Federal Court of Appeal | Cour d'appel fédérale

Date: 20100316

Dockets: A-481-08
A-483-08

Citation: 2010 FCA 74

CORAM: **NOËL J.A.**
NADON J.A.
LAYDEN-STEVENSON J.A.

BETWEEN:

OLTCPI INC.

Appellant

and

THE MINISTER OF NATIONAL REVENUE

Respondent

Heard at Toronto, Ontario, on March 9, 2010.

Judgment delivered at Ottawa, Ontario, on March 16, 2010.

REASONS FOR JUDGMENT BY: NOËL J.A.

CONCURRED IN BY: NADON J.A.
LAYDEN-STEVENSON J.A.

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REASONS FOR JUDGMENT

NOËL J.A.

[1] These are appeals from decisions of Weisman D.J. (the Tax Court Judge) confirming two determinations made by the Minister of National Revenue (the Minister) according to which Renu Arora (Ms. Arora) was engaged in insurable employment pursuant to the *Employment Insurance Act*, S.C. 1996, c. 23 (the EI Act) and pensionable employment pursuant to the *Canada Pension Plan*, R.S.C. 1985, c. C-8 as amended (the CPP), and that accordingly the appellant had the duty to deduct and remit the contributions payable with respect to her under these statutes.

[2] The main issue turns on whether the appellant, in making Ms. Arora's services available to a related company in her capacity as dietician, acted as a placement agency for purposes of paragraph 6(*g*) and section 7 of the *Insurable Earnings and Collection of Premiums Regulations*, S.O.R./97-33 (the EI Regulations) and subsection 34(1) of the *Regulations Respecting the Administration of the Canada Pension Plan*, S.O.R./78-142 s. 3 (the CPP Regulations).

[3] The two appeals were consolidated by order of this Court dated January 9, 2009. Pursuant to this order these reasons dispose of both appeals, the original being filed in docket A-481-08 and a copy thereof in docket A-483-08.

[4] For the reasons which follow, I am of the view that both appeals should be dismissed.

THE FACTS

[5] During the period in issue, the Ontario Long Term Care Providers Incorporated or OLTCPI (the appellant) assumed the function of providing dieticians and social workers to its related company and sole client Leisureworld Inc. (Leisureworld), Ontario's largest operator of long term care facilities for senior citizens. In addition, the appellant provided bulk purchasing services for food and medical supplies for all of Leisureworld's nursing homes (Reasons, para. 1). There was no written agreement reflecting this arrangement (Evidence of David Cutler, Transcript, p. 171).

[6] The Ontario Ministry of Health and Long Term Care (the Ministry of Health) provided for minimum standards for the dietary care of nursing home patients (Appeal Book, p. 37). In addition,

the *Dietary Services and Criteria Guidelines* published by the Ministry of Health (the Ministry guidelines) required Leisureworld to provide dietary services to its patients and meet specific requirements (Reasons, para. 17). The evidence of the appellant was that its principal task with respect to dieticians was to ensure that the guidelines and other requirements of the Ministry of Health for dietary matters and for dieticians were being met by Leisureworld nursing homes (Evidence of David Cutler, Transcript, p. 154).

[7] The payment made by Leisureworld for the services provided by the appellant took the form of a flat fee computed by reference to the number of residents in the facility being serviced (Evidence of David Cutler, Transcript, pp. 148 and 149). This flat fee was for the dietician and social work services. The appellant did not bill Leisureworld for the bulk purchasing service as it earned sufficient profits from the spread between the flat fee paid by Leisureworld and the cost of providing the dieticians and social workers (*idem*, p. 198).

[8] When a dietician was required at a Leisureworld facility, an advertisement would be posted on the internet by the appellant using Leisureworld's letterhead (Evidence of David Cutler, Transcript, pp. 174 and 175; Job description, Appeal Book, p. 46). Upon acceptance, the agreement between the appellant and the dieticians was reduced to writing and followed a standard template (Consultant Agreement, Appeal Book, p. 49). The only variables in the template were the hourly rate of pay and the number of monthly hours required. The monthly hours were determined by the size of the long term care facility being serviced by the dietician (Evidence of Lori Halliwuska, Transcript, p. 27).

[9] The agreement between the appellant and Ms. Arora stipulated that she was an independent contractor and was not to be considered an employee of the appellant or any of its clients; that Ms. Arora would be required to obtain liability insurance; and that, Ms. Arora would provide 82 hours of service per month, at an hourly rate of $35, to be billed to the appellant via invoices (Reasons, para. 2). Leisureworld was not a party to this agreement.

[10] Ms. Arora filed her income tax returns on the basis that she was an independent contractor (Reasons, para. 2).

[11] While performing her services, Ms. Arora had the ability to set her own hours. However, she was expected to attend the facilities during normal business hours, Monday to Friday, 8:00am to 6:00pm (Evidence of Robert Low, Transcript, p. 137). She was able to set the order of her patient visits, but was obliged to prioritize patient referrals made by the nursing staff, doctors or the directors who were acting on behalf of Leisureworld (Evidence of Lori Halliwuska, Transcript, pp. 64 and 66; Evidence of Renu Arora, Transcript, pp. 34 and 35).

[12] The Ministry guidelines required that nursing home patients be served a variety of foods, be consulted on menus, that foods be served at normal meal times in a pleasant manner. Leisureworld had its own “Clinical Dietician Job Description” which incorporated the Ministry guidelines and required the dietician to go beyond those guidelines (Reasons, para. 17).

RELEVANT STATUTORY PROVISIONS

[13] Paragraph 6(*g*) and section 7 of the EI Regulations and subsections 34(1) and (2) of the CPP Regulations provide respectively:

EI Regulations

6. Employment in any of the following employments, unless it is excluded from insurable employment by any provision of these Regulations, is included in insurable employment:	**6.** Sont inclus dans les emplois assurables, s'ils ne sont pas des emplois exclus conformément aux dispositions du présent règlement, les emplois suivants :
…	[…]
(*g*) employment of a person who is placed in that employment by a placement or employment agency to perform services for and under the direction and control of a client of the agency, where that person is remunerated by the agency for the performance of those services.	*g*) l'emploi exercé par une personne appelée par une agence de placement à fournir des services à un client de l'agence, sous la direction et le contrôle de ce client, en étant rétribuée par l'agence.
7. Where a person is placed in insurable employment by a placement or employment agency under an arrangement whereby the earnings of the person are paid by the agency, the agency shall, for the purposes of maintaining records, calculating the person's insurable earnings and paying, deducting and remitting the premiums payable on those insurable earnings under the Act and these Regulations, be deemed to be the employer of the person.	**7.** L'agence de placement qui procure un emploi assurable à une personne selon une convention portant qu'elle versera la rémunération de cette personne est réputée être l'employeur de celle-ci aux fins de la tenue des registres, du calcul de la rémunération assurable de la personne ainsi que du paiement, de la retenue et du versement des cotisations exigibles à cet égard aux termes de la Loi et du présent règlement.

CPP Regulations

34. (1) Where any individual is placed by a placement or employment agency in employment with or for performance of services for a client of the agency and the terms or conditions on which the employment or services are performed and the remuneration thereof is paid constitute a contract of service or are analogous to a contract of service, the employment or performance of services is included in pensionable employment and the agency or the client, whichever pays the remuneration to the individual, shall, for the purposes of maintaining records and filing returns and paying, deducting and remitting contributions payable by and in respect of the individual under the Act and these Regulations, be deemed to be the employer of the individual.

34. (1) Lorsqu'une personne est placée par une agence de placement pour la fourniture de services ou dans un emploi auprès d'un client de l'agence, et que les modalités régissant la fourniture des services et le paiement de la rémunération constituent un contrat de louage de services ou y correspondent, la fourniture des services est incluse dans l'emploi ouvrant droit à pension, et l'agence ou le client, quel que soit celui qui verse la rémunération, est réputé être l'employeur de la personne aux fins de la tenue de dossiers, de la production des déclarations, du paiement, de la déduction et du versement des contributions payables, selon la Loi et le présent règlement, par la personne et en son nom.

(2) For the purposes of subsection (1), "placement or employment agency" includes any person or organization that is engaged in the business of placing individuals in employment or for performance of services or of securing employment for individuals for a fee, reward or other remuneration.

(2) Une agence de placement comprend toute personne ou organisme s'occupant de placer des personnes dans des emplois, de fournir les services de personnes ou de trouver des emplois pour des personnes moyennant des honoraires, récompenses ou autres formes de rémunération.

