Federal Court of Appeal | Cour d'appel fédérale

Date: 20201201

Dockets: A-268-19
A-269-19

Citation: 2020 FCA 207

CORAM: **WOODS J.A.**
LASKIN J.A.
RIVOALEN J.A.

BETWEEN:

AE HOSPITALITY LTD.

Appellant

and

THE MINISTER OF NATIONAL REVENUE

Respondent

Heard by online video conference hosted by the registry on December 1, 2020.

Judgment delivered from the Bench at Ottawa, Ontario, on December 1, 2020.

REASONS FOR JUDGMENT OF THE COURT BY: WOODS J.A.

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REASONS FOR JUDGMENT
(Delivered from the Bench at Ottawa, Ontario, on December 1, 2020).

WOODS J.A.

[1] In decisions dated June 20, 2016, the Minister of National Revenue confirmed assessments issued to AE Hospitality Ltd. (AE) for failure to deduct and remit premiums under the *Employment Insurance Act*, S.C. 1996, c. 23 (EIA) and the *Canada Pension Plan*, R.S.C. 1985, c. C-8 (CPP) in relation to 218 workers providing services as servers, bartenders, chefs and

supervisors (the workers). At issue is whether the workers were engaged as employees or independent contractors of AE for the period from January 1, 2013 to December 31, 2013. The Tax Court (*per* D'Auray J.) dismissed AE's appeals from these decisions (2019 TCC 116). AE has appealed in relation to these decisions to this Court.

[2] AE is a staffing company which provides staff for two related companies carrying on catering businesses.

[3] AE directly hired supervisors, servers and bartenders for the catering companies' events (the wait staff) and AE relied on the head chefs of the catering companies to hire chefs on AE's behalf. AE only hired experienced workers who did not require training.

[4] The head chef or kitchen manager of the catering companies selected the chefs who would work any given event. AE's booking coordinator offered the wait staff shifts through specialized software. Wait staff could not subcontract their work without AE's approval. If the wait staff accepted a shift but were subsequently unavailable, AE was responsible for finding a replacement. Workers were free to accept or decline shifts.

[5] Workers were provided with no guaranteed minimum hours and could negotiate their hourly rate within a range of $16 to $20 per hour.

[6] The catering companies' events ranged from two to two thousand guests. At large events, a supervisor acted as a liaison between the wait staff, head chef and the client of the catering

companies. Clients communicated issues that arose at events to the supervisor, who was expected to deal with those issues. Supervisors had the capacity to correct servers' work if they did not agree with how it was done and could compel wait staff to perform their tasks. A supervisor was not required for smaller events.

[7] Head chefs relayed instructions from the catering companies to the chefs and distributed tasks among the chefs accordingly. For consistency, chefs were provided with pictures of plated food. Head chefs could make corrections if they did not like how food was plated.

[8] Bartenders were required to provide bar kits for each shift. Workers were otherwise not required to bring their own tools. Servers and bartenders were required to wear aprons bearing the catering companies' logos.

[9] The Tax Court accepted that AE and the workers shared an intention for the workers to provide their services as independent contractors. However, the Tax Court did not find that the objective reality of the relationship between AE and the workers sustained their subjective intention. Rather, the factors of control by AE, the workers' opportunity for profit and risk of loss, and integration all pointed towards an employee relationship. The additional factor of tools was determined to not be an important factor. Accordingly, the Tax Court concluded that the workers were employees.

[10] The Tax Court concluded in the alternative that AE was a placement agency for the chefs and therefore AE was a deemed employer for EI and CPP purposes.

[11] AE asks this Court to set aside the Tax Court's judgments for any of the following reasons: (1) the Tax Court erred in applying the legal test for an employee / independent contractor determination; (2) the Tax Court failed to follow or address industry-specific legal authorities; (3) the Tax Court relied on authorities not submitted by the parties and on which the parties did not have an opportunity to provide submissions; and (4) the Tax Court misinterpreted the CPP regulations in determining that AE acted as a placement agency for the chefs.

[12] In our view, AE cannot succeed.

[13] AE submits that the Tax Court erred by misapplying the test described in *1392644 Ontario Inc. (Connor Homes) v. Canada (National Revenue),* 2013 FCA 85, 358 D.L.R. (4th) 363. This test requires that the Court look at the objective reality between the parties with a view to determining whether it sustained their subjective intention. AE's submission is without merit. The Tax Court clearly considered the objective factors in light of the parties' intent (paragraphs 84, 158).

[14] At the hearing, AE submitted that the Tax Court misapplied *Connor Homes* and that the Court should have applied the test in the manner described in *Insurance Institute of Ontario v. The Minister of National Revenue*, 2020 TCC 69. This is a recent decision of the Tax Court which was issued after the decision in this case. We disagree with AE's submission in this regard. The legal principles to be applied are as set out in *Connor Homes* and the Tax Court did not err in its application of them. There is no reason to expand on these legal principles here.

[15] AE also submits that the Tax Court erred in its analysis of the control, ownership of tools, opportunity for profit and risk of loss, and integration factors. However, AE merely points to conflicting evidence and invites us to find different facts or reweigh the evidence. This Court cannot reweigh the evidence before the Tax Court and replace its factual findings in the absence of a palpable and overriding error: *Singh v. Canada*, 2020 FCA 146 at para. 6. AE has identified no palpable and overriding errors.

[16] AE further submits that the Tax Court erred in failing to address case law finding that "similarly situated workers" were independent contractors. The factors relevant to an employee / independent contractor determination and their relative weight depend on the particular facts and circumstances of a given case: *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, 2001 SCC 59, [2001] 2 S.C.R. 983 at para. 48; *Connor Homes* at para. 41. Subtle differences in fact or circumstance may lead to different outcomes even where decisions involve the same industry. The Tax Court did not err by failing to address or follow the cases raised by AE.

[17] Lastly, AE submits that the Tax Court denied it procedural fairness by relying on case law that was not submitted by the parties and without providing it an opportunity to make submissions. A breach of procedural fairness might arise where a judge's reliance on additional authorities "introduce[s] a principle of law that was not raised by either party expressly or by necessary implication, or [takes] the case on a substantially new and different analytical path" (*Heron Bay Investments Ltd. v. Canada*, 2010 FCA 203, 405 N.R. 73 at para. 24). We do not agree that there was a breach of procedural fairness in this case.

[18] AE referred to the Tax Court's discussion of a recent decision of the Supreme Court of Canada in *Modern Cleaning Concept Inc. v. Comité paritaire de l'entretien d'édifices publics de la région de Québec*, 2019 SCC 28, 434 D.L.R. (4th) 313. Although the Court referred to this decision in its reasons at paragraph 159, and had not sought submissions on it from the parties, no harm was done because the Court (at para. 158) had already concluded that the workers were employed by AE without reference to this recent case. It was not a breach of procedural fairness for the Court not to seek submissions.

[19] AE also referred to the Tax Court's discussion (at para. 153) of a decision of the Tax Court in *Johnson v. The Minister of National Revenue*, 2018 TCC 201. The Court commented that the decision had been appealed to this Court, but we note that appeal has since been withdrawn. The Tax Court was not required to seek submissions regarding *Johnson*. In particular, the excerpt from *Johnson* referred to did not "introduce a principle of law that was not raised by either party expressly or by necessary implication, or [take] the case on a substantially new and different analytical path" (*Heron Bay* at para. 24).

[20] Given our conclusion on the primary issue in these appeals, it is not necessary to address whether AE acted as a placement agency.

[21] We therefore dismiss the appeals with one set of costs fixed in the amount of $4,000, all inclusive.

"Judith Woods"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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