Dockets: 2013-1268(EI)
2013-1267(CPP)

BETWEEN:

CHRIS J.J. BADOUR,

appellant,

and

THE MINISTER OF NATIONAL REVENUE,

respondent.

Appeals heard on 12 May and 25 August 2014, at Timmins, Ontario.

Before: The Honourable Justice Gaston Jorré

Appearances:

For the appellant:	The appellant himself
Counsel for the respondent:	George Boyd Aitken

JUDGMENT

The appeals are dismissed and the decision made by the Minister of National Revenue on 15 January 2013 under the *Employment Insurance Act* and the *Canada Pension Plan* is confirmed, in accordance with the attached reasons for judgment.

Signed at Montreal, Quebec, this 25th day of September 2014.

"Gaston Jorré"

Jorré J.

Citation: 2014 TCC 279
Date: 20140925
Dockets: 2013-1268(EI)
2013-1267(CPP)

BETWEEN:

CHRIS J.J. BADOUR,

appellant,

and

THE MINISTER OF NATIONAL REVENUE,

respondent.

REASONS FOR JUDGMENT

Jorré J.

[1] The appellant appeals from determinations by the Minister of National Revenue that Howard Fletcher, the worker, was in insurable employment and in pensionable employment with the appellant within the meaning of the *Employment Insurance Act* and the *Canada Pension Plan* during the period from 1 January to 31 December 2010.[1]

[2] During the period, Chris Badour, the appellant, operated a taxi business in Timmins and the worker drove one of the appellant's cabs.

[3] The appellant, Robert Laporte and Rodney Badour, the appellant's brother, testified. Mr. Fletcher, the worker, was not at the hearing. Three exhibits were filed.[2]

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[1] By virtue of subsection 18.29(1) of the *Tax Court of Canada Act*, some of the key provisions of the informal procedure, notably section 18.14 and subsection 18.15(3), but not all the provisions of the informal procedure apply to employment insurance appeals.

[2] After the hearing of this matter began on 12 May 2014, because a broken water main had deprived the sprinkler system of water, there was mandatory closure of the building forcing the Court to adjourn in the middle of the hearing. The hearing resumed and concluded on 25 August 2014.

The Employment Insurance Appeal

[4] I will start with the employment insurance appeal because special provisions apply to taxi drivers. These provisions create a "bright line" test that eliminates much of the uncertainty found in other areas; however, these provisions have no application to the Canada Pension Plan appeal.

The Law

[5] Subsections 5(1) and (4) of the *Act* say, in part, that:

> 5(1) . . . insurable employment is
>
> (*a*) employment . . . under any express or implied contract of service . . ., written or oral, whether the earnings of the employed person are received from the employer or some other person and whether the earnings are calculated by time or by the piece . . ., or otherwise;
>
> . . .
>
> (*d*) employment included by regulations made under subsection (4) or (5); and
>
> . . .
>
> (4) The Commission may, with the approval of the Governor in Council, make regulations for including in insurable employment
>
> . . .
>
> (*c*) employment that is not employment under a contract of service if . . .[3]

[6] Paragraph 6(*e*) of the *Employment Insurance Regulations* (SOR/96-332) is such a regulation and says:

> 6 Employment in any of the following employments . . . is included in insurable employment:
>
> (*e*) employment of a person as a driver of a taxi, . . ., where the person is not the owner of more than 50 per cent of the vehicle or the owner or operator of the business . . .[4]

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[3] In its entirety, paragraph 5(4)(*c*) reads as follows:

> (*c*) employment that is not employment under a contract of service if it appears to the Commission that the terms and conditions of service of, and the nature of the work performed by, persons employed in that employment are similar to the terms and conditions of service of, and the nature of the work performed by, persons employed under a contract of service;

[4] In its entirety, paragraph 6(*e*) reads as follows:

> (*e*) employment of a person as a driver of a taxi, commercial bus, school bus or any other vehicle that is used by a business or public authority for carrying passengers, where the person is not the

[7] It is clear that the word "employment" used by itself in section 5 of the *Act* and section 6 of the *Regulations* is not limited to employment under a contract of service but is used in a wider sense.[5]

[8] As a result of this regulation, employment of a person as a driver of a taxi is always insurable employment unless:

(a) the person owns more than 50% of the taxi vehicle,
(b) the person owns the business or
(c) the person operates the business.