DECISION UNDER APPEAL

[14] The Tax Court Judge begins by asking whether paragraph 6(*g*) of the EI Regulations can apply to Ms. Arora if she is an independent contractor, a status which she recognized in the agreements which she signed (Reasons, para. 6). Relying on the decision of this Court in *Sheridan v. Canada*, [1985] F.C.J. No. 230 (*Sheridan*), the Tax Court Judge answers this question in the affirmative (Reasons, paras. 7, 8 and 9). However, he holds that the same cannot be said with respect to subsection 34(1) of the CPP Regulations which require that Ms. Arora be engaged under a contract analogous to a contract of service (Reasons, para. 10).

[15] Dealing with the central issue, the Tax Court Judge finds that the appellant acted as a placement or employment agency (Reasons, para. 13). According to the Tax Court Judge, it is clear that the appellant placed Ms. Arora in Leasureworld's Lawrence Avenue facility, as the purpose of the advertisement which it placed on the Dieticians of Canada website was to fill its client's vacancy at that location (Reasons, para. 15). The evidence also revealed that the appellant earned a profit for doing so (Reasons, para. 13).

[16] In reaching the conclusion that the appellant was a placement agency, the Tax Court Judge rejected the appellant's contention that it was providing a distinct service and was in a situation analogous to that of a contractor who agrees to send personnel to a construction site to perform a particular service under the supervision of a general contractor (Reasons, para. 14).

[17] The Tax Court Judge then turns to the question of whether Ms. Arora was "under the direction or control" of Leisureworld, as these words are used in paragraph 6(*g*) of the EI Regulations. In this respect, the Tax Court Judge notes that she was required by Leisureworld to perform tasks over and above those set out in the Ministry guidelines (Reasons, para. 17), and that she had to report and account for every minute of the day (Reasons, para. 18). The Tax Court Judge goes on to conclude that Ms. Arora was under the *de facto* control of Leisureworld which had effective authority to dismiss her (Reasons, paras. 19 and 20).

[18] The Tax Court Judge then addresses the question of whether the contract pursuant to which Ms. Arora performed her services was "analogous to a contract of service" for purposes of subsection 34(1) of the CPP Regulations. This according to the Tax Court Judge requires an examination of the total relationship of the parties using the four traditional criteria identified in *Wiebe Door Services v. M.N.R.*, 87 DTC 5025 (FCA) (*Wiebe Door*) (Reasons, para. 21).

[19] As to control, the Tax Court Judge finds Ms. Arora's working relationship with Leisureworld, for reasons already given, analogous to a subordinate employee (Reasons, para. 22). With respect to ownership of tools, the only significant tools with which Ms. Arora was provided was the facility in which her patients resided (if that can be viewed as a tool) and an office with a computer allowing access to patient information. Ms. Arora for her part contributed her expertise, although this may not be considered as a tool (Reasons, paras. 23 to 27). As to the chance of profit arising from Ms. Arora's activities with Leisureworld, the Tax Court Judge found that these existed in theory only (Reasons, paras. 28 to 30).

[20] While the common intention of the parties was clearly that Ms. Arora be an independent contractor, the Tax Court Judge notes that three of the four criteria conclusively indicate that her working relationship with Leisureworld was analogous to a contract of service. The Tax Court Judge concludes that, in those circumstances, the intention of the parties is not to be given great weight (*The Royal Winnipeg Ballet v. M.N.R.*, [2006] F.C.J. No. 339 (F.C.A.) (Reasons, para. 31).

[21] The Tax Court Judge goes on to deny both appeals on the basis that the Minister's determinations for EI and CPP purposes were objectively reasonable (Reasons, paras. 33 and 34).

ALLEGED ERRORS

[22] The appellant first claims that the Tax Court Judge misunderstood the functions which it was called upon to perform within the Leisureworld group. Specifically, the appellant contends that it was responsible for ensuring that the Ministry guidelines and requirements for dietary matters and for dieticians' duties were being met by the Leisureworld nursing homes (Memorandum, para. 30). It also had functions beyond dietary matters in that it provided Leisureworld with social workers and arranged for bulk purchases (Memorandum, para. 35). Relying on the decision of the Tax Court in *Supreme Tractor Services Ltd. v. M.N.R.*, 2001 CanLII 748 (T.C.C.), 2000-4909-CPP (*Supreme Tractor*), the appellant contends that it should be viewed as a subcontractor which, in the course of providing services, places personnel at the premise of the client being serviced, rather than as a placement agency (Memorandum, paras. 49 to 53).

