Docket: 2003-1668(EI)

BETWEEN:

FIRST CHOICE COMMUNICATIONS INC.,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

Appeal heard on common evidence with the appeal of *First Choice Communications Inc.* (2003-1669(CPP)) on July 31, 2003 at Vancouver, British Columbia

Before: The Honourable D.W. Rowe, Deputy Judge

Appearances:

Agent for the Appellant: Robert B. Rieveley

Counsel for the Respondent: Bruce Senkpiel

JUDGMENT

The appeal is dismissed and the decision of the Minister is confirmed in accordance with the attached Reasons for Judgment.

Signed at Vancouver, British Columbia, this 27th day of October 2003.

"D.W. Rowe"

Rowe, D.J.

Citation: 2003TCC761
Date: 20031027
Dockets: 2003-1668(EI)
2003-1669(CPP)

BETWEEN:

FIRST CHOICE COMMUNICATIONS INC.,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

REASONS FOR JUDGMENT

Rowe, D.J.

[1] The appellant, First Choice Communications Inc. (Communications) appeals from two decisions – both dated February 26, 2003 - wherein the Minister of National Revenue (the "Minister") decided the employment of Oluwakemi Adeoye (Adeoye or worker) with Communications during the period from February 1 to February 28, 2002, constituted both insurable and pensionable employment pursuant to the relevant provisions of the *Employment Insurance Act* (the "*Act*") and the *Canada Pension Plan* (the "*Plan*") because she had been employed pursuant to a contract of service.

[2] Counsel for the respondent and Mr. Robert Rieveley, agent for the appellant, agreed both appeals would be heard together.

[3] Robert Rieveley (Rieveley) testified that he resides in Vancouver, British Columbia, has a designation as a Chartered Accountant and serves as the Chief Executive Officer (CEO) of Communications. He is also a director of the appellant corporation which carries on a communications service business that answers telephone calls, sends and receives faxes and e-mail on behalf of clients, responds to inquiries concerning advertisements broadcast on television and undertakes advertising campaigns for specific clients. In the within appeals, CHQM -

a radio station - contracted with the appellant to undertake a promotion whereby members of the public are contacted - by workers hired by Communications - in order to obtain information concerning listening patterns/preferences and to entice them into choosing CHQM as their favourite station. Rieveley stated this sort of promotional activity generally takes place within a two/three-week period. Communications secures the necessary personnel for these promotions by advertising in newspapers. Rieveley stated it is highly unusual for Communications to re-hire any worker since most people worked only for the two or three weeks required to finish a specific project. Rieveley stated Adeoye and Communications had entered into a written contract – Exhibit A-1 – in which both parties had agreed she would provide her services on the basis she was an independent contractor. The hourly rate was $10 and Adeoye was to be paid – bi-weekly – in accordance with invoices submitted at least two days before either the 15th or the last day of the month. Rieveley stated Communications' business hours were between 9:00 a.m. and 5:00 p.m. and, although each worker was expected to complete 300 calls per working day, some were able to make as many as 600 while others only did 200. He stated there was a system for payment of bonuses to the worker making the most calls in a certain period and for obtaining the highest number of sign-ups whereby people responding to the call agreed to participate in ongoing promotions requiring them to listen – frequently - to that particular radio station. The promotional work was carried out by as many as 20 workers in office space that had been leased by the appellant. Each worker was provided with a desk and chair located within a small space – separated by a divider – and a computer, telephone and headphones. In order to complete a call, a worker had to dial 9 and then the number. Each telephone number had to be dialled by hand. Rieveley stated Communications was concerned – primarily - with obtaining results and most workers put in a full day. The client – CHQM – provided Communications with a script for workers to follow when making a call but they were not supervised or instructed otherwise how to carry out their tasks. Rieveley stated some workers were consistently able to produce the desired results by making a large number of calls each day. No workers were required to incur any work-related expenses. Rieveley stated Adeoye worked only 15 days during the relevant period and stated she was at liberty to hire someone to perform the tasks pursuant to her contract with Communications. There was no training period prior to commencing work. Rieveley stated it was too much trouble to sign workers up for a regular payroll when they worked for only two or three weeks. He stated only two workers had ever been hired to work on any subsequent promotion undertaken by Communications on behalf of another client. At the outset, applicants were informed the work would not last more than three weeks. Rieveley stated certain assumptions of fact relied on by the Minister in the Reply to the Notice of Appeal (Reply) - filed in appeal 2002-1668(EI) - were incorrect. From a written argument he had prepared, he read out

certain points he wished to be taken into account by way of rebutting said assumptions, including the content of various terms within the written contract between the appellant and the worker. Rieveley agreed the worker was required to perform her task within the parameters of the contract but noted she was free to take lunch breaks, coffee breaks and other brief absences from her desk. Although there were a certain number of businesses and individuals required to be contacted in order to fulfil her end of the bargain, the most important factor - in his view – was Adeoye's skill in carrying out the task in accordance with the prepared script supplied by CHQM. Rieveley agreed that – in accordance with standard practice within the industry - the worker had been assigned a work name – Sandra – so she could be identified in the event there was a problem - arising from a telephone contact - during the course of the promotional activity. Rieveley stated there were three regular employees of Communications, one responsible for the operation of computers and two others: Stevin Ditty (Ditty) - President of Communications - and another person - Chantal – who undertook limited supervision of workers and were on the premises and available for consultation by the workers. He stated Adeoye's work was subject to random audit, pursuant to paragraph 8 of the contract (Exhibit A-1). In Rieveley's opinion, since Adeoye was paid at the rate of $10 per hour only for the hours she chose to work, she was able to increase her income by working the full day and could earn bonuses based on performance. In his view, the appellant's practice of hiring workers, on the basis they were providing their services as independent contractors, was suited to the special business activity in which particular campaigns or surveys were completed within a short period. Communications has been operating since 2001, and he was somewhat surprised to receive the Minister's decisions concerning the working relationship with Adeoye. He agreed Adeoye had to attend at Communications' office in order to begin work at 9:00 a.m., but stated she was free to leave before 4:00 p.m. provided she had completed 300 calls, although any early departure may have limited her opportunity to earn bonuses.

[4] In cross-examination, Robert Rieveley agreed there was no mention of bonuses in the contract – Exhibit A-1 – but had understood that cash prizes were awarded each day to workers achieving certain goals. He stated 14 other workers had been hired the same day as Adeoye.

[5] Cheryl Rieveley testified she is in charge of accounts payable at Communications and is aware daily cash bonuses were payable to some workers. In her view, it was an oversight - in drafting the contract - not to have mentioned the method by which workers could earn bonuses.

[6] In cross-examination, Cheryl Rieveley stated she had completed the Questionnaire – Exhibit R-1 – on behalf of Communications and agreed Adeoye had to perform – personally - the services described in the written contract – Exhibit A-1 - and acknowledged the worker had to attend – daily - at the appellant's office. She agreed the contract entered into by Communications and CHQM was result-based in that the amount of revenue earned was linked to the number of calls completed by its workers.

[7] Oluwakemi (Kemi) Adeoye testified she resides in Burnaby, British Columbia and is employed as an Administrative Secretary. Via the Internet, she became aware of the appellant's advertisement in which interested parties were invited to telephone a certain number. Adeoye called Communications and, in the course of the conversation, was requested to attend at the office for an interview. She completed the interview and - the same day - received a call from Communications offering her work. Within the appellant's office, Adeoye stated it appeared as though Ditty - and an individual she knew only as Chantal - were in charge. Adeoye started work at 9:00 a.m. on February 4, 2002. She was provided with a list of telephone numbers and assigned the working name, Sandra. During the course of her work, Adeoye entered certain details - such as name, age, address and gender - into the computer while speaking with any persons who had responded to her call. Persons contacted in this manner were informed the call was being made on behalf of CHQM. Adeoye stated a script was provided to her and Ditty informed her – and other workers – they were to adhere to said script and could not improvise. She started work at 9:00 a.m. - each morning – following Chantal's instruction to the workers that they could begin making telephone calls to the numbers on their assigned list. At 5:00 p.m., although workers involved in placing calls left the office, Ditty and Chantal remained. During the day, the workers received two 15-minute breaks and one 30-minute break – when announced by Chantal - who also recorded the time of Adeoye's arrival and departure and the number of hours worked. Adeoye stated all workers involved in the CHQM promotion were laid off on February 22, 2002. At that point, she had worked 15 days. Adeoye was paid in accordance with the hours recorded on two time sheets – Exhibit R-2 – and two attached invoices, one in the sum of $542.50 - representing 54.25 hours of work at $10 per hour - and another in the sum of $470, pertaining to 47 hours of work. On February 4, 2002 – her first day at work – Adeoye had informed the interviewer she had an upcoming medical appointment and, as a result, worked only 5.25 hours on February 6. Prior to beginning work, she was handed a sheet – Exhibit R-3 – printed on Communications' letterhead, setting out the code of conduct to be observed by workers. In said sheet, Adeoye pointed to a section dealing with dress codes – including a description of what constituted proper and/or inappropriate business wear - and to references therein to workers as "employees". She stated all

workers were in the same room and each used a desk, chair, computer and telephone provided by the appellant. In her opinion, she was required to perform her services personally. Each day, she would bring up – on her computer - a list of telephone numbers - whether residential, commercial or institutional – and begin dialling them in sequence. The nature of the promotion was such that in order to win a contest, participants were required to listen to CHQM at a particular time during the day and, if their name was announced on air, they could win a prize. Information gathered during the telephone conversation was entered into the computer by Adeoye. Once all the numbers on the list had been called, she would inform Chantal and another batch of numbers was assigned. With regard to the matter of bonuses being paid to workers, Adeoye stated there were bonuses – paid every two weeks – in three categories, namely, to the worker who made the most calls, obtained the most "sign-ups" or accumulated the highest number of "new names". Adeoye identified the Questionnaire – Exhibit R-4 – she had completed.

[8] In cross-examination, Kemi Adeoye agreed with Robert Rieveley's suggestion that workers arriving late were not fired even though work was supposed to begin at 9:00 a.m. each morning. She stated she telephoned numbers assigned to churches, schools, private residences, government offices and commercial establishments. Adeoye stated she had not won any of the bonuses as only one winner was permitted within each category. Most workers – including her – made more than 500 calls per day but because the software used by Communications tracked only completed calls – defined by Communications as a call answered by someone at the called number - those unanswered numbers had to be redialled by the relevant worker. Adeoye stated she wore a telephone headset and estimated that a completed call - followed by a swift rejection – might occupy only 5 seconds but the conversation with a willing participant could occupy one minute. In order to call numbers within the Greater Vancouver area, workers had to dial 9, then the 604 area code, followed by the full 7-digit number. Adeoye stated she made long-distance calls to telephone numbers in British Columbia and that activity represented approximately 10% of her total contacts.

[9] Robert Rieveley testified – in rebuttal – that workers could arrive later in the morning as long as they were able to get the job done. He stated he could not explain why the sheet – Exhibit R-3 – dealing with the subject matter of personal appearance and demeanour - had been handed out to the workers. He stated he had not been at Communications' office while the work was being carried out during the relevant period.

[10] In the course of his summation, Robert Rieveley, agent for the appellant, urged the Court to accept the written contract between Communications and Adeoye as being determinative of her working status. He submitted the worker had been engaged to perform a single mission over a short term and was free to obtain results as she chose, provided her performance adhered to the terms of their contract.

[11] Counsel for the respondent submitted the evidence conformed to the requirements of current jurisprudence in that all the indicia of working status favoured the conclusion Adeoye had been an employee and not a person providing services as a person in business on her own account.

[12] The Supreme Court of Canada - in a recent decision - *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, [2001] 2 S.C.R. 983 – (*Sagaz*) dealt with a case of vicarious liability and in the course of examining a variety of relevant issues, the Court was also required to consider what constitutes an independent contractor. The judgment of the Court was delivered by Major, J. who reviewed the development of the jurisprudence in the context of the significance of the difference between an employee and an independent contractor as it affected the issue of vicarious liability. After referring to the reasons of MacGuigan, J.A. in *Wiebe Door Services Ltd. v. M.N.R.*, [1986] 2 C.T.C. 200 and the reference therein to the organization test of Lord Denning - and to the synthesis of Cooke, J. in *Market Investigations, Ltd. v. Minister of Social Security,* [1968] 3 All E.R. 732 - Major, J. at paragraphs 45 to 48, inclusive, of his judgment stated:

> Finally, there is a test that has emerged that relates to the enterprise itself. Flannigan, ... ("Enterprise control: The servant-independent contractor distinction" (1987), 37 U.T.L.J. 25, at p. 29) sets out the "enterprise test" at p. 30 which provides that the employer should be vicariously liable because (1) he controls the activities of the worker; (2) he is in a position to reduce the risk of loss; (3) he benefits from the activities of the worker; (4) the true cost of a product or service ought to be borne by the enterprise offering it. According to Flannigan, each justification deals with regulating the risk-taking of the employer and, as such, control is always the critical element because the ability to control the enterprise is what enables the employer to take risks. An "enterprise risk test" also emerged in La Forest J.'s dissent on cross-appeal in London Drugs where he stated at p. 339 that "[v]icarious liability has the broader function of transferring to the enterprise itself the risks created by the activity performed by its agents".

In my opinion, there is no one conclusive test which can be universally applied to determine whether a person is an employee or an independent contractor. Lord Denning stated in Stevenson Jordan, ... ([1952] 1 The Times L.R. 101) that it may be impossible to give a precise definition of the distinction (p. 111) and, similarly, Fleming observed that "no single test seems to yield an invariably clear and acceptable answer to the many variables of ever changing employment relations..." (p. 416) Further, I agree with MacGuigan J.A. in Wiebe Door, at p. 563, citing Atiyah, ...(Vicarious Liability in the Law of Torts. London: Butterworths, 1967) at p. 38, that what must always occur is a search for the total relationship of the parties:

> [I]t is exceedingly doubtful whether the search for a formula in the nature of a single test for identifying a contract of service any longer serves a useful purpose... The most that can profitably be done is to examine all the possible factors which have been referred to in these cases as bearing on the nature of the relationship between the parties concerned. Clearly not all of these factors will be relevant in all cases, or have the same weight in all cases. Equally clearly no magic formula can be propounded for determining which factors should, in any given case, be treated as the determining ones.

Although there is no universal test to determine whether a person is an employee or an independent contractor, I agree with MacGuigan J.A. that a persuasive approach to the issue is that taken by Cooke J. in Market Investigations, supra. 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.

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.

[13] I will examine the facts in relation to the indicia set forth in the judgment of Major J. in *Sagaz*.

Level of control:

[14] Prior to examining this factor – and others – pertaining to the working relationship at issue, I make the point that Robert Rieveley – certainly - and Cheryl Rieveley – probably - were not present at the Communications' office while the work was being carried out during the relevant period. The testimony of Adeoye discloses the workers were told when to start, when to take a break and that they had to adhere to certain codes of dress and conduct in accordance with instructions contained in the sheet – Exhibit R-3 – handed to them by Ditty and/or Chantal, the on-site Communications' employees who exercised management/supervisory functions. The workers were instructed to follow a script that had been prepared by CHQM and were instructed not to deviate therefrom during the course of any telephone solicitation. Adeoye was provided – via the computer situated on her desk – with a list of numbers to call and when that supply had been exhausted, more numbers were provided. The workers – including Adeoye – were placed in one room and functioned under the supervision of employees of the appellant. Calls were monitored in order to assure performance levels were maintained and their work terminated when either Ditty or Chantal instructed them to put down their phones and headsets. Chantal also recorded Adeoye's time of arrival and departure.

Provision of equipment and/or helpers:

[15] The workers were not required to provide any equipment. The entire office, including furniture, computers, telephones and related equipment, was leased/owned by the appellant. Cheryl Rieveley agreed Adeoye's services had to be performed personally during the short period covered by the written contract.

Degree of financial risk and responsibility for investment and management:

[16] Adeoye did not incur any financial risk arising from the performance of the required tasks relevant to the working relationship. She provided her services for a total of 15 working days within a three-week period. The nature of the undertaking governed the duration of the engagement and Communications utilized its own staff members in order to supervise all workers engaged in the short-term project.

Opportunity for profit in the performance of tasks:

[17] The remuneration paid to Adeoye was $10 per hour - not $8 - as assumed by the Minister in the Reply. She was paid that rate for each hour worked. She was not paid for those hours she was absent - due to a medical appointment – from Communications' office. The so-called system of daily cash bonuses seemed to exist mostly inside Rieveley's head as he was not present during the relevant period. There were no daily payments; instead, Adeoye stated bonuses – in each of three categories – were paid only at the end of the second week of the promotional campaign. Each worker was required to make a minimum of 300 calls per day. A typical workday consisting of 7 hours or 420 minutes – after taking into account one hour for breaks - was the amount of time available for workers to make 300 to 500 or more calls. Adeoye testified that dialling a number and not obtaining a response would occupy 5 seconds of her time. When a person answered her call, the elapsed time thereafter could range from 5-10 seconds – in the case of a quick rejection – or perhaps occupy at least one minute if the person responding was interested in participating in the promotion and then provided various bits of personal information which were then entered into the computer by Adeoye. One does not have to be adept at higher mathematics to discern there is little room for efficient management of time on the part of the worker in order to maximize earnings.

[18] In the case of *Minister of National Revenue v. Emily Standing*, [1992] F.C.J. No. 890 Stone, J.A. stated:

> ...There is no foundation in the case law for the proposition that such a relationship may exist merely because the parties choose to describe it to be so regardless of the surrounding circumstances when weighed in the light of the **Wiebe Door** test ...

[19] Robert Rieveley – agent of the appellant – submitted Adeoye was in the same category as a carpenter who had been hired – pursuant to a written contract - to complete a specific project within the period of time estimated for its completion. The actual conduct of the parties during the period of the working relationship relevant to the within appeals is not supportive of the appellant's assertion that Adeoye was an independent contractor. By way of comparison, I suspect that instructing an independent contractor such as a carpenter or plumber precisely when to pick up/lay down tools or take coffee/lunch breaks - while demanding compliance with strict, specific codes of dress and comportment not specified in said contract - would constitute a faux pas of prodigious proportion, destined to provoke an abrupt response on the part of the service provider, including - probably - the judicious application of one or more personal hand tools common to those trades.

[20] In a recent decision of the Federal Court of Appeal - *Precision Gutters Ltd. v. Canada (Minister of National Revenue – M.N.R.),* [2002] F.C.J. No. 771 - the Court heard the appeal by a company that negotiated contracts with the customer and then hired installers to perform the work. In arriving at the conclusion that the gutter installers were independent contractors – and not employees – Sexton J.A. found there were two businesses operating, one on the part of Precision Gutters and the other on the part of the installers. One business concerned the manufacture of the gutters and the other arose from the physical installation. Sexton J.A. did not deal with the elaborate operational infrastructure of Precision Gutters since that was considered to have been a separate business whose breadth and level of responsibility and financial connection with the end user was distinct from the business aspect of the installation process - in the narrow sense - as it applied to the installers.

[21] I return to the central question - as referred to by Major J. in *Sagaz, supra* - which is to determine whether Adeoye provided her services to Communications on the basis she was in business on her own account. What business did she have? She responded to an on-line advertisement by the appellant and – following an interview – was hired to work during a short-term advertising/marketing campaign. Clearly, she was a person providing a service within the context of an employee/employer relationship. From the perspective of Adeoye and, examining the relevant indicia on an objective basis, it is apparent there was only one business operating and it belonged to the appellant.

[22] I understand the concern expressed by Rieveley that the current Employment Insurance regime - whereby every hour of employment is insurable – is cumbersome in terms of requiring payors to adhere to ordinary payroll requirements which are not suited to certain types of business where people are hired only for short periods in order to carry out a specific, one-time project. However, in revising the governing legislation, Parliament eliminated the requirement to work a minimum number of hours during a defined period in order to be insurable under the *Act*.

[23] The decisions issued by the Minister are correct and are confirmed.

[24] The appeals are hereby dismissed.

Signed at Vancouver, British Columbia, this 27th day of October 2003.

"D.W. Rowe"

CITATION:	2003TCC761
COURT FILE NO.:	2003-1668(EI) and 2003-1669(CPP)
STYLE OF CAUSE:	First Choice Communications Inc. and M.N.R.
PLACE OF HEARING:	Vancouver, British Columbia
DATE OF HEARING:	July 31, 2003
REASONS FOR JUDGMENT BY:	The Honourable D.W. Rowe, Deputy Judge
DATE OF JUDGMENT:	October 27, 2003
APPEARANCES:	
Agent for the Appellant:	Robert B. Rieveley
Counsel for the Respondent:	Bruce Senkpiel
COUNSEL OF RECORD:	
For the Appellant:	
Name:	
Firm:	
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