Citation: 2003TCC873
Date: 20031219
Docket: 2003-1432(EI)
2003-1431(CPP)

BETWEEN:

ACCESS COMMUNICATIONS CO-OPERATIVE LIMITED,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT
(delivered orally from the Bench at Regina, Saskatchewan on October 3, 2003)

Beaubier, J.

[1] These appeals were heard together on common evidence at Regina, Saskatchewan on September 30, 2003. The Appellant called Kenneth Lorenz, the outside technical manager of the Appellant, and Jeffrey Morhart, one of the workers in question. At issue is whether installers of cable hookups under the contract (the "installers") with the Appellant were employees in the years 2000, 2001 and 2002.

[2] Paragraphs 7 and 8 of the Reply to the Notice of Appeal in 2003-1432(EI) read:

> 7. In so assessing as the Minister did with respect to the Workers, the Minister relied on the following assumptions of fact:
>
> (a) the Appellant operates a cable and internet service business;

(b) the Workers were hired as cable/internet installer and their duties included installing cable, hooking up cable, installing modems, doing service calls and collecting payments from the Appellant's clients;

(c) the Workers performed their services at the Appellant's client's premises;

(d) the Workers were paid on a piece work basis;

(e) the Appellant set the rates of pay for services performed;

(f) the Workers were paid on a bi-weekly basis;

(g) the Appellant set and scheduled the Worker's hours and days;

(h) the Workers normally worked set shifts;

(i) the Workers were also required to work the first two days and the last two days of each month, from 8:30 AM to 9:00 PM;

(j) the Appellant had the right to control the Workers;

(k) the Appellant established guidelines for the Workers to follow;

(l) the Appellant obtained and scheduled the work;

(m) the Appellant prepared a two week work schedule for the Workers to follow;

(n) the Workers reported to the Appellant's premises daily;

(o) the Appellant inspected the Workers' work;

(p) the Appellant had preferred call for the Workers' time;

(q) the Workers had to notify the Appellant of any leave requirements;

(r) the Appellant provided the Workers with identification cards;

(s) the Workers represented the Appellant while in the field;

(t) the Workers did not replace themselves or hire their own helpers;

(u) the Workers could only work for others if it did not interfere with their work for the Appellant;

(v) the Appellant provided training for the Workers;

(w) the Workers provided their own vehicles, cell phones, ladders, power tools and shovels;

(x) the Appellant provided cable splitters, vehicle decals, meters, stripping tools, security tools, crimping tools, fish tape, two way radios, and a test television;

(y) the Appellant provided all of the supplies and materials required including work orders, cable and business forms;

(z) the Workers incurred expenses related to their vehicle and cell phone;

(aa) the Appellant provided liability insurance to cover the Workers;

(bb) the Workers did not have a chance of profit or risk of loss;

(cc) the Workers were not in business for themselves;

(dd) the Workers did not advertise their services;

(ee) the Workers were employed under a contract of service with the Appellant, and

(ff) wages paid by the Appellant to the Workers, for the period January 1, 1000 to August 31, 2002, are detailed on *Schedule "E"* attached to and forming part of the Reply to the Notice of Appeal.

B. ISSUES TO BE DECIDED

8. The issue to be decided is whether the Workers were employed under a contract of service with the Appellant during the 2000, 2001 and 2002 years.

[3] Assumptions 7 (a), (c), (d), (e), (f), (r), (s), (w), (x), (y), (z), (aa) and (dd) were not refuted.

[4] With respect to the remaining assumptions, the Court finds:

8 (b) "hired" in line one should read "contracted for".

(c) The installers filed a list of days each month when they would be available for the Appellant. Using that schedule, the Appellant obtained cable work from customers, scheduled the work for each day and put the work orders in the "bins" of the workers who were expected to pick up the work orders at 8:00 a.m. each working day. Most work orders specified the day of the week; a few specified the hour at which someone would be available to admit the installers, in which case there was a two hour "window" in which the work should be done.

(h) The installers normally worked in the day during the time from 8:00 a.m. to 9:30 p.m. They could work seven days per week or special days or hours per day.

