

Docket: 2013-4298(EI)

BETWEEN:

LE TRÉPORT WEDDING AND
CONVENTION CENTRE LTD.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on common evidence with the appeal of *Le Tréport
Wedding and Convention Centre Ltd.* 2013-4300(CPP)
on April 20-22, 2015, at Toronto, Ontario

Before: The Honourable Justice Valerie Miller

Appearances:

Counsel for the Appellant: Michael A. Katzman
Howard J. Alpert
Counsel for the Respondent: Jasmeen Mann

JUDGMENT

The appeal with respect to the assessments made under the *Employment Insurance Act* dated January 22, 2013 for 2010 and 2011 is allowed and the assessment is referred back to the Minister for reconsideration and reassessment on the basis that:

- a) Elizabeth Crowe was an employee with the Appellant in 2010 and 2011;
- b) Giacomina Tagliaferri was an employee with the Appellant in 2010; and,

c) the other Workers who were engaged by the Appellant in 2010 and 2011 were independent contractors.

Signed at Halifax, Nova Scotia, this 12th day of August 2015.

“V.A. Miller”

V.A. Miller J.

Docket: 2013-4300(CPP)

BETWEEN:

LE TRÉPORT WEDDING AND
CONVENTION CENTRE LTD.,

Appellant,

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Appeal heard on common evidence with the appeal of *Le Tréport
Wedding and Convention Centre Ltd.* 2013-4298(EI)
on April 20-22, 2015, at Toronto, Ontario

Before: The Honourable Justice Valerie Miller

Appearances:

Counsel for the Appellant: Michael A. Katzman
Howard J. Alpert
Counsel for the Respondent: Jasmeen Mann

JUDGMENT

The appeal with respect to the assessments made under the *Canada Pension Plan* dated January 22, 2013 for 2010 and 2011 is allowed and the assessment is referred back to the Minister for reconsideration and reassessment on the basis that:

- a) Elizabeth Crowe was an employee with the Appellant in 2010 and 2011;
- b) Giacomina Tagliaferri was an employee with the Appellant in 2010; and,

c) the other Workers who were engaged by the Appellant in 2010 and 2011 were independent contractors.

Signed at Halifax, Nova Scotia, this 12th day of August 2015.

“V.A. Miller”

V.A. Miller J.

Citation: 2015TCC203
Date: 20150812
Docket: 2013-4298(EI)
2013-4300(CPP)

BETWEEN:

LE TRÉPORT WEDDING AND
CONVENTION CENTRE LTD.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

V.A. Miller J.

[1] The issue in these appeals is whether in 2010 and 2011 the Appellant engaged its Workers as employees or independent contractors for the purposes of the *Employment Insurance Act* (“*EI Act*”) and the *Canada Pension Plan* (“*CPP*”). The Minister of National Revenue (the “Minister”) assessed the Appellant for unpaid EI premiums and CPP contributions, penalties and interest. The *EI Act* assessments related to 133 Workers and the *CPP* assessments included 60 Workers.

[2] The Appellant has operated a catering business in Mississauga, Ontario for at least 30 years. Its business is operated out of a leased banquet facility with five banquet halls. The events catered by the Appellant on weekends usually included weddings, baptisms, stag/ doe parties or prom parties. Whereas, the events catered by the Appellant on weekdays usually included corporate functions.

[3] The Workers included bartenders, captains, dishwashers, kitchen helpers, servers, and set-up crew. The Minister assessed the Appellant on the basis that the Workers were employees.

[4] At the beginning of the hearing, the Appellant conceded that Elizabeth Crowe was an employee for the period she was employed as an office worker in

2010 and 2011. Since the Appellant did not keep track of the specific periods she worked in the office, it conceded that she was an employee for 2010 and 2011. The Appellant also conceded that Giacomina Tagliaferri, a kitchen helper, was an employee in 2010 and not an independent contractor. According to the Appellant, Ms. Tagliaferri had become an assistant to the chef in 2010.

[5] The sole shareholder of the Appellant is a numbered company whose shareholders are John Cipressi and Tony Cipressi.

[6] The Workers who were called as witnesses at the hearing and the position they held with the Appellant were:

- on behalf of the Appellant - Irena Zielinska-Olejnik, captain; Raul Peligrin, server; and Josef Smuxz, bartender;

- on behalf of the Respondent - Maria Veronica Menguito, server, Nadia Oleniak, server and captain and Elizabeth Crowe, office worker, server and captain.

[7] John Cipressi and Jessica Gonzalez, an appeals officer with the Canada Revenue Agency, were also witnesses.

Mr. Cipressi's Evidence

[8] During the period, the Appellant catered between 400 and 500 events annually.

[9] Mr. Cipressi testified concerning the Workers generally; the positions they held and the Appellant's policies. He stated that most of the Workers were immigrants. The majority of the Workers were not highly educated but they were professional in their duties and were very good at their jobs. He stated that the Appellant did not offer training to the Workers and expected that they knew how to do the job when they were hired. The Appellant gave the Workers an orientation to show them where items were located within the banquet facilities.