Facts and Analysis — Employment Insurance

[9] On the evidence before me, it is quite clear that the appellant had the necessary licence for the taxi vehicle, equipped the car with the necessary equipment, insured the car, paid for the fuel and arranged for dispatching services for the vehicle; the worker did not. The worker was engaged to drive the taxi during one of the two available 12-hour shifts, had no ownership interest in the taxi or the business and was not the operator of the business.

[10] Given the regulation and these facts, it necessarily follows that the worker was in insurable employment for the purposes of the *Act*. It is not necessary to determine whether or not the worker was employed under a contract of service under the general law of Ontario.

[11] The employment insurance appeal must be dismissed.[6]

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owner of more than 50 per cent of the vehicle or the owner or operator of the business or the operator of the public authority;

[5] Otherwise empowering the Commission to "make regulations for including in insurable employment . . . employment that is not employment under a contract of service" would make no sense. See also *Martin Service Station Ltd. v. M.N.R.,* [1977] 2 SCR 996, and *Canada (Attorney General) v. Skyline Cabs (1982) Ltd.*, [1986] FCJ No. 335 (QL).

[6] I would note that through most of the hearing the respondent proceeded on the basis of the classical issue as to whether the worker was an employee or an independent contractor under the general law of Ontario. However, I am satisfied that there is no unfairness in my deciding the matter on the basis of the *Regulations* for two reasons: first, paragraph 6(*e*) of the *Regulations* was pleaded in the alternative in paragraphs 9 and 11 of the reply to the notice of appeal; secondly, I am satisfied that all the relevant evidence came out during the hearing.

The Canada Pension Plan Appeal

The Law

[12] For the purpose of the *Canada Pension Plan*, there is nothing like paragraph 6(*e*) of the *Regulations*. One must consider the usual factors to determine whether or not the worker was employed under a contract of service under the general law of Ontario.

[13] The *Canada Pension Plan* provides in paragraph 6(1)(*a*) that:

> 6(1) Pensionable employment is
>
> (*a*) employment in Canada that is not excepted employment;

[14] The *Canada Pension Plan* also defines "employment" in section 2 as follows:

> "employment" means the state of being employed under an express or implied contract of service or apprenticeship, and includes the tenure of an office;

[15] There have been many cases on the question whether an individual is an independent contractor or an employee. In *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, the Supreme Court of Canada reviewed the law.[7] Paragraphs 47 and 48 summarize the analysis to be undertaken:

> 47 Although there is no universal test to determine whether a person is an employee or an independent contractor, I agree with MacGuigan J.A. that a persuasive approach to the issue is that taken by Cooke J. in *Market Investigations, supra*. 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.
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> 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.

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[7] 2001 SCC 59, at paragraphs 33 to 48.

[16] More recently, in *1392644 Ontario Inc. (Connor Homes) v. Canada (National Revenue)*, Justice Mainville of the Federal Court of Appeal reviewed the test for determining whether an individual is an employee or an independent contractor.[8] 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 relationship, i.e. the legal effect of the contract, as creating an employer-employee or an independent contactor 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

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[8] 2013 FCA 85, at paragraphs 23 to 41.

> 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 color 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.

Facts and Analysis — Canada Pension Plan

[17] The arrangement between the appellant and the worker was quite straightforward.

[18] There was no written contract of employment.

[19] The appellant provided a properly equipped, insured and licensed taxi vehicle and arranged for dispatching services.

[20] In return for driving the vehicle, the worker kept 40% of gross revenues, but paid no expenses. The appellant paid all the expenses out of the 60% of gross revenues that went to him.[9]

<u>Intention</u>

[21] The appellant, his brother Rodney and Mr. Laporte, who was also a driver for the appellant, all testified that the intention was that the drivers were to be independent contractors.

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[9] The expenses paid by the appellant included fuel.

[22] The worker was not present to testify to his understanding. The reply to the notice of appeal states that the Minister assumed that the worker considered himself to be an employee.

[23] Based on the testimony before me, I am satisfied that the worker was aware of the fact that the appellant intended a self-employment arrangement.

[24] The Minister also included in the assumptions that the worker reported what he received from the appellant as “other employment income” on his 2010 income tax return and that the worker did not claim any expenses in his return. There was no evidence to the contrary.

[25] While the worker’s return is consistent with him considering himself as an employee insofar as the income was reported as “other employment income”, I would note that the fact of not claiming any expenses, in itself, does not show much since, on the evidence, he had no expenses to claim.[10]

[26] While I am satisfied of the appellant’s intention to have a self-employment arrangement, the evidence does not allow me to conclude that there was a common intention to that effect. I now turn to the objective reality of the contract.

