comply and carry out all directives given to it by the respective Directors and designated authorities of [Advantage] and comply and carry out the by-laws of [Advantage], acting at all times in the best interests of [Advantage]. [Mr. Rossiter] shall comply with and follow all [Advantage]'s policies established from time to time, whether written or otherwise in the performance of [Mr. Rossiter]'s specific contractual duties.

[9] Some of the other provisions state:

- (a) Advantage is to provide Mr. Rossiter with the sufficient inventory of parts to complete most jobs without additional purchases.²
- (b) Reasonable and necessary parts not normally stocked and required for a specific job may be purchased by Mr. Rossiter on Advantage accounts at suppliers approved by Advantage.³
- (c) Advantage is to supply Mr. Rossiter with a suitable service truck and cover the costs of fuel, maintenance, tires, insurance and lease payments.⁴

² Exhibit A-1, Tab 19, clause 16.

³ Exhibit A-1, Tab 19, clause 17.

⁴ Exhibit A-1, Tab 19, clause 18; the copy of the contract in the exhibit is hard to read and I am not absolutely sure that the word "tires" is correct but that seems to be the word used.

[10] On November 12, 2003, Mr. Rossiter also signed a letter⁵ addressed to Advantage “AND TO: Whom It May Concern”, recognizing that he was an independent contractor. It provides:

I am not an employee but contract independently per job.

You act as a job broker only and do not control the work or fee or losses I may collect or suffer. I completely control the jobs I take, the tools I use and work I do.

There is no guarantee of work or salary or money I get, or any requirements regarding people I might hire to do my work.

I alone am responsible for paying my taxes and employment insurance and other expenses or remittances.

I am not entitled to an ROE and I am not an employee.

This letter is not signed by Advantage.

[11] Advantage and Mr. Rossiter entered into a new agreement entitled “Contractor Agreement”⁶ on February 10, 2008. This replaced the 2003 agreement. Some of the terms state:

- (a) “The parties understand and agree that [Mr. Rossiter] is not an employee of [Advantage].”⁷ They also agree that Mr. Rossiter shall perform the services as an independent contractor.⁸
- (b) “[Mr. Rossiter] may refuse any work or job presented”⁹
- (c) Advantage is to provide Mr. Rossiter with the sufficient inventory of parts to complete most jobs without additional purchases.¹⁰
- (d) Reasonable and necessary parts not normally stocked and required for a specific job may be purchased by Mr. Rossiter on Advantage accounts at suppliers approved by Advantage.¹¹
- (e) Mr. Rossiter is to supply all general tools and equipment necessary to perform the services but he may rent specialty tools as required from Advantage.¹²

⁵ Exhibit A-1, Tab 5.

⁶ Exhibit A-1, Tab 6.

⁷ Exhibit A-1, Tab 6, clause 1.7.

⁸ Exhibit A-1, Tab 6, clause 21.

⁹ Exhibit A-1, Tab 6, clause 1.3.

¹⁰ Exhibit A-1, Tab 6, clause 5.1.

¹¹ Exhibit A-1, Tab 6, clause 5.3.

¹² Exhibit A-1, Tab 6, clauses 6.1 and 6.2.

- (f) Advantage is to supply a suitable service truck and pay the costs of fuel, maintenance, tires, insurance and lease payments.¹³

[12] There are no clauses like clauses 9, 11 and 12 of the 2003 agreement preventing Mr. Rossiter from taking other plumbing employment or competing with Advantage. However, schedule B of the 2008 agreement clearly stipulates that the service truck provided may only be used for Advantage's business, for example: "Under no circumstances shall [Mr. Rossiter] use, or allow to be used, the service vehicle for business other than [Advantage]'s business" ¹⁴

Calculation of the Compensation to Mr. Rossiter

[13] Pursuant to both the 2003 and 2008 agreements, Advantage paid Mr. Rossiter a fixed percentage of what I shall refer to as the "net selling price". The net selling price is equal to the price paid by the plumbing customer before the addition of provincial sales tax and GST less certain deductions. The amounts deducted are the costs of parts, materials and specialty tools rented by Advantage to Mr. Rossiter.