[10] Many of the Workers were employed elsewhere and only worked with the Appellant on weekends. Usually, the Workers telephoned the Appellant at the beginning of the week to ascertain if there was work available for them on the weekend. However, the Appellant also called Workers to see if they were available for a particular function. Mr. Cipressi stated that the Appellant normally telephoned the Workers or a Personnel Agency to engage Workers for busy times

of the year such as New Year's Eve. A Worker had the right to refuse a shift and there were no consequences if they refused.

[11] The captain was the most experienced Worker on the banquet floor. When she arrived to perform her services, the room was already set-up for the event. She was given the floor plan and the menu for the event. The floor plan showed the position and number of tables, the number of guests, the bar, etc. The captain showed the menu to the servers and told them which tables they were to serve. The captain oversaw the service of food to the tables. Although it was not considered to be part of their duties, most captains also decorated the head table or the dessert table by placing strings of lights on these tables.

[12] The servers checked the tables to make sure that the dishes, glasses and cutlery were appropriate for the menu. Both the captains and the servers waited on the tables and cleaned up when the function was finished.

[13] When they attended for their shift, the bartenders were given a Bar Report which listed the types of liquors included in the bar for that event. The content of the Bar Report was determined by the contract between the Appellant and its client. The bartenders prepared their bar accordingly and filled out a sheet so that the Appellant would know the quantity of liquor used at the event.

[14] The kitchen helpers plated the salads and the dessert. They were given the menu by the chef and the food items were already prepared by the chef and his assistants.

[15] Mr. Cipressi stated that the Workers were transient and the type of work they performed did not lend itself to a uniform. The captains, servers and bartenders were required to wear "event appropriate apparel" which they had to purchase. The "event appropriate apparel" included black pants, white shirt, black vest, black tie and black shoes.

[16] The kitchen helpers were not required to wear a uniform but most wore soft sole shoes and many wore their own apron.

[17] Most servers, captains and bartenders owned a lighter so they could light the candles on the tables/bar and a corkscrew to open the wine and an arm towel. The bartender was also required to have a martini shaker.

[18] In Ontario, anyone who serves or handles alcoholic beverages must have a Smart Serve Certificate. In order to get the certificate, they must receive training and pass a test. In the circumstances of this appeal, all servers, captains and bartenders were required to have a Smart Serve Certificate. According to Mr. Cipressi, at present, one can take the training and the test for the Smart Serve Certificate on-line. There was no evidence with respect to the cost for this training or the certificate. However, prior to 2011, in order to take this training, one had to purchase a video of the program. The Appellant purchased the video so that its Workers could get the training and their Smart Serve Certificates. According to Mr. Cipressi, those Workers who used the Appellant's video to get their Smart Serve training paid for the training; the Appellant deducted the cost from the Workers' pay.

[19] However, most Workers already had their Smart Serve Certificates when they started to work for the Appellant.

[20] Many captains owned lights, extension cords, cake knives and other materials which they used to decorate the head table. Mr. Cipressi estimated that the extra tools which a captain used cost more than \$100 but less than \$1,000.

[21] According to Mr. Cipressi, the Workers were able to hire a substitute when they were not able to work at a function. However, they had to notify the Appellant so the correct person would receive the wages.

[22] Some Workers work at other catering facilities and many of them have full time employment elsewhere.

[23] If a Worker was negligent and there was breakage of dishes or spillage of food, the cost of the damage was deducted from the Worker's pay.

[24] The Workers were able to negotiate their rate of pay. This was especially true during the busy season when the Workers were offered jobs with other catering companies.

[25] Captains and servers were paid an hourly rate which could increase for busy weekends. Bartenders were paid a flat rate of \$85 on Saturdays and \$75 for other evenings. The Workers were required to use a punch card so that the Appellant could keep track of the hours they worked. The cost of the punch card was deducted from the Workers' pay.

[26] Mr. Cipressi also testified concerning prior assessments against the Appellant under the *Canada Pension Plan* and the *Employment Insurance Act*. Those assessments had been made on July 22, 2003 and were with respect to the Workers who were engaged for the period 2002 and January 1, 2003 to May 31, 2003. As in the present appeals, the Minister had determined that the Workers engaged by the Appellant were employees. However, in December 2003, the Minister reversed its determination and decided that the Workers were not employed in insurable and pensionable employment.

[27] Although Mr. Cipressi stated that the catering business, and particularly the Appellant, operated in the same manner in 2010 and 2011 as it did in 2003, there was no evidence to support Mr. Cipressi's testimony. There was also no evidence with respect to the facts assumed by the Minister when he raised the assessments in 2003 or the facts which he later relied on to vacate those assessments. As a result, I have given no weight to the fact that the Minister determined that the Appellant's Workers in 2002 and 2003 were not employees and were not engaged pursuant to a contract of service.