Ownership of the Tools

[27] It is quite clear that all the relevant tools were provided by the appellant. This factor points in the direction of employment.

Chance of Profit

[28] Clearly the worker could earn more by working more and by making astute choices in the course of taking calls, but this would be equally true of any employee driver except one who is paid a flat hourly salary. This points mildly towards self-employment.

Risk of Loss

[29] As a practical matter the set-up was such that the worker had no possibility of loss. Since he did not pay for fuel, or any other expense, even if he drove for a

[10] The absence of expenses is significant because it affects the risk of loss.

day without a client he would not have a loss; he would simply have no net income for a day. This is consistent with employment under a contract of service.

Control

[30] It is useful to bear in mind that the key with respect to control is whether the payer has the power to control the worker; it is not whether control is actually exercised on a day-to-day basis. Indeed, as Justice Hershfield said in *Follwell v. The Queen*:[11]

> 42 . . . That an employer chooses not to exercise control by virtue of trust and confidence in an employee, or in a third party to whom control has been delegated, does not mean that the control factor favours a finding that the contract is one for services. . . .

[31] The appellant argues that the worker was free to work or not and set his own hours and that the worker did in fact choose his hours and would suddenly stop working without telling the appellant.

[32] However, the evidence is not quite that straightforward.

[33] In the fall of 2009 the appellant had just bought his third taxi vehicle and, since no one was driving the car yet, both the day shift and the night shift were available with the result that the worker, who started driving the taxi at that time, was free to choose the shift he wanted.

[34] Certainly the worker was free to choose his own hours within the shift but he could not drive outside his shift; the taxi vehicle needed to be available to the driver who had the other shift.

[35] The driver was also free to not drive on any given day and, indeed, according to the evidence there were many such days after the day when the driver had started taking care of his 14-year old daughter who had previously been living in Sudbury.[12]

[36] The appellant had arranged for dispatching services by another company, Beal Taxi, which imposed quite a few rules on taxis which it dispatched. The worker had to conform to those rules. For example, if the worker took a call which

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[11] 2011 TCC 422.

[12] The worker also changed shifts soon after his daughter came to live with him.

had been given to a different cab, then the dispatching company would require the worker to pay the fare to the driver who should have received the call and both the worker and the vehicle would be "parked" for the rest of the day by the dispatching service.

[37] At one point there were certain customer complaints to the dispatching company that the worker was preaching to the clients. The dispatching company spoke to the appellant and asked the appellant to tell the worker that it was not acceptable. The appellant spoke to the worker.

[38] While the freedom to work or not and to choose how long to work is more consistent with self-employment, on balance, there is control by the appellant of the worker. This is clear from:

(a) the fact that the worker cannot work during the other shift,
(b) the fact that part of the arrangement is the dispatching services arranged by the appellant which compel the worker to comply with the rules imposed by the dispatching service.

Other Considerations

[39] A limited number of clients could charge their cab fare and would provide some sort of voucher for the ride. When this happened the worker would be paid his 40% share as if the voucher was a cash receipt and the appellant was the one who had to wait until the charge was actually paid to the customer.

[40] There was no evidence that the worker hired anyone to replace him.

[41] Both of these considerations point away from self-employment.

Conclusion on the Canada Pension Plan Appeal

[42] When one considers the totality of these factors, this is an arrangement where the worker works pursuant to a contract of service with the result that the employment is pensionable employment.

[43] This would be the result even if there were a common intention that the worker was to be self-employed.[13]

General Conclusion

[44] As a result, both appeals will be dismissed.

Signed at Montreal, Quebec, this 25th day of September 2014.

"Gaston Jorré"

Jorré J.

[13] In the absence of paragraph 6(*e*) of the *Regulations*, I would have reached the same conclusion with respect to employment insurance.

CITATION:	2014 TCC 279
COURT FILE NOS.:	2013-1268(EI) 2013-1267(CPP)
STYLE OF CAUSE:	CHRIS J.J. BADOUR v. M.N.R.
PLACE OF HEARING:	Timmins, Ontario
DATES OF HEARING:	12 May and 25 August 2014
REASONS FOR JUDGMENT BY:	The Honourable Justice Gaston Jorré
DATE OF JUDGMENT:	25 September 2014
APPEARANCES:	
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