Federal Court of Appeal | Cour d'appel fédérale

CANADA

Date: 20110922

Docket: A-388-10

Citation: 2011 FCA 256

CORAM: **SHARLOW J.A.**
PELLETIER J.A.
STRATAS J.A.

BETWEEN:

TBT PERSONNEL SERVICES INC.

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Heard at Toronto, Ontario, on September 7, 2011.

Judgment delivered at Ottawa, Ontario, on September 22, 2011.

REASONS FOR JUDGMENT BY: SHARLOW J.A.

CONCURRED IN BY: PELLETIER J.A.
STRATAS J.A.

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REASONS FOR JUDGMENT

SHARLOW J.A.

[1] In 2005, the Minister of National Revenue determined that 96 truck drivers engaged by the appellant TBT Personnel Services Inc. in 2002, 2003 and 2004 were employees of TBT during those years. On the basis of that determination, the Minister assessed TBT for premiums payable under the *Employment Insurance Act*, S.C. 1996, c. 23, and contributions payable under the *Canada Pension Plan*, R.S.C. 1985, c. C-8, in respect of the 96 drivers.

[2] TBT requested a review of the assessments, which were confirmed. TBT then appealed the assessments to the Tax Court of Canada. For reasons now reported as *TBT Personnel Services Inc.*

v. Canada (Minister of National Revenue - M.N.R.), 2010 TCC 360, the judge concluded that during the relevant period, 53 of the 96 drivers were employees of TBT but the other 43 drivers were not, and he ordered the assessments to be varied accordingly.

[3] TBT has appealed the judgment relating to the 53 drivers who were held to be employees of TBT, and the Crown has cross-appealed the judgment relating to the 43 drivers who were held not to be employees of TBT. At the hearing of the cross-appeal, the Crown conceded that the judge had correctly determined that 4 of those 43 drivers were not employees of TBT.

[4] For the reasons that follow, I would dismiss the appeal of TBT with respect to the 53 drivers who were held to be employees of TBT, and allow the Crown's cross-appeal in respect of the other 43 drivers except the 4 drivers that the Crown has conceded were not employees of TBT.

The legislation

[5] TBT must pay premiums under the *Employment Insurance Act* and contributions under the *Canada Pension Plan* for any drivers who are its employees. The determination as to whether that obligation arose in this case turns on the following definitions (my emphasis):

Employment Insurance Act	*Loi sur l'assurance-emploi*
5. (1) Subject to subsection (2), insurable employment is	**5.** (1) Sous réserve du paragraphe (2), est un emploi assurable :
(*a*) employment in Canada by one or more employers, under any express or implied contract of service or apprenticeship, written or oral, whether the earnings of the employed person	*a*) l'emploi exercé au Canada pour un ou plusieurs employeurs, aux termes d'un contrat de louage de services ou d'apprentissage exprès ou tacite, écrit ou verbal, que l'employé reçoive sa

are received from the employer or some other person and whether the earnings are calculated by time or by the piece, or partly by time and partly by the piece, or otherwise;	rémunération de l'employeur ou d'une autre personne et que la rémunération soit calculée soit au temps ou aux pièces, soit en partie au temps et en partie aux pièces, soit de toute autre manière;
Canada Pension Plan	*Régime de pensions du Canada*
2. (1) In this Act,	**2.** (1) Les définitions qui suivent s'appliquent à la présente loi.
…	[…]
"employment" means the performance of services under an express or implied contract of service or apprenticeship, and includes the tenure of an office.	« emploi » L'accomplissement de services aux termes d'un contrat de louage de services ou d'apprentissage, exprès ou tacite, y compris la période d'occupation d'une fonction.

[6] In the common law provinces of Canada, the phrase "contract of service" describes the relationship between an employer and its employee, while the phrase "contract for services" is used to describe the relationship that arises when one person engages a self-employed person or an independent contractor to perform services. (The corresponding terms in the *Civil Code of Québec*, S.Q. 1991, c. 64, are « *un contrat de travail* » and « *un contrat d'entreprise* » ; see articles 2085 and 2098).

[7] It appears to be undisputed in this case that the legal relationship between TBT and its drivers is governed by the laws of Ontario, and thus the common law.