The Other Witnesses

[28] Most of the testimony of the other witnesses was in accord with that of Mr. Cipressi. The exceptions were that some of the witnesses stated that they had no experience as a Server or Kitchen Help prior to working with the Appellant.

- Mr. Smuxz was a professional bartender who received his training when he was a student in Poland. He started to work for the Appellant more than 12 years ago. His first event was a party with more than 200 guests and he job shadowed a friend who was working with the Appellant.

- In 2010, Mr. Smuxz's son worked with him as a bartender at the Appellant's facility and Mr. Smuxz trained him.

- Ms. Menguito testified that she had no prior experience as a server or as kitchen helper and her friend trained her during her first day performing each of these duties with the Appellant.

- Nadia Oleniak stated that she had no experience as a server and the other servers showed her what to do.

- Elizabeth Crowe stated that she had no experience as a server or captain and she job shadowed for her first few events.

[29] All of the Respondent's witnesses thought that they were supervised in their duties; whereas, all of the Appellant's witnesses said that they were not supervised in their duties.

Law

[30] To determine whether the Workers were employees or independent contractors while employed by the Appellant, it is necessary to determine if they were performing their services as persons in business on their own account: *671122 Ontario Ltd v Sagaz Industries Canada Inc*, [2001] 2 SCR 983. The intention of the parties is important and I will use the factors from *Wiebe Door Services Ltd v MNR*, [1986] 3 FC 553(FCA) to analyze the work relationship between the Workers and the Appellant with a view to ascertaining whether their working relationship was consistent with their intention. The factors from *Wiebe Door* are control, ownership of tools, chance of profit and risk of loss.

[31] All of the Workers who testified on behalf of the Appellant stated that they intended to be independent contractors with the Appellant. They were all employed on a full time basis elsewhere. Both Ms. Menguito and Ms. Oleniak who were called as witnesses by the Respondent, testified that they intended to be employees with the Appellant.

A. Control

[32] When the Workers were engaged by the Appellant, they were given an orientation session so that they knew where to find items which they needed to perform their services. However, it is my view that, beyond the orientation session, the Appellant did not train the Workers. I believe Mr. Cipressi when he said that most of the Workers had performed the same services prior to working with the Appellant. For those Workers like Ms. Menguito, Ms. Oleniak and Ms. Crowe who had not waitressed before, they learned by watching others perform the same services. They were not trained by the Appellant.

[33] Generally, it was clear that most of the Workers were sufficiently professional so that they did not need supervision. The Appellant did instruct the Workers on "what" to do for each event but not how to do it. I have concluded from the evidence that the Appellant did not supervise the Workers.

[34] The Workers were not obliged to take shifts when the Appellant called them. They could refuse, or if they had accepted and later realized that they could not work, the Workers could send a substitute as long as they informed the Appellant.

[35] According to the control factor, the Workers were independent contractors.

B. Tools

[36] The Appellant leased the banquet facility and it owned the chairs, tables and china which were used at functions. The Appellant supplied all the necessary tools and equipment to look after its clients. The Workers supplied their own “event appropriate apparel”, corkscrews, aprons, shoes, Smart Serve Certificates and in the case of bartenders, their own martini shaker. In the circumstances of this case, the Workers supplied the tools of the trade which it was reasonable for them to own as servers, bartenders and kitchen helpers. I have concluded that the Workers were independent contractors even though the major tools necessary to perform their jobs were provided to them: *Precision Gutters Ltd v Canada*, 2002 FCA 207 at paragraph 25.

C. Chance of Profit/Risk of Loss

[37] The majority of the witnesses testified that the Workers could negotiate their rate of pay. Some Workers stated that they negotiated their pay rate while others stated they were offered an hourly rate which they thought was fair.

[38] Although it appeared that breakage of dishes or spillage of food didn't happen very often, Workers were responsible for the cost of the damage when it did occur.

Conclusion

[39] When I considered all of the *Wiebe Door* factors, I concluded that the Workers were independent contractors. The Appellant has discharged its burden of proof. The appeal is allowed and the assessments are referred back to the Minister for reconsideration and reassessment on the basis that:

- a) Elizabeth Crowe was an employee with the Appellant in 2010 and 2011;
- b) Giacomina Tagliaferri was an employee with the Appellant in 2010; and,
- c) the other Workers who were engaged by the Appellant in 2010 and 2011 were independent contractors.

Signed at Halifax, Nova Scotia, this 12th day of August 2015.

“V.A. Miller”

V.A. Miller J.

CITATION: 2015TCC203

COURT FILE NO.: 2013-4298(EI)
2013-4300(CPP)

STYLE OF CAUSE: LE TRÉPORT WEDDING AND
CONVENTION CENTRE LTD. AND HER
MAJESTY THE QUEEN

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: April 20-22, 2015

REASONS FOR JUDGMENT BY: The Honourable Justice Valerie Miller

DATE OF JUDGMENT: August 12, 2015

APPEARANCES:

Counsel for the Appellant: Michael A. Katzman
Howard J. Alpert

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