[14] Under the 2008 agreement, Mr. Rossiter received compensation equal to 40% of the net selling price. However, under that agreement, but not the 2003 agreement, Mr. Rossiter also paid Advantage an amount equal to 10% of the net selling price for use of the service vehicle, the truck. That 10% came out of the 40% with the result that Mr. Rossiter received 30% of the net selling price.¹⁵

[15] Under the 2003 agreement, Mr. Rossiter received 28% of the net selling price and did not pay for the use of the truck.

[16] As a practical matter, with respect to compensation the only difference between the 2003 and 2008 agreements was that, after accounting for the truck under the 2008 agreement, Mr. Rossiter received 30% of the net selling price instead of 28%, a 2% increase.

[17] While I am unable to find a provision in either of the agreements with respect to this, in practice the evidence showed one other deduction in the computation of the net selling price. Where Mr. Rossiter needed assistance on a particular project and he obtained help from employees of Advantage or from workers supplied by another

¹³ Exhibit A-1, Tab 6, clause 7 of the agreement, together with clause 1 of schedule B to the agreement.

¹⁴ Exhibit A-1, Tab 6, schedule B, clauses 6a) and 7.

¹⁵ Schedule B of the 2008 agreement shows an option to pay a fixed daily rate instead of the 10%. That alternative option was not chosen.

company through Advantage, Advantage would pay those costs and then deduct them in the computation of what I have been referring to as the net selling price.

[18] This can be seen in the computations for the pay periods.¹⁶ On these computations one can see that, in all deductions that are subtracted from the total billings, the deductions include not only use of equipment, parts and supplies but also hourly charges for labour. A 30% “commission” is then computed on the net amount. “Commission” is the term used on the documents.¹⁷

[19] I note that this produces a very different result from that which would have occurred if Mr. Rossiter had retained and paid other workers out of his compensation.

[20] This is easily illustrated. For example, under the arrangement between Advantage and Mr. Rossiter, if the net selling price apart from any labour other than Mr. Rossiter’s were \$10,000, and if there was also \$5,000 in wages paid in a project, what would happen in the computation is the following:

Net selling price apart from labour	\$10,000
Labour	<u>(\$5,000)</u>
Net selling price	\$5,000
Commission: 30% x \$5,000	\$1,500
Amount retained by Mr. Rossiter	\$1,500

[21] If the practice had been different and Mr. Rossiter had been obliged to pay for extra labour out of his compensation, the result would be very different:

Net selling price	\$10,000
Commission: 30% x \$10,000	(\$3,000)
Cost of labour	<u>(\$5,000)</u>
Loss incurred by Mr. Rossiter	(\$2,000) ¹⁸

[22] Advantage did the computation of Mr. Rossiter’s commissions. Mr. Rossiter did not send in invoices for his work to Advantage.¹⁹

¹⁶ See Exhibit A-1, Tabs 9, 18, 20 and 25, for examples.

¹⁷ There are other deductions which are not relevant to the computation of the compensation of Mr. Rossiter shown on these sheets. For example, there are deductions for a contribution to health benefits and certain other adjustments. The health benefit contribution is deducted after calculation of the compensation.

¹⁸ The theoretical example I have just used contains numbers to exaggerate the point, but it makes very clear that the practice on labour costs was very much more beneficial to Mr. Rossiter than would have been the alternative of excluding the labour cost from the net selling price.

¹⁹ Many examples of the computations are found at Tab 9 of Exhibit A-1.

[23] Mr. Rossiter was not paid if he went out to a customer and gave an estimate that was turned down. He received no additional payment if he had to go back and fix work he had already done.

[24] For a period of somewhat less than a year in 2009, Advantage paid Mr. Rossiter what was referred to as “team leader compensation” of \$300 every two weeks. This was in recognition of the phone calls that Mr. Rossiter would take from other plumbing technicians who had various problems and needed his advice. No one else was paid as “team leader”.

Mr. Rossiter’s Tax Returns

[25] Unfortunately, Mr. Rossiter’s tax returns were not in evidence. The Court only had the Canada Revenue Agency printouts that show limited information, as follows:²⁰

Year	Type of Income	Approximate Amount	Note
2003	<i>Employee</i>	\$2,500 (T4)	About \$1,000 of other income not from self-employment
2004	Self-employment	\$37,000 gross: \$37,000 net	Shown as commission income
2005	<i>Employee</i>	\$55,500 (T4)	
2006	Self-employment	\$63,000 gross: \$57,000 net	Shown as business income
2007	Self-employment	\$66,000 gross: \$63,000 net	Shown as business income
2008	Self-employment	\$78,000 gross: \$75,000 net	Shown as business income
2009	Self-employment	\$80,000 gross: \$78,000 net	Shown as commission income ²¹

[26] It is not certain whether the amount shown in 2003 relates to Advantage or not since Mr. Rossiter started with Advantage in November 2003.

[27] The year 2005 is shown as employment income with a T4.

[28] With respect to the years 2006 to 2009, the gross income reported corresponds with T5018 contract payment slips issued by Advantage, except for 2008 where the

²⁰ Exhibit A-1, Tab 16.

²¹ In setting out this information, I am satisfied that I can take judicial notice of the fact that the three digit numbers often seen on the type of printouts at Tab 16 correspond to line numbers on T1 tax returns, that lines 162, 164, 166, 168 and 170 correspond to different kinds of the gross self-employment income, that lines 135, 137, 139, 141 and 143 correspond to different kinds of net self-employment income, that lines 162 and 135 correspond to gross and net business income, that lines 166 and 139 correspond to self-employment commission income and that line 130 corresponds to other income that is not self-employment income.

reported amount on Mr. Rossiter's tax return appears to be about \$3,000 less than on the contract payment slip.²²

GST

[29] Mr. Rossiter registered for GST on June 1, 2007. Advantage would calculate the GST on the amount payable to Mr. Rossiter and provide a separate cheque for the GST.²³

Tools

[30] Mr. Rossiter provided only a small fraction of the equipment used.

[31] Mr. Rossiter was required to provide his own small tools, and Advantage provided the service truck together with parts and tools in the truck sufficient to do most routine jobs. The service truck costs approximately \$60,000 and carries about \$10,000 to \$20,000 worth of parts, fittings, pumps and equipment.²⁴ The service truck had Advantage's name on the side.

[32] Advantage also supplied Mr. Rossiter with a mobile phone, a pager and business cards showing Advantage's name. These were supplied at no charge to Mr. Rossiter.

[33] Advantage provided Mr. Rossiter with a uniform and, although Advantage encouraged him to wear the uniform, it was not mandatory. Mr. Van Hunenstijn testified that in general Mr. Rossiter did not wear the uniform. Wearing a uniform was mandatory for employees. Mr. Rossiter testified that he had to wear the uniform.

[34] If Mr. Rossiter needed other parts or equipment he would get it from Advantage. Advantage equipment, such as an excavator, would be used when available; if Advantage did not have the equipment, the Advantage office would arrange for the equipment. Cost of the parts or equipment would be deducted by Advantage in the computation of the net selling price and the commissions.

²² Exhibit A-1, Tab 24. These slips are for one-year periods ending on August 31 of each year. The last slip for the period ending in 2010 is for \$55,517.95; allowing for the fact that Mr. Rossiter was dismissed at the end of May or after roughly three quarters of the year ending on August 31 had been completed, it is about \$4,000 less than three quarters of the amount paid to Mr. Rossiter in the prior year.

²³ According to Mr. Van Hunenstijn, Mr. Rossiter's accountant told Advantage it would have to pay GST. According to Mr. Rossiter, Advantage told him to register for GST. Advantage also prepared a third cheque for Mr. Rossiter at every payment period. This cheque was for the CRA and Mr. Rossiter would use it, in effect, to make installment payments. On the commission calculation sheets at Tab 9 of Exhibit A-1, it is referred to as "CRA deduction 30%". See also Exhibit A-1, Tab 8.

²⁴ Transcript of September 7, 2012, pages 41 and 44.

Labour

[35] If on any given job Mr. Rossiter needed the help of other workers, he could use Advantage workers or workers provided by a company such as Labour Ready that were arranged for by Advantage. Mr. Van Hunenstijn also stated that it was an option for Mr. Rossiter to hire someone directly himself although they would have no paperwork on it because it did not go through them; he believed that Mr. Rossiter had done that on rare occasions.²⁵

[36] I note that Mr. Rossiter's compensation arrangement with Advantage had a strong disincentive against his hiring labour directly. Without any paperwork, labour he hired directly would not be included in the various deductions made to the gross selling price.

[37] As I indicated in my examples above, such non-deductible labour reduced the commission left for him far more than if he obtained the labour through Advantage. Labour obtained through Advantage would reduce his commission by 30%, whereas labour he hired directly would reduce what he made by 100% of its cost since it was paid out of his commission.

Other Facts

[38] In 2006, Advantage gave Mr. Rossiter the award for best overall performance.²⁶

[39] There was general agreement that Mr. Rossiter was a very good plumber.

[40] Whether a call was answered by a contractor like Mr. Rossiter or an employee, there would be no apparent difference for the customer.

[41] Mr. Rossiter chose to participate in the company medical and dental plan. He was not obliged to do so but employees were. Mr. Rossiter paid half the cost.

[42] Advantage obtained a special insurance rider so as to obtain insurance coverage for its contractors including Mr. Rossiter.

[43] Payment was collected from customers at the end of each plumbing job, but if there was some issue collecting, Advantage took care of it.

²⁵ Transcript of September 7, 2012, pages 79, 80 and 112.

²⁶ Transcript of September 7, 2012, pages 138 and 139.

[44] Advantage paid for Mr. Rossiter's workman's compensation coverage. Mr. Rossiter did not have any business or professional insurance and did not have liability insurance for his work.²⁷

Areas of Significant Factual Dispute

[45] While the parties generally dispute how to characterize most of the evidence, there are three areas where there was a significant disagreement over the facts. They were:

- (a) regarding the intentions of the parties,
- (b) whether or not Mr. Rossiter turned down specific jobs and
- (c) whether Mr. Rossiter did plumbing work other than for Advantage during the period in issue.

Intention

Mr. Van Hunenstijn's Testimony

[46] Mr. Van Hunenstijn testified that Advantage had about 25 employees and that when it started out many years ago almost all the technical people were contractors like Mr. Rossiter. During the period in issue in these appeals, the technicians were a mixture of employees and contractors; since then Advantage has moved to having exclusively employee technicians.

[47] Mr. Van Hunenstijn is the person who decided whether a technician would be an employee or a contractor. To choose someone as a contractor, he would have to be satisfied that the technician had experience, had good customer rapport and was good at closing the deal and getting the business of the potential client.

[48] He testified that whereas employees were paid on the strict hourly basis, contractors could make more by working longer, smarter and harder. However, contractors could also lose out if it turned out that the potential client was not prepared to pay the estimate and get the work done.

[49] Mr. Van Hunenstijn stated that contractors would make more than employees and estimated that Mr. Rossiter made roughly 20% more than an employee of similar experience.

²⁷ Transcript of September 7, 2012, page 183.

[50] Unlike employees, contractors could turn down calls and sometimes it was harder to get contractors to take calls, for example on Friday afternoons.

[51] Gradually, Advantage put more incentive features into employee pay.

[52] When asked why there was a second contract with Mr. Rossiter, the 2008 agreement, Mr. Van Hunenstijn responded:

A Yeah, I think the other one was set for a five-year term, and you know, as business goes on and time goes on, we decided to, you know, write a new contract and, you know, we just tried to improve on the previous one, in terms of the writing and the wording of the contract. But the intent and the actual facts of what happened did not change from day to day. It wasn't -- it was a new agreement on paper, to carry on business as we were already doing.²⁸

[Emphasis added.]

[53] For smaller jobs there was suggested pricing and in later years this was shown on the invoices although this pricing could be adjusted for special circumstances.

[54] On larger jobs Mr. Rossiter could provide estimates without office approval unlike employees who would need approval for estimates on jobs over \$1,000.

[55] Employees would have to rotate through the seven days of the week so that Advantage had seven-day coverage, whereas contractors only worked on Saturdays and Sundays if they wanted to do so.

[56] Mr. Rossiter was happy with his income and never questioned his status as a contractor.

[57] He did not mind if Mr. Rossiter did outside work as long as Mr. Rossiter did not use Advantage's equipment or parts.

Mr. Rossiter's Testimony

[58] Mr. Rossiter trained as a plumber in England and had acquired quite substantial experience there.

[59] He was in Canada for quite a few years before working for Advantage. During those years he sold real estate and, later, he was a chef.

²⁸ Transcript of September 7, 2012, page 38.

[60] His association with Advantage came about because he responded to an advertisement that Advantage had placed. Working for Advantage was the first time he worked in plumbing in Canada.

[61] As far as he was concerned, he was offered a job by Advantage and he was delighted to get the job. Indeed, he enjoyed his work with Advantage.

[62] He signed what he was asked to sign at the start without reviewing it, and he was never given copies of what he signed although he was told he would get copies. His understanding was that he was an employee, that he had to be available for work and that he was paid on a commission basis for doing work. He assumed that if you worked for a company you were an employee.

[63] The letter of November 12, 2003 addressed to Advantage “AND TO: Whom It May Concern”, which he signed, does not reflect his understanding of his agreement with Advantage.

[64] When he started it was his understanding that everyone was paid on commission.

[65] He worked from Tuesdays to Saturdays with Sundays and Mondays off. He was required to attend the weekly sales meetings and would receive a reminder the night before the sales meeting. The reminder would state that the meeting was mandatory.

[66] With respect to the second contract, he also stated that he simply signed what was put in front of him.

[67] He would start his workday at a regular hour and call the dispatcher asking him to send him to his first job. After each job, the dispatcher would send him to the next one. His day would not end at a fixed time but could be quite variable depending on what jobs there were and how long the last job might take to complete.

[68] He was on call after hours on certain nights. When asked whether this was required of him, he responded that it was expected of him.

[69] Mr. Rossiter testified that he only refused one job, and that was because of the appalling conditions he found in the crawl space where he would have had to work. He phoned the office and explained; they said “that’s fine, drive away”.

[70] However, he also testified that, when the dispatcher would ask him to take a job that was very far from where he was located, he would ask to be sent to a job that made more geographical sense in relation to his location.

[71] He testified that he left his tax returns to his accountant.

[72] At first Advantage used regular invoices but later it used preprinted forms with fixed prices for routine types of work. For the bigger jobs, he could do a price estimate himself but still needed to get the approval of Advantage.

[73] Advantage would tell him which job to go and do but, because he was experienced, there was no on-site supervision. Very occasionally someone from Advantage might look in.

Did Mr. Rossiter Turn Down Jobs?

[74] Amanda Cockroft and Katie Panganiban testified. Ms. Cockroft was a dispatcher from October or November 2009 until June 2010 at Advantage. She no longer works there. Ms. Panganiban has been a dispatcher at Advantage from December 2008 to the present.

[75] Both testified that employees were simply told where to go, whereas contractors had to accept the job. Both stated Mr. Rossiter was difficult to deal with and often turned down work as either too far to go to or as not paying him enough.

[76] I previously indicated that Mr. Rossiter testified that he did not turn down jobs with one exception but that he did ask for work that made more sense in terms of driving.

Did Mr. Rossiter Do Work Other Than With Advantage?

[77] Ms. Cockroft also testified that she had received a call on May 20, 2010 from a woman who was being sued by her landlord and needed proof of some plumbing work she had had done one year earlier. The woman had responded to an advertisement in the local paper for plumbing work and could not remember the plumber's name but she remembered that the truck had the name Advantage on it.²⁹

[78] Advantage also brought evidence of two printouts of computer screens showing on-line advertisements, one for "Bryan's Plumbing" and the other for an

²⁹ See also the second page of Tab 10 of Exhibit A-1. I note this call was two days prior to the termination of the employment.

“Experienced Journeyman Plumber”. The first was in mid-May 2010 and the second in late March 2010.

[79] Mr. Rossiter agreed that the phone numbers on the two advertisements were his but said he did not recognize the advertisements. He said that he knew nothing about the Internet but his wife put Internet advertisements up for him from the time when he was fired.

[80] However, when looking at the late March 2010 advertisement, he commented that his wife must have put it up and that was probably why Advantage fired him.

[81] Earlier in his testimony, Mr. Rossiter said he did not have the time to do work other than for Advantage and that he could not do such work because that would be instant dismissal.

[82] When asked how he knew that outside work would lead to dismissal, he said that he knew because Mr. Van Hunenstijn had told him that just after he started.

[83] He also said that he did plumbing jobs for friends while working for Advantage but stated that he did not charge his friends.

Analysis

The Law

[84] There have been numerous cases on the distinction between an employee and an independent contractor. In the recent decision of the Federal Court of Appeal in *1392644 Ontario Inc. (Connor Homes) v. Canada (National Revenue)*,³⁰ Justice Mainville, writing for the Court, reviews the test for determining whether an individual is an employee or an independent contractor in paragraphs 23 to 41 of that decision. He summarizes the analysis as follows:

36 However, properly understood, the approach set out in *Royal Winnipeg Ballet* simply emphasises the well-know principle that persons are entitled to organize their affairs and relationships as they best deem fit. The relationship of parties who enter into a contract is generally governed by that contract. Thus the parties may set out in a contract their respective duties and responsibilities, the financial terms of the services provided, and a large variety of other matters governing their relationship. However, the legal effect that results from that

³⁰ 2013 FCA 85. This decision came out after the present cases were argued; I did not feel it necessary to invite comments from counsel because I do not understand the decision as changing the law although it does remove any doubt that subjective intent must be examined prior to the objective reality.

relationship, i.e. the legal effect of the contract, as creating an employer-employee or an independent contractor relationship, is not a matter which the parties can simply stipulate in the contract. In other words, it is insufficient to simply state in a contract that the services are provided as an independent contractor to make it so.

37 Because the employee-employer relationship has important and far reaching legal and practical ramifications extending to tort law (vicarious liability), to social programs (eligibility and financial contributions thereto), to labour relations (union status) and to taxation (GST registration and status under the *Income Tax Act*), etc., the determination of whether a particular relationship is one of employee or of independent contractor cannot simply be left to be decided at the sole subjective discretion of the parties. Consequently, the legal status of independent contractor or of employee is not determined solely on the basis of the parties declaration as to their intent. That determination must also be grounded in a verifiable objective reality.

38 Consequently, *Wolf* and *Royal Winnipeg Ballet* set out a two step process of inquiry that is used to assist in addressing the central question, as established in *Sagaz* and *Wiebe Door*, which is to determine whether the individual is performing or not the services as his own business on his own account.

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 intent as well as the terms of the contract may also be taken into account since they colors the relationship. As noted in *Royal Winnipeg Ballet* at para. 64, the relevant factors must be considered “in the 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 factor 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.

Application of the Test

Subjective Intent

[85] Clearly, Advantage wanted to create an independent contractor relationship. Mr. Rossiter states he understood he was becoming an employee.

[86] The first agreement uses the language of a contractor but many key terms are more consistent with employment, notably: Mr. Rossiter's commitment to full-time performance of the contract, the prohibition on competing directly or indirectly with Advantage and the fact that Advantage provides the services vehicle.

[87] The fact that Mr. Van Hunenstijn drew up the agreement does not change its actual terms.

[88] On the other hand, the letter Mr. Rossiter signed on the same day certainly acknowledges being an independent contractor. However, the letter, not signed by Advantage, cannot modify the contract and the letter is in some ways inconsistent with the contract.³¹

[89] As a result, the intent of the first contract is, overall, more consistent with a contract of employment than an independent contractor relationship.

[90] Mr. Rossiter's income tax returns were mostly filed on the basis of self-employment income although in one year, 2005, he reported his income as employment income.³² On the other hand, Mr. Rossiter did not register for GST until June 1, 2007, three and a half years after he started, even though his gross revenue was above the small supplier threshold in 2004.

[91] Mr. Rossiter's tax reporting as to his status is ambiguous for the period as a whole although towards the end of the period it is more consistent with being an independent contractor.

³¹ For example, Mr. Rossiter does not contract independently per job. It is a one-year agreement renewable for one-year terms at the option of Advantage. It is also incorrect to say Mr. Rossiter completely controls the work he does or the tools he uses; while he could refuse jobs, he could only take jobs offered to him by Advantage and the vast majority of the tools and, consequently, the investment, the truck and its contents, worth \$70,000 to \$80,000, came from Advantage.

³² With a T4, which means Advantage must have sent a T4, although it may have done so erroneously.

[92] Mr. Rossiter did not send invoices for his services to Advantage. Advantage calculated his commissions.

[93] The second agreement does not have many of the terms consistent with employment found in the first agreement. However, I note that it still provided for the bulk of the tools to come from Advantage in the form of the truck and its contents. It also continued to prohibit use of the truck for anything other than Advantage's business.

[94] Nothing in the other evidence apart from the second agreement suggests a change in contractual intent at the time of the signature of the second agreement. Indeed, Mr. Van Hunenstijn's evidence, quoted above in paragraph 52, is that there was no change of intent in writing the new contract.

[95] To summarize, overall the subjective intent is ambiguous.

The Objective Reality

[96] Mr. Rossiter was a very experienced plumber and little or no direct supervision was needed or carried out. This is not uncommon for people with a high degree of skills even when they are employees.

[97] On the other hand, Advantage had a high degree of, but not complete, juridical control. Only Advantage could send him to jobs, although I accept that he could refuse specific jobs and that he sometimes insisted on jobs at locations that were geographically closer than what was first proposed. I accept that he avoided, at least a few, jobs that might not pay well in favour of other jobs.³³

[98] However, such behaviour is not necessarily inconsistent with a senior, experienced employee.

[99] With respect to tools, Mr. Rossiter only had some small tools, as against the truck and the tools and parts in it provided by Advantage. The investment was overwhelmingly that of Advantage.

³³ All of the evidence to this effect was towards the end of the period in issue.

[100] It is also worth noting that there was no suggestion that Mr. Rossiter owned his own service truck with similar contents and, as a result, he could not, as a practical matter, carry out a similar business. Without such a truck and its contents, at most, he could do some very minor and simple work with the tools he owned, a poor use of his experience and skills.

[101] With respect to profit and loss, there was very little risk of loss. He had little investment and, given his experience, the worst that was likely was that if he underestimated the time required he might earn less per hour than expected.

[102] On the profit side, he could earn more if he worked faster and longer but this is not dissimilar from an employee on commission.

[103] It is also worth recalling that, apart from some ability to obtain “better” jobs³⁴ than those first offered, he operated like an employee in most respects. He went to sales meetings, for example. In addition, customers would not know that he was not an employee.³⁵

[104] Towards the end of the period in issue, Mr. Rossiter may have taken on a small number of plumbing jobs privately that were not done for Advantage. However, the only evidence at all on this are two advertisements in 2010 and the phone call received by Ms. Cockroft in May 2010 regarding work in 2009 where the Advantage service truck was used. If this were the case, and it is not necessarily that I make a finding on the point, it would have been done in violation of his agreement with Advantage given that the service truck was allegedly used.

[105] The overall balance of factors, especially ownership of the tools and the relatively high but not full juridical control of the work, leads to the conclusion that the relationship was one of employment.³⁶

³⁴ “Better” in the sense of better located or potentially better paying.

³⁵ I would note that, although Mr. Rossiter may have sometimes sought and obtained a job he considered preferable to the one initially proposed, overall he had to be taking on a lot of jobs and to be considered very valuable to Advantage given that his commissions rose steadily from 2004 to 2009, that he received the 2006 award for best overall performance, that other employees regularly phoned him for advice and that for much of 2009 he was paid \$300 every two weeks for giving that advice. Obviously, something happened to ruin that relationship towards the end of the period in issue.

³⁶ Even if a small amount of work were done on the side by Mr. Rossiter using the service truck in violation of the agreement, it would not, by itself, demonstrate that Mr. Rossiter was an independent contractor who did jobs for others and for Advantage. Given the alleged use of Advantage’s truck, it is equally consistent with Mr. Rossiter being an employee and breaching his employment agreement to do work on the side.

[106] There remain two other matters to deal with.

Estoppel

[107] Advantage made an argument that, in effect, Mr. Rossiter was estopped at this point from asserting he was an employee. Advantage accepted that there was no estoppel against the Crown.

[108] Whatever argument might or might not be made in an action between Advantage and Mr. Rossiter, it is unnecessary for me to deal with it here insofar as the Crown is entitled to bring out all the facts in respect of the issue before this Court.

Are the Decisions Too Late?

[109] Advantage raised a concern that decisions in July 2011 going back to November 2003 went too far back and were unfair. Advantage accepted that the *Employment Insurance Act* did not have a time limit for these decisions.

[110] The decisions are not too late. I would note, however, that there is a three-year limitation on assessing employment insurance premiums pursuant to subsection 85(3) of the *Employment Insurance Act* and a four-year limitation on assessments made under subsection 22(3) of the *Canada Pension Plan*.³⁷

[111] While not certain, it would appear that at the first date of hearing, no assessment had yet been made.³⁸

[112] As a practical result, it may be that premiums can no longer be assessed for much or most of the period in issue.

Conclusion

[113] For these reasons, the appeals will be dismissed.

Signed at Ottawa, Ontario, this 31st day of May 2013.

³⁷ The provisions actually take one back somewhat more than three or four years insofar as they relate to when premiums are payable as opposed to the period for which they arise. Also, the limitations do not apply if there is misrepresentation or fraud.

³⁸ Transcript of September 7, 2012, page 4.

“Gaston Jorré”

Jorré J.

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