The *Wiebe Door* analysis

[8] The leading case on the principles to be applied in distinguishing a contract of service from a contract for services is *Wiebe Door Services Ltd. v. M.N.R.*, [1986] 3 F.C. 553 (C.A.). *Wiebe Door* was approved by Justice Major, writing for the Supreme Court of Canada in *67112 Ontario Ltd. v. Sagaz Industries Canada Inc.*, 2001 SCC 59, [2001] 2 S.C.R. 983. He summarized the relevant principles as follows at paragraphs 47-48:

> 47. […] 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.
>
> 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.

[9] In *Wolf v. Canada*, 2002 FCA 96, [2002] 4 F.C. 396 (C.A.), and *Royal Winnipeg Ballet v. Canada (Minister of National Revenue - M.N.R.)*, 2006 FCA 87, [2007] 1 F.C.R. 35, this Court added that where there is evidence that the parties had a common intention as to the legal relationship between them, it is necessary to consider that evidence, but it is also necessary to consider the *Wiebe Door* factors to determine whether the facts are consistent with the parties' expressed intention.

Applying the relevant principles

[10] In this case, the key question with respect to each of the 96 drivers is this: did TBT engage the driver as a person in business on his own account? For any driver for whom the answer is yes, TBT is entitled to an order vacating the assessments. For any driver for whom the answer is no, the assessments must stand.

[11] TBT presented documentary evidence, the testimony of Mr. Tony Santos who is the owner and operator of TBT, and the testimony of two drivers engaged by TBT pursuant to written agreements, Mr. David Howson and Mr. Perry Lamers. The Crown presented the testimony of another driver engaged by TBT, Mr. Brian Boddington.

[12] The judge made no adverse comments about the credibility of any of the witnesses. For that reason, I have assumed that each of them was honestly stating his understanding of the facts.

[13] TBT's evidence was intended to persuade the judge to infer that all 96 drivers were engaged by TBT on the same terms and conditions. The judge did not draw that inference and in my view he could not reasonably have done so on the evidence. There were written agreements between TBT and 43 of the 96 drivers, but there was no evidence as to whether any of the other 53 drivers had agreed to the same terms. Mr. Santos testified that he (and thus TBT) considered all of the drivers to be self-employed. Mr. Howson and Mr. Lamers testified that they intended from the outset not to provide their services as employees of TBT. However, Mr. Boddington, who was engaged by TBT as a driver and did not sign an agreement, testified that he considered himself to be an employee.

[14] The nature of the evidence led the judge to divide the drivers into two groups. One group consisted of the 43 drivers who had signed an agreement with TBT. The other group consisted of the 53 drivers for whom there was no evidence of a written agreement with TBT. The judge considered the two groups separately. I see no error in that approach, and I will do the same.

The 43 drivers who signed an agreement with TBT

[15] The judge concluded that the 43 drivers who had signed an agreement with TBT were not employees of TBT. That part of his judgment is challenged in the Crown's cross-appeal.

[16] The evidence relating to these 43 drivers was provided primarily through the testimony of Mr. Santos, who explained generally how the drivers were engaged and the circumstances in which the agreements were signed. The agreements are identical except for the named parties. Mr. Howson and Mr. Lamers were included in this group, and gave evidence as to their own situation. (The evidence of Mr. Boddington addressed only his situation, and as he was not one of the drivers who signed an agreement, his evidence is not helpful in determining the facts relating to the drivers who signed an agreement.)

[17] During the relevant period, TBT engaged drivers to provide services to its client Locomote Systems Inc., the business of which included the transportation of steel products. Locomote would pay TBT a fee based on mileage, and TBT would pay the drivers a fee based on the same mileage but at a lower rate. The drivers did not negotiate their rates of pay. The record does not disclose the terms of any agreements between Locomote and its clients.

[18] Locomote is a corporation controlled and operated by the spouse of Mr. Santos. During the relevant period, Locomote leased trucks from a related corporation, Centinel Equipment Leasing Inc., and provided the leased trucks to the drivers engaged by TBT.

[19] Locomote's clients included steels mills such as Dofasco Inc. in Hamilton, Ontario. Typically, the steel mills required Locomote to transport their steel products to factories in Ontario and Quebec. That required specially equipped trucks and drivers with specialized knowledge, experience and skill, as well as the appropriate licences and professional credentials.

[20] The trucks that Locomote supplied to the TBT drivers were equipped with items required to secure loads, such as tarps, chains, and binders. There is evidence that some but not all drivers provided some equipment of that kind, although the agreements did not require them to do so. No driver supplied his own truck. The drivers did not bear any of the costs of operating the trucks (including fuel, insurance, and maintenance). However, the drivers were responsible for any damage to the trucks or related equipment caused by their negligence (except to the extent the damage was covered by the insurance carried by Locomote or Centinel). The drivers were also required to pay any tickets and fines for which they were responsible.

[21] Mr. Santos testified that TBT did not supervise the work of the drivers. The evidence of Mr. Howson and Mr. Lamers was to the same effect. Indeed, there is no evidence that the drivers were supervised by anyone. However, there is evidence that the drivers were highly skilled and experienced professional drivers, suggesting that they would have required little supervision apart

from the necessary instructions for obtaining assignments (which I assume was provided initially by TBT), and complying with the requirements of Locomote and its clients.

[22] The drivers' assignments were managed by Locomote through its dispatcher. The drivers would contact the dispatcher when they were available for work, and they would be assigned to transport a particular load from one of Locomote's steel mill clients to one of the mill's customers in Ontario or Quebec. The drivers determined the days on which they were available for work, and could take time off when they wished. This is consistent with the evidence of Mr. Santos that the drivers were in high demand because of their special skills.

[23] Dofasco periodically conducted "compliance audits" to ensure that the credentials and practices of the drivers provided by Locomote met a certain standard. It is not alleged that this amounted to supervision of the drivers. It is not clear whether any other clients of Locomote also conducted such audits. The record does not disclose the purpose of the Dofasco compliance audits, but it seems reasonable to infer that Dosfasco had legitimate business reasons for ensuring the competence of the drivers who were responsible for transporting its products.

[24] The single document in the record that provides evidence of a Dofasco compliance audit indicates that Dofasco required the following:

a. the Dofasco contractor health and safety handbook must be available and current;
b. the driver must adhere to corporate safety rules and guidelines;

c. the driver must have the required personal protective equipment and work clothing;
d. the driver must adhere to corporate road rules and guidelines;
e. the driver must adhere to site specific rules and guidelines;
f. the driver must meet fitness for work requirements;
g. the driver must utilize the Dofasco standard crane signals;
h. the driver must adhere to site specific safety rules;
i. the driver must be properly positioned while the truck is loaded;
j. the trailer must have a functional back up horn;
k. the driver must secure the tarping system on the load.

[25] The compliance audit document also notes that failure to reach a 100% compliance rating would result in a written non-conformance rating. A second non-conformance rating within a year would result in a "final" written non-conformance rating. A third non-conformance rating would "jeopardize any future business with Dofasco Inc.". I take this was a warning to Locomote that its contract with Dofasco could be terminated if the compliance audits disclosed three problems within one year with the credentials or practices of one or more of the drivers provided by Locomote. I infer that any loss of business suffered by Locomote would adversely affect TBT, and could lead to the termination of the engagement of the driver or drivers who caused the non-conformance rating.

[26] Mr. Santos engaged the drivers for TBT. He followed a checklist entitled “driver qualification files – hiring procedure”. Most of the items of the checklist appear to relate in some way to the professional credentials, experience and driving record of the driver.

[27] One item on the checklist is entitled “Corporation”. Mr. Santos, in direct examination, gave the following testimony relating to that item (transcript page 30:17 – 31:25):

> A. … Corporation is the corporation that they would supply me so that I could pay them.
>
> Q. Let’s just turn to the corporation. Why is that on the interview sheet?
>
> A. When you are dealing with these types of drivers in the steel industry, they live a hard life and they like to take a lot of time off. You sign these people up for a year and you keep them working, but they do take a lot of time off. We hire them within the corporation so that they can do what they want. If they feel like working one week, they could work one week. If they don’t feel like working, they don’t have to work. We hire them under a corporation so that we can send them to several different places.
>
> Q. What if they don’t have a corporation? Do you still hire them?
>
> A. Yes.
>
> Q. How do you treat them?
>
> A. I treat them as if they are self-employed. They sign a contract with me.
>
> Q. Do you ever hire somebody that that does not sign a contract, who for one reason or another doesn’t get to sign a contract?
>
> A. Yes.
>
> Q. Why is that?
>
> A. Because there is such a shortage of these people in the steel industry that sometimes these people will come to you and say, “It’s okay, Tony. Pay me as a subcontractor. Pay me the gross amount and I will do my tax.