(i) The installers were not required to work on any particular day or during any particular hours. They chose their working times. Usually, in order to get paid, the installers had to collect payment for their work. The Appellant did not want them to collect payment on Christmas Day.

(j) The work orders were in the bins if there was any work on any given day. The installers could trade work orders. They could refuse work orders. Work orders they took had to be completed that day. The work was ordered from Access by the customer and done at the customer's premises. What was to be done was specified in the order which often instructed the installer to collect. The installer was not paid if he did

not collect. Within these parameters, "how" the work was done and "when" in the day the work was done was up to the installer.

(k) The Appellant had a book of standards respecting installation and courtesy which the installers were to adhere to.

(l) The Appellant's scheduling was based on time-tables which the installers had delivered to the Appellant.

(m) The installers (not he Appellant) prepared the two week schedules when they were available. The Appellant assigned the workers by individual binned work orders each day based on the installers schedules. The workers could and did then trade work orders among themselves.

(n) The workers reported to the Appellant's premises at 8:00 a.m. each day that they had said they would be there.

(o) The Appellant did random inspections but it generally relied on customer complaints.

(p) Is false.

(q) Is false. The workers scheduled their own times for work.

(r) The workers did replace themselves and some did hire their own helpers.

(s) Is false. The workers only worked for the Appellant when they chose to do so.

(t) The Appellant did not train the workers. A worker spent one day with another worker to see how the work was done and if he could do it. Then, if he wanted to, he signed a contract and went to work.

(x) Is true, but the decals were magnetic, most workers used their own cell phones and the Appellant's tools cost a total of under $4,000. Including a vehicle, the workers' own tools cost about $19,000.

(bb), (cc) and (ee) are in dispute.

[5] Adopting the criteria set forth in *Wiebe Door Services Ltd. v. The Minister of National Revenue*, 87 DTC 5025, the Court finds:

1. Control

Each worker could accept, refuse or trade a work order with another worker. When the job was finished the worker had to "code off" to the Appellant to indicate that the job was completed in full (including collection of the fee if that work was ordered). At the end of the day the worker attended at the Appellant's premises, filed his work orders completed and accounted for his collections and paid them to the Appellant. On the whole, because the worker decided his order of work, how the job would be done and when it would be done, this test indicates that the worker was an independent contractor.

2. Ownership of Tools and Chance of Profit, Risk of Loss

Each worker had the cost of tools, vehicle expenses, the cost of replacing any of the Appellant's tools that were lost, the chance each day that there would be no work or too little work to make it pay. Each was paid $3.60 per point of a job and each job was valued at a set of points designated by the Appellant. The worker had to correct any of his complained of work on his own time and expense. If the work order required him to collect payment, the worker was not paid those points until he collected, nor was he paid until a complaint was satisfied. The Appellant purchased Workers' Compensation for the workers and liability insurance, but both of these insurances were bought to protect the Appellant from liability in the event of an accident or a lawsuit. Mr. Lorenz testified that they were not intended to protect the workers so much as to protect the Appellant; he is believed. Each worker had a risk of loss and a chance of profit. This test favours the workers as a contractor.

3. Integration

Without the installers, the Appellant could carry on business because it also employed installers. When these employees had been assigned work orders, the overage was "binned" to the contract installers in question. These workers were also free to work for others. In these circumstances, the

concept of integration is highly questionable, in fact the Court finds that there was not integration.

[6] In the Court's view, the installers were independent contractors on the terms set out in the parties' written contract. The Appellant had a business and each installer had a business that was an independent business.

[7] The Appeals are allowed and these matters are referred back to the Minister of National Revenue for reconsideration and reassessment accordingly. The Appellant is awarded such amounts by way of costs and disbursements as are permitted by the *Employment Insurance Act*.

Signed at Saskatoon, Canada, this 19th day of December 2003.

"D. W. Beaubier"

Beaubier, J.

CITATION:	2003TCC811
COURT FILE NO.:	2002-3442(IT)I
STYLE OF CAUSE:	Janice L. Kinch v. The Queen
PLACE OF HEARING:	Regina, Saskatchewan
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REASONS FOR JUDGMENT BY:	The Honourable Justice Beaubier
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