[23] Alternatively, the appellant contends that the Tax Court Judge erred in holding that for EI purposes, it was sufficient to hold that Ms. Arora was performing her functions at Leisureworld under the direction and control of Leisureworld (Memorandum, paras. 54 to 61). At the hearing of the appeal, counsel for the appellant conceded that this issue was academic since the Tax Court Judge did conduct the required analysis, albeit for CPP purposes. Hence he did not pursue this argument.

[24] In any event, the appellant contends that the Tax Court Judge erred in holding that the relationship between Ms. Arora and Leisureworld was analogous to a contract of service. In this respect, the appellant submits that the evidence did not allow for the conclusion that Ms. Arora had no chance of profit or risk of loss, and that the Tax Court Judge did not place sufficient weight on the contractual intent of the parties (Memorandum, paras. 78 to 89).

ANALYSIS AND DISPOSITION

[25] Two issues arise from the submissions made by the appellant in support of the appeals, namely, whether the Tax Court Judge properly held that the appellant was a "placement agency" and that the terms and conditions under which Ms. Arora worked were analogous or similar to a contract of service.

[26] The appellant did not address the standard of review. In my view, the question whether the appellant should be viewed as a placement agency based on the test set out in *Supreme Tractor* gives rise to a question of mixed fact and law as does the question as to whether the *Wiebe Door*

factors were properly applied. It follows that absent an extricable error of law, this Court cannot intervene unless the Tax Court Judge is shown to have committed a palpable and overriding error.

Placement agency

[27] Turning to the first issue, the relevant provisions of the EI Regulations and the CPP Regulations, which are relevant to the disposition of the appeals, are similar but not identical. For one thing, the term "placement agency" is defined in the CPP Regulations (subsection 34(2)) but not in the EI Regulations. The Tax Court Judge nevertheless applied this definition for EI purposes as well, an approach with which the appellant does not take issue.

[28] It is common ground that Leisureworld was a client of the appellant, that Ms. Arora was placed by the appellant at the Leisureworld Lawrence facility and that the appellant remunerated Ms. Arora. However, the appellant maintains that in so doing, it was providing a basket of services including that of ensuring that Leisureworld met the requirements of the Ministry of Health for dietary matters and for dieticians' duties. As such it was not acting as a placement agency.

[29] In support of this argument, the appellant refers to the distinction drawn by Porter D.J. in *Supreme Tractor*. The key passages relied upon by the appellant are the following:

> [12] Thus, the first question to be asked is whether the worker is performing services for entity A as part of the business of the latter, albeit part of that business may be a contract for entity A to provide a service for entity B, or whether entity A is simply acquiring personnel as its very business with no contract to undertake anything further than to pass the worker on to entity B to undertake whatever the business of entity B might be. The simple question to ask is whether entity A is under any obligation to provide a service to entity B other than simply provide personnel. Is it obligated to

> perform in some other way than simply to make people available? If the answer is yes, it clearly has business of its own as does any general contractor on a building site and the worker is not covered by the Regulations under either statute. If however, the answer is no, that is, it is not obligated to carry out any service other than to provide personnel, then clearly the worker in such a situation is covered by the Regulations under both statutes.
>
> [13] The question as I see it is not so much about who is the ultimate recipient of the work or services provided as this will cover every single possible subcontract situation, but rather who is under obligation to provide the service. If the entity alleged to be the placement agency is under an obligation to provide a service over and above the provision of personnel, it is not placing people, but rather performing that service and is not covered by the Regulations.

[30] In so saying, Porter D.J. was addressing the difficulty in insuring that the placement agency provisions not apply to persons, such as a subcontractor, providing services which require that workers attend to the premises of the client and perform functions, sometimes at the direction of the client. The question in this regard is whether the person concerned is merely supplying workers or is doing so in the course of providing a distinct service.

[31] The difficulty confronting the appellant in this regard is that its agreement with Leisureworld was not reduced to writing and the evidence suggests that the dieticians assigned to Leisureworld were asked to do more than ensure compliance with the requirements of the Ministry of Health. For instance, Leisureworld's "Clinical Dietician Job Description" beyond incorporating the Ministry guidelines required the dieticians to: develop programs; provide resource services; participate in the pharmacy and therapeutics committee; and meet with the facility administrator (Reasons, para. 17).