Q. That is what they tell you?

A. That is what they tell me and they sign a contract. Sometimes they don't.

[28] Mr. Santos was not cross-examined on this part of his testimony. It was apparently accepted by the judge as an accurate expression of Mr. Santos' understanding of the hiring process, and his preference that TBT enter into a written agreement with a corporation owned by a driver (sometimes referred to as an "incorporated driver"), rather than the driver alone. Mr. Santos also testified that if a driver had no corporation, he nevertheless would cause TBT to enter into a written agreement with the driver personally, and he would also cause TBT to engage a driver who did not sign an agreement.

[29] The agreements signed by 43 of the 96 drivers contain this clause:

> The Contractor represents and warrants that the Contractor hereby desires to engage in the business as an independent contractor and is fully qualified and adequately equipped to carry on such business. The Contractor agrees to perform such transportation and ancillary services including loading and unloading as required by the Company's customers. The parties agree that the relationship between the parties reflects a contract for service.

The "Company" means TBT. The "Contractor", in the case of a driver who is an "incorporated driver", is the driver's corporation, and otherwise it is the driver.

[30] The Crown admitted in its pleadings in the Tax Court that "incorporated drivers" were not engaged by TBT under contracts of service. I assume that admission flowed from the fact that in the

case of an incorporated driver, it was the driver's corporation that undertook to provide transportation services through the named driver, while the driver promised to "guarantee" the performance of the corporation's obligations. The assessments under appeal relate to 96 drivers who the Minister believed, at the time of assessment, not to be "incorporated drivers".

[31] From paragraph 49 of the judge's reasons, it appears that he considered any driver who had signed one of the 43 agreements in the record to be an "incorporated driver". On that basis, and in light of the Crown's admission in the pleadings, the judge concluded that TBT's appeal should succeed with respect to those 43 drivers.

[32] That conclusion is based on a misapprehension of the facts, and cannot stand. Of the 43 drivers who signed agreements with TBT, only 2 were "incorporated drivers" – Mr. Justin Nurse (1507978 Ontario Inc.) and Mr. W. Wood (2041435 Ontario Inc.). In this Court, the Crown conceded that its cross-appeal should be dismissed in respect of those two drivers. The Crown also conceded that its cross-appeal should be dismissed in respect of Mr. Howson and Mr. Lamers, who testified that they carried on business on their own account. Those concessions reduce to 39 the number of drivers who are the subject of the Crown's cross-appeal.

[33] As a result of the judge's approach to the 43 drivers (now 39) who had signed agreements, he did not consider the legal tests to be applied in determining whether they were employees of TBT. This Court could require a new hearing in the Tax Court, or determine the matter *de novo* on the record. In my view, the latter is more appropriate in the circumstances.

[34] The agreement signed by each of the 39 drivers contained a clause in which the driver represented that he was an independent contractor, and another clause expressing the driver's agreement that he was not being engaged as an employee. Those clauses suggest a common intention that the driver would be engaged as a person carrying on his own business.

[35] Such intention clauses are relevant but not conclusive. The *Wiebe Door* factors must also be considered to determine whether the contractual intention suggested by the intention clauses is consistent with the remaining contractual terms and the manner in which the contractual relationship operated in fact. My analysis of the *Weibe Door* factors is as follows:

> A. The level of control TBT had over the worker's activities. As stated above, TBT did not directly supervise the work of the drivers. In my view, this is a neutral factor in the circumstances of this case. The drivers were highly skilled professional drivers who probably would have needed little supervision whether they were employees or self-employed.
>
> B. Whether the drivers provided their own equipment. The written agreements did not require the drivers to provide their own trucks or bear any of the costs of operating the trucks. Nor did they require the drivers to provide their own tools or equipment. This favours the conclusion that the drivers were employees.
>
> C. Whether the drivers hired helpers. The written agreements gave the drivers the right to substitute another driver at their own cost, subject to

certain conditions. That is consistent with the drivers being self-employed. However, there is no evidence that any driver ever exercised this right, which suggests that this factor should be afforded little weight.

