Docket: 2006-947(CPP)

BETWEEN:

UNISON TREATMENT HOMES FOR YOUTH,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

Appeal heard on common evidence with the appeal of
Unison Treatment Homes for Youth (2006-948(EI))
on June 27, 2007, at Windsor, Ontario

Before: The Honourable Justice G.A. Sheridan

Appearances:

Agent for the Appellant:	Marilyn J. Crowley, C.A.
Counsel for the Respondent:	Daniel Bourgeois

JUDGMENT

In accordance with the attached Reasons for Judgment, the appeal is allowed, without costs, and the decision of the Minister of National Revenue is vacated on the basis that Ms. Snagg was not engaged in pensionable or insurable employment for the period February 1, 2002 to May 5, 2005.

Signed at Ottawa, Canada, this 2nd day of August, 2007.

"G.A. Sheridan"

Sheridan J.

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"G.A. Sheridan"

Sheridan J.

Citation: 2007TCC447
Date: 20070802
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2006-948(EI)

BETWEEN:

UNISON TREATMENT HOMES FOR YOUTH,

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REASONS FOR JUDGMENT

Sheridan, J.

[1] The Appellant, Unison Treatment Homes for Youth, is appealing the decision of the Minister of National Revenue which held that the worker, Velma Snagg, was an employee, rather than an independent contractor, during the period February 1, 2002 to May 5, 2005.

[2] The Minister's assessment was based on the assumptions of fact set out in paragraph 16 of the Reply to the Notice of Appeal:

(a) the Appellant is a "for profit" partnership involved with co-ordinating residential group home care and support to take care of children that are under protection of the Children's Aid Societies (the "CAS");

(b) Juel Wadw, Oslyn Henry and Kathleen Jess equally own the partnership;

(c) the partners controlled the day-to-day operations and made the major business decisions;

(d) the Appellant had to follow the directives issued by The Ministry and CAS;

(e) the Worker was hired as a "Support Worker" under a verbal agreement;

(f) the Worker was responsible for the following:

- provide care for youths in various programs
- update file information, produce behaviour and incident reports
- provide life skills training, safety, hygiene and take them on recreational outings and appointments
- assist foster parents with daily routines by delegating chores, making dinner choices, giving rewards/consequences and dispensing medication
- provide respite relief for foster care provider
- may also provide one-on-one supervision/guidance for a high-needs child

(g) the Worker performed her duties at the Appellant's group homes and in the community;

(h) the Appellant provided the Worker with an office at the group home;

(i) the Worker was paid $10 per hour for support work and $14.50 for special needs support;

(j) the Worker was paid by cheque to her personal name, on a monthly basis;

(k) the Worker's rate of pay was determined by the Appellant;

(l) the Worker did not receive any vacation pay or leave;

(m) the Appellant did provide a health plan for which they paid half to foster parents and support workers;

(n) the Appellant's daily hours of operation are 24 hours a day, 7 days a week;

(o) the Worker's hours of work varied based on program requirements and her availability;

(p) the Worker had to record her hours of work on a timesheet;

(q) the following information was indicated on the timesheet:
- timesheet is on the Appellant's form and has a heading of "relief/support hours worked for the Appellant"
- she was paid an hourly rate for hours worked and a flat rate for weekends
- signed by worker and the foster parent
- shows what she did, where she did it, when she did it and for whom she did it and some descriptions of the activity
- shows that she was paid for time during training session
- shows relief hors *(sic)*

(r) the Worker was provided with training, as per the Ministry standards on a yearly basis for Non-violent Physical Crisis Intervention, First Aid and CPR by the Appellant;

(s) the Worker was required to report to the Appellant if a serious event occurred which affected the children, the Ministry standards determined the types of serious occurrences and time frames for the reporting;

(t) the Worker did not incur any expenses in the performance of her duties;

(u) the Worker was provided with a "Policies and Procedures manual" by the Appellant and each year, she had to sign a form acknowledging that she read the manual;

(v) the Worker was also provided with guidelines, house rules and direction when required;

(w) the Worker was subject to multiple evaluations in a year;

(x) the Worker had to log all daily information in a "Daily Log Book" for each child;

(y) the Worker and the Foster Parent decided if work had to be redone and both covered the related costs;

(z) the Appellant provided the liability insurance as required by the Ministry Standards;

(aa) the Worker, Foster Parent and CAS were all responsible for resolving complaints;

(bb) the Worker had to provide her services personally;

(cc) the Worker had to advise the Appellant if she was sick and the Appellant would be responsible for finding a replacement;

(dd) the Worker worked exclusively for the Appellant during the period in question;

(ee) the Appellant had the right to terminate the Worker's services.

[3] The only issue in these appeals is whether the worker, Ms. Snagg, was engaged in pensionable and insurable employment while performing her duties as a Support Worker at Unison Treatment Homes for Youth. This determination turns on whether she was an employee or an independent contractor. The test for this determination was developed in *Wiebe Door Services Ltd. v. The Minister of*

National Revenue[1] and applied by the Supreme Court of Canada in *671121 Ontario Ltd. v. Sagaz Industries Canada Inc.*[2]:

> [47] 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.
>
> [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.[3]

[4] In addition to the consideration of control, ownership of tools, chance of profit and risk of loss and the degree of integration, the Court may also take into account the intentions of the parties[4].

[5] The jurisprudence of the common law is clear that no one factor has precedence; rather, they are intended to provide a framework for analysis of the particular facts of each case. The Appellant submits that it is not so much the facts that are in dispute as their interpretation. According to the Appellant, some of the assumptions are inaccurate because the information is incomplete. One of the partners in the Appellant partnership, Kathleen Jess, and the worker, Ms. Snagg, testified on behalf of the Appellant. Ms. Snagg was excluded from the Court while Ms. Jess gave her evidence. Ms. Jess was cross-examined extensively and unshaken in her evidence which was, for the most part, corroborated by that of Ms. Snagg. I

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[1] 87 DTC 5025.

[2] [2001] 2 S.C.R. 983.

[3] *Sagaz, supra,* paragraphs 47 and 48.

[4] *Lawrence Wolf v. Her Majesty the Queen*, 2002 FCA 96, 2002 DTC 6853; *The Royal Winnipeg Ballet v. The Minister of National Revenue*, [2006] F.C.J. No. 339.

found both witnesses to be straightforward in the presentation of their testimony and their evidence credible.

[6] No witnesses were called for the Respondent.

[7] The Respondent takes the position that the evidence supports the finding that Ms. Snagg was an employee and accordingly, that her work was pensionable and insurable. Counsel for the Respondent urged the Court to follow the decisions of this Court in three cases dealing with other Ontario youth treatment facilities[5]. Certainly the approach taken by the Court in those cases is the correct one: the decisions were the result of a close review of the evidence of the relationship between each worker and the payor. Applying the same tactic in the present case, however, leads me to conclude that Ms. Snagg was providing her services as a "Support Worker" as an independent contractor.

[8] The Respondent's position is that Ms. Snagg was under the "control" of the Appellant, not least because she was required to comply with the Unison policy and procedures manual[6] and other directives such as the "House Rules"[7] and "Things to Remember"[8]. This argument, however, fails to take into account the effect of one of the Minister's own assumptions, that "the Appellant had to follow the directives issued by the Ministry [of Community and Social Services] and the [Children's Aid Societies], CAS"[9]. The practices set out in the manual were a reflection of the statutory obligations imposed on those responsible for the children placed in care by the Government of Ontario. The penalty for non-compliance with these requirements was the non-renewal of the Appellant's annual licence. As well as establishing the standards required for the proper care of the children, the purpose of the above documents was to avoid such an outcome by ensuring that the Foster Parents and the Support Workers were aware of and complying with these externally imposed requirements. The policy and procedures manual and the "Things to Remember" were particularly directed at safety issues. I accept the Appellant's evidence that the

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[5] *1392644 Ontario Inc. (c.o.b. Connor Homes) v. Canada*, [2003] T.C.J. No. 670 (McArthur J.); *1392644 Ontario Inc. (c.o.b. Windswept on the Trent) v. Canada*; [2004] T.C.J. No. 214 (Paris J.); *1392644 Ontario Inc. (c.o.b. Connor Homes) v. Canada*, [2006] T.C.J. No. 416 (O'Connor J).

[6] Exhibit A-1.

[7] Exhibit A-3.

[8] Exhibit R-2.

[9] Paragraph 16(d) of the Reply to the Notice of Appeal.

"House Rules" were directed primarily at the children. They were posted in the bedroom area, for their easy reference and to avoid having them on public view in the main areas of the home. They were intended to remind the youth in care of their commitment, upon entering Unison, to conform to certain expected behaviours. (As I understand it, the Ministry's philosophy for treating the children seems to have been premised on getting "buy-in" from the youth themselves by setting goals, regularly assessing whether such goals had been attained and modifying the goals accordingly.) In the circumstances, these documents are different in nature from the standard employer-employee directives that govern an employment relationship.

[9] The same is true for the data recording that workers were required to perform. The Ministry and CAS required the keeping of a daily activities log for the children; any "serious occurrences" (such things as death, suicide, abduction, running away) had to be documented in accordance with special Ministry-imposed procedures. All records had to be maintained in a complete and timely fashion. The recording of such information was done by the Support Worker for the child(ren) in her care; the recorded data could later be entered by any of the Support Workers. This reporting was not for the purpose of evaluating Ms. Snagg's performance, but rather for ensuring a complete file for each child being treated. The Appellant did not typically conduct performance evaluations of the Support Workers and none were done for Ms. Snagg, in particular[10].

[10] Ms. Snagg was not "supervised" in the performance of her tasks. Indeed, the very nature of the work of caring for children with behavioural, psychological or other problems required that the Support Worker be able to think on her feet and use good judgment in resolving problems as they occurred. Ms. Snagg seems to have been possessed of such skills. As she said at the hearing, she had her own ideas and she implemented them. The partners of the Appellant, including Ms. Jess, were not normally at the five Unison homes more than once a month. The Foster Parent in charge of each home was being relieved by the assistance of Support Workers like Ms. Snagg. Thus, in normal circumstances, Ms. Snagg was effectively on her own.

[11] The Respondent assumed that Ms. Snagg's rate of pay was imposed by the Appellant. I accept the evidence of Ms. Jess and Ms. Snagg, however, that each worker negotiated her own payment levels. Ms. Snagg seems to have established herself as a skilled worker: she accepted difficult children on a "one-to-one" basis, a duty for which the Ministry (not the Appellant) provided a higher rate ($14 per hour)

[10] As wrongly assumed in paragraph 16(w) of the Reply to the Notice of Appeal.

than regular childcare ($10 per hour). She also negotiated a higher flat rate for taking the children on excursions. She was free to accept or reject any assignment without repercussion. On a related note, Ms. Snagg was able to enhance her earnings by taking on, without extra pay, the task of doing the scheduling for four of the five group homes in Windsor. This was a deliberate strategy which gave her "first dibs" on as many shifts as she chose to take as well as on shifts that paid at a higher rate. Further, she sometimes used her own money to buy treats for the children to build a "rapport" with them, thus making herself more in demand. This is akin to the building of goodwill that is routinely employed by those in business for themselves (and regularly claimed as a business expense). Though as counsel for the Respondent quite rightly pointed out, Ms. Snagg had not "invested" any money in the Appellant's business. I am satisfied, however, that in the particular context of this case she had a certain chance of profit. She also had a risk of loss. The Appellant did not provide her with workplace liability insurance coverage. She had no job security, no vacation pay, no sick leave. As Décary, J.A. pointed out in *Lawrence Wolf v. Her Majesty the Queen,*[11] these are the realities of the "risk" in today's workplace:

> 120 In our day and age, when a worker decides to keep his freedom to come in and out of a contract almost at will, when the hiring person wants to have no liability towards a worker other than the price of work and when the terms of the contract and its performance reflect those intentions, the contract should generally be characterised as a contract for services. If specific factors have to be identified, I would name lack of job security, disregard for employee-type benefits, freedom of choice and mobility concerns.[12]