[32] Ms. Arora was also required to: generate weight change reports; prepare high risk resident reports for Leisureworld's Director of Nursing; author supplement change reports for the purpose of cutting Leisureworld's food costs; and prepare detailed site visit reports (Evidence of Ms. Arora, Transcript, pp. 16 to 19, 27 and 32). While Ms. Arora's mandate was mainly for high risk patients, the Director of Nursing also required her to follow low and moderate risk patients as well (Reasons, para. 18).

[33] The picture which emerges from the evidence is that, beyond insuring compliance with the requirements of the Ministry of Health, the dieticians were assigned by the appellant to Leisureworld in order to answer to Leisureworld's specific needs and provide the particular services which they were called upon to provide by the Leisureworld staff. As such, it was open to the Tax Court Judge to hold that the appellant's situation was not analogous to that of a contractor providing personnel in the performance of a distinct service.

[34] The fact that more than one service was provided by the appellant is of no assistance on the facts of this case. The bulk purchasing service has no connection with the supply of dieticians. As was stated by the Tax Court Judge, there is no requirement in the definition of a placement agency that the placing of workers be the sole function of the agency (Reasons, para. 14).

[35] The situation is rather like the one in *Big Sky (Lundle) Drilling Inc. v. Canada (Minister of National Revenue)*, [2002] T.C.J. No. 16 (*Big Sky*), a case also decided by Porter D.J. In that case, Porter D.J. rejected the appellant's claim that personnel was being supplied to a third party in the

course of the performance of a distinct service. He found that the appellant was in fact providing two separate services, that is supplying personnel on the one hand and providing management and consulting functions on the other (*Big Sky*, paras. 43 and 49).

[36] I can detect no error in the Tax Court Judge's conclusion that in supplying dieticians to Leisureworld, the appellant was acting as a placement agency.

Analogous to a contract of service

[37] The Tax Court Judge concluded that the terms and conditions of Ms. Arora's working relationship with Leisureworld were analogous to those which would apply to a subordinate employee. In reaching this conclusion, the Tax Court Judge used the four in one criteria set out in *Wiebe Door*, namely control ownership of tools, chance of profit and risk of loss.

[38] The appellant does not take issue with the legal approach used by the Tax Court Judge in reaching his conclusion. Rather, it argues that the conclusion reached was not supported by the evidence. In particular, the appellant contends that the Tax Court Judge erred in holding that there was direction and control where there was none, in failing to find that Ms. Arora had a chance of profit and a risk of loss where both elements were present, and in failing to give proper weight to the intention of the parties.

[39] With respect to control, it is apparent from the reasons of the Tax Court Judge that there was evidence to support the conclusion that he reached.

[40] With respect to the Tax Court Judge's conclusion that there was not risk of loss, the Tax Court Judge accepted Ms. Arora's evidence that given the fact that her expenses were minimal, it was impossible for her income to exceed this amount. This conclusion cannot be labeled as unreasonable.

[41] As to the chance of profit, the Tax Court Judge found that it existed in theory only. As a practical matter, the agreement entitled Ms. Arora to be paid on an hourly basis, at a rate close to industry standards. The agreement provided for a maximum of 82-paid hours per month, and there was no opportunity to increase revenues under the agreement. While she could profit if she found a replacement at a lower rate, the Tax Court Judge concluded that this was not a realistic possibility. Again I can detect no reviewable error in the Tax Court Judge's conclusion on this point.

[42] As to the weight given by the Tax Court Judge to Ms Arora's contractual intent, it was incumbent upon the Tax Court Judge to determine if this intent reflected the true nature of the relationship. The Tax Court Judge found that the tripartite relationship was inconsistent with the stated intention. This is a conclusion that was open to the Tax Court Judge on the facts before him.

[43] I would dismiss both appeals with one set of costs in file A-481-08.

"Marc Noël"

J.A.

"I agree
M. Nadon J.A."

"I agree
Carolyn Layden-Stevenson J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKETS:	A-481-08, A-483-08
(APPEAL FROM TWO JUDGMENTS OF THE DEPUTY JUDGE N. WEISMAN OF THE TAX COURT OF CANADA DATED AUGUST 25, 2008, NO. 2007-1674(EI) AND 2007-1675(CPP).)	
STYLE OF CAUSE:	OLTCPI INC. and THE MINISTER OF NATIONAL REVENUE
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	March 9, 2010
REASONS FOR JUDGMENT BY:	Noël J.A.
CONCURRED IN BY:	Nadon J.A. Layden-Stevenson J.A.
DATED:	March 16, 2010

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