D. The degree of financial risk taken by the drivers. The drivers bore no financial risk related to any investment in trucks or equipment, or the cost of operating or insuring the trucks. The only financial risk they bore related to their contractual obligation to pay any fines they incurred as a result of breaching traffic or safety rules, and to pay for any damage to the trucks or equipment caused by their own negligence (except insured losses). It is not unusual for employees to be required to pay their own fines for unlawful conduct. It is more unusual, but not unheard of, to require employees to pay for damage to property caused by their own negligence. However, those elements of financial risk are relatively minor compared to what must be the largest financial aspect of the drivers' work, namely the cost of the truck and its operation. On balance, I conclude that the facts relating to financial risk are more consistent with the drivers being employees than self-employed.

E. The degree of responsibility for investment and management held by the drivers. The drivers bore no responsibility for investing in anything required to fulfil their contractual obligations to TBT, or for managing their work to any extent not required of an employee. They obtained their

> assignments from the dispatcher, loaded the truck, transported the load, and unloaded the truck at its destination. Even the invoices relating to the drivers' work were prepared by TBT. This favours the conclusion that the drivers were employees.
>
> F. The opportunity for profit. The drivers did not negotiate their rates of pay. They could have earned more only by taking more assignments and avoiding fines and damages. Since the operating costs of the trucks were borne by Locomote, the drivers could not expect to benefit financially by operating the trucks more efficiently. This favours the conclusion that the drivers are employees.

[36] The *Wiebe Door* factors on balance favour the conclusion that the drivers who signed agreements with TBT were employees, clearly contradicting the intention clauses in those agreements. I conclude, paraphrasing the words of Justice Major in *Sagaz*, that the drivers who signed the agreements were not engaged to perform services as persons in business on their own account (except, as conceded by the Crown, Mr. Nurse, Mr. Wood, Mr. Howson and Mr. Lavers).

[37] It follows that I would dismiss the Crown's cross-appeal with respect to Mr. Nurse, Mr. Wood, Mr. Howson and Mr. Lavers, and allow it with respect to the remaining 39 drivers who signed agreements with TBT.

The 53 drivers for whom there was no evidence of a written agreement with TBT

[38] As to the 53 drivers for whom there was no evidence of a written agreement with TBT, the judge said only this at paragraph 50 of his reasons:

> I am not prepared to recognize that the remaining 53 workers (other than Mr. Howson) are independent contractors.

There is a factual error in this statement. Mr. Howson was one of the drivers who had signed an agreement with TBT, and he should not have been named as one of the 53 drivers who did not.

[39] Putting that error aside, I interpret paragraph 50 of the judge's reasons to mean that he was not persuaded that any of the 53 drivers for whom there was no evidence of a written agreement was self-employed. In my view, that conclusion was reasonably open to the judge on the evidence.

[40] Mr. Santos gave general testimony about the business of TBT, the hiring of the drivers, and their working arrangements, but his testimony fails to establish what the contractual terms and working conditions were for each of the 53 drivers who did not sign agreements

[41] I conclude that the judge made no error of law, and no palpable and overriding error of fact, when he dismissed TBT's appeal in so far as they related to the 53 drivers for whom there was no evidence of a written agreement. It follows the assessments must stand in relation to those 53 drivers, and on that basis I would dismiss TBT's appeal.

Conclusion

[42] For these reasons, I would dismiss the appeal of TBT and allow the Minister's cross-appeal with respect to all of the drivers who signed agreements with TBT except Mr. Nurse, Mr. Wood, Mr. Howson, and Mr. Lamers. I would set aside the judgment of the Tax Court and, making the judgment that should have been made, dismiss the appeal of TBT from the assessments dated August 17, 2005 under the *Canada Pension Plan* and the *Employment Insurance Act* except with respect to Mr. Nurse, Mr. Wood, Mr. Howson and Mr. Lamers.

[43] As the Crown has been substantially successful on the appeal and the cross-appeal, I would award the Crown costs in this Court.

"K. Sharlow"
J.A.

"I agree
J.D. Denis Pelletier"

"I agree
David Stratas J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-388-10
STYLE OF CAUSE:	TBT PERSONNEL SERVICES INC. v. HER MAJESTY THE QUEEN
PLACE OF HEARING:	Toronto
DATE OF HEARING:	September 7, 2011
REASONS FOR JUDGMENT BY:	SHARLOW J.A.
CONCURRED IN BY:	PELLETIER J.A. STRATAS J.A.
DATED:	September 22, 2011

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