[12] The Ministry required that only Support Workers with training in CPR, First Aid and Non-Violent Crisis Intervention could work at youth treatment homes. Accordingly, the Appellant had to ensure that its Support Workers possessed such skills. For those without them, the Appellant provided training without charge; if the Support Workers billed for the time they spent training, the Appellant paid the invoice. The Support Workers who already had the appropriate certification, or who wished to obtain it elsewhere did not have to take the training offered by the Appellant. Thus the training offered by the Appellant was not specific to its own operation but rather to Ministry requirements. Ms. Snagg took her training through the Appellant; there is no evidence as to whether she invoiced the Appellant for her training time.

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[11] 2002 FCA 96, 2002 DTC 6853.

[12] *Wolf, supra,* at paragraph 120.

[13] The Respondent argued that the fact that Ms. Snagg had to complete and submit time sheets is indicative of her employee status. In my view, however, the timesheets were the equivalent of invoices. Had they not been completed and submitted to the Appellant, Ms. Snagg would not have been paid. Indeed, she testified that she had once missed the 15th of the month billing deadline and had not been paid within that period. The timesheets, like invoices, included details of the tasks performed, the number of hours worked, and so on. The need for such information was succinctly explained by Ms. Jess: she wanted to know what she was paying for. On cross-examination, Ms. Snagg explained the details provided regarding an unusually long shift where a child had been suspended from school requiring her to spend the entire day with him rather than just the normal after-school period. How is this different from the detailed invoice of a lawyer or accountant justifying the amount billed by listing each service performed and the time taken to provide it? In these circumstances, no one would argue that the lawyer or the accountant was the client's "employee".

[14] Ms. Snagg was free to work at other youth treatment centres, although because she had devised a way to get all the shifts she needed at Unison, she chose not to. If she were not available for her shifts at Unison, she was entitled to find a replacement, provided that the replacement worker had the Ministry-required certification. Thus, within that subset of individuals, Ms. Snagg could (and on occasion, did) find others to perform her duties. She made her own arrangements with such persons for their payment, either paying them directly or having the replacement invoice the Foster Parent or the Appellant. In any case, there is little financial incentive for the hiring of a replacement worker, as that concept is normally understood, for work that is remunerated at the rate of $10-14 per hour.

[15] As mentioned above, not all of the factors in the *Wiebe Door* test will be applicable in every context. In the present case, the matter of "tools" is not particularly pertinent to the discussion. Counsel for the Respondent submitted with some vigour that the homes and their contents including the computer used by Ms. Snagg for data entry were tools that were furnished exclusively by the Appellant. While I agree that they were provided by the Appellant, in my view they were equally necessary for the Appellant's business of providing care at the Ministry standard for the troubled youth in residence. I agree with the agent for the Appellant, Ms. Crowley, that it is important to remember whose business we are talking about.

This determination must be made from the worker's perspective[13]. In the present case, Ms. Snagg was in the business of providing her services as a Support Worker to homes like those established and run by the Appellant. Like many consultants these days, the only "tools" she required were her own skills and judgment.

[16] At the time of the hearing of these appeals, Ms. Snagg remained in her position as a Support Worker at Unison. She testified on behalf of the Appellant. From this it may be inferred that she viewed herself as an independent contractor. Certainly that is the basis upon which Ms. Jess dealt with this valued worker.

[17] Taken as a whole, the evidence satisfies me that Ms. Snagg was providing her services as a Support Worker during the relevant period as a self-employed independent contractor. Accordingly, the appeal is allowed, without costs, and the decision of the Minister of National Revenue is vacated on the basis that Ms. Snagg was not engaged in pensionable or insurable employment for the period February 1, 2002 to May 5, 2005.

Signed at Ottawa, Canada, this 2nd day of August, 2007.

"G.A. Sheridan"

Sheridan J.

[13] *Direct Care In-Home Health Services Inc. v. The Minister of National Revenue*, 2005 TCC 173 at paragraph 8.

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APPEARANCES:

Agent for the Appellant:	Marilyn J. Crowley, C.A.
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