

Citation: 2007TCC511
Date: 20070913
Docket: 2006-1569(EI)
2006-1571(CPP)

BETWEEN:

GUY PRESTON DBA GLADIATOR TRANSPORT SS,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent,

and

DEREK W. BURGESS,

Intervenor.

REASONS FOR JUDGMENT
**(Delivered orally from the Bench at
Kelowna, British Columbia on February 6, 2007)**

Beaubier, J.

[1] These appeals were heard together on common evidence at Kelowna, British Columbia on February 6, 2007. The Appellant and the Intervenor were the only witnesses.

[2] The particulars in dispute are outlined in paragraphs 12 to 14, inclusive, of the Reply to Notice of Appeal number 2006-1571(CPP). They read:

12. By letter dated March 10, 2006, the Minister decided that the Appellant employed Burgess under a contract of service from September 10, 2004 to May 13, 2005 (the "Period") within the meaning of paragraph 6(1)(a) of the *Plan*.
13. In making his decision the Minister relied on the assumptions of fact as follows:

- a) the Appellant transferred title to a truck tractor and trailer to Bronco Transportation Systems Inc. (“Bronco”);
- b) Bronco was in the business of ground transportation of goods and merchandise utilizing tractors and trailers;
- c) the Appellant and Bronco entered into a lease arrangement wherein Bronco utilized the Appellant’s tractor/trailer unit in Bronco’s transportation business;
- d) Bronco provided the dispatch and administration services and paid the Appellant a percentage of the revenue for each trip of the Appellant’s leased tractor/trailer;
- e) Bronco’s name appeared on the tractor/trailer;
- f) the Appellant, under the lease arrangement with Bronco, was required to reimburse Bronco for the tractor/trailer insurance coverage;
- g) the Appellant advertised for a truck driver;
- h) Burgess responded to the Appellant’s advertisