

Dockets: 2013-2467(CPP)
2013-2468(EI)

BETWEEN:

HERBERT D. SETTEE,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

Appeals heard on February 27, 2014, at Winnipeg, Manitoba.

Before: The Honourable Justice Robert J. Hogan

Appearances:

Agent for the Appellant: Grant Settee
Counsel for the Respondent: Larissa Benham
Hugh Crawley (student-at-law)

JUDGMENT

The appeals from the determinations by the Minister of National Revenue that Reginald Smith was employed by the Appellant in insurable and pensionable employment during the relevant periods, and with respect to the consequential assessments made under the *Employment Insurance Act* and the *Canada Pension Plan*, are dismissed in accordance with the attached reasons for judgment.

Signed at Ottawa, Canada, this 26th day of May 2014.

“Robert J. Hogan”

Hogan J.

Citation: 2014 TCC 173
Date: 20140526
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BETWEEN:

HERBERT D. SETTEE,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

REASONS FOR JUDGMENT

Hogan J.

I. Introduction

[1] These are appeals from determinations made by the Minister of National Revenue (the “Minister”) that for the years 2011 and 2012 Reginald Smith (the “Worker”) was not an independent contractor but rather an employee of Herbert D. Settee (the “Appellant”) for the purposes of the *Employment Insurance Act* and the *Canada Pension Plan*. The appeals also cover the consequential assessments that followed the Minister’s determination.

[2] The Appellant argues that the Worker was an independent contractor providing services to him in the course of a business carried on by the Worker for his own benefit.

II. Factual Summary

[3] The only witness to appear on behalf of the Appellant was his son, Grant Settee, who worked with the Appellant in an electrical contracting and repair business carried on under the trade name Dale’s Electric & Desco Supplies. The

witness testified that he was co-owner of the business with his father. No evidence was produced to contradict this statement. The Appellant did not appear in court.

[4] The evidence shows that the Worker was hired as an electrician under a verbal agreement. The Worker worked on average 20 hours a week on a on-call basis, as needed by the Appellant.

[5] The Appellant and his son obtained small electrical contracts with residential or commercial property owners or tenants in Selkirk, Manitoba. Generally, they were fixed-price contracts and included labour and materials. The Worker would be called to work on the projects at a set rate of \$14.00 per hour. He did not participate in the negotiation of the terms and conditions of the contracts with the clients. The Worker did not invoice the Appellant for his services.

[6] The Appellant and his son would drive the Worker to the jobsites in a vehicle that belonged to them. The Worker would work alongside them on the projects.

[7] The Respondent accepts that it was the Appellant's intention that the Worker be self-employed, but argues that the objective reality of the parties' relationship does not support the Appellant's intention in this regard.

[8] The Worker was paid \$8,719 and \$2,841 in 2011 and 2012 respectively.

III. Analysis

[9] The case law is clear with regard to the legal test that should be applied to determine whether an individual is an employee or self-employed.

[10] The leading case on this issue is *Wiebe Door Services Ltd. v. M.N.R.*,¹ a decision which was confirmed by the Supreme Court of Canada in *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*² The question is always whether or not the worker "is performing [the services] as a person in business on his own account".³ *Sagaz* summarizes as follows the test enunciated in *Wiebe Door* and the factors that need to be weighed in determining the nature of a work relationship:

¹ [1986] 3 F.C. 553, 1986 CarswellNat 366.

² [2001] 2 S.C.R. 983, 2001 SCC 59.

³ *Ibid.*, at para. 47.

47 . . . 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.⁴

[Emphasis added.]

[11] In addition to these factors, the subjective intention of the parties also needs to be considered. Where one can establish a common intent of the parties with regard to the type of working relationship they wished to establish, this intent must be considered in the Court's analysis of the foregoing factors.

[12] It is important to bear in mind, however, that the intention of the parties is only relevant to the extent that it is reflected in the facts of the case. The subjective intention of the parties is not determinative in itself. Justice Mainville of the Federal Court of Appeal has provided the following clarification:⁵

37 . . . 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.

[13] *Connor Homes* further confirms that the analysis involves a two-step process. First, the intention of the parties must be ascertained in order to determine what kind of relationship they wished to create. In the light of that intent, the second step is to analyze the facts of the case to determine whether the objective reality of the situation is reflective of the intent. In this second step, the Court must apply the four *Wiebe Door* factors, namely: (i) control, (ii) ownership of tools, (iii) chance of profit and (iv) risk of loss, to determine whether the factual reality reflects the subjective intention of the parties.

[14] From the evidence, it is clear that the Appellant desired to employ the Worker as an independent contractor. It is not entirely clear whether the Worker accepted this status. In any event the parties' characterization of their relationship is not determinative of the issue. The parties' intentions must also be consistent

⁴ *Ibid.*

⁵ *1392644 Ontario Inc. o/a Connor Homes v. Minister of National Revenue*, 2013 FCA 85.

with the objective reality of their relationship, which is determined through a balancing of, *inter alia*, the following factors:

1. The level of control the employer has over the worker's activities;
2. Whether the worker uses his or her own tools;
3. The degree of financial risk taken on by the worker; and
4. The worker's opportunity for profit.

[15] The above factors constitute a non-exhaustive list. The relative weight of each factor will depend on the particular facts and circumstances of the case.

Control

[16] The clients were obtained by the Appellant. The Appellant and his son would work alongside the Worker on the worksite. The Appellant was responsible for the execution of the client contracts. I infer from the evidence as a whole that the Appellant could tell the Worker what to do to ensure that the work performed met with the approval of the Appellant's client.

Tools

[17] The Worker had his own tools but, for the most part, used tools and equipment belonging to the Appellant and his son. This factor weighs in favour of an employee-employer relationship.

Financial Risk

[18] The Worker assumed little or no financial risk. If there was a miscalculation in a quotation (with respect to the cost of the materials or the hours required to complete the job), the loss would be assumed by the Appellant and his son. This factor weighs in favour of an employee-employer relationship.

Opportunity for Profit

[19] The Worker was paid an hourly wage and there is no indication that he could have profited beyond this. In the instances where the Worker purchased materials, he would be reimbursed. Where he used his own materials, he would be reimbursed or the materials would be replaced. Again, there was no opportunity for profit beyond the hourly wage. This factor therefore weighs in favour of an employee-employer relationship.

IV. Conclusion

[20] On balance, the application of the *Wiebe Door* factors favours a finding that the Worker was an employee. The Worker was not in business on his own account.

[21] For these reasons, the appeals are dismissed.

Signed at Ottawa, Canada, this 26th day of May 2014.

“Robert J. Hogan”

Hogan J.

CITATION: 2014 TCC 173

COURT FILE NOS.: 2013-2467(CPP)
2013-2468(EI)

STYLE OF CAUSE: HERBERT D. SETTEE v. M.N.R.

PLACE OF HEARING: Winnipeg, Manitoba

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REASONS FOR JUDGMENT BY: The Honourable Justice Robert J. Hogan

DATE OF JUDGMENT: May 26, 2014

APPEARANCES:

Agent for the Appellant: Grant Settee
Counsel for the Respondent: Larissa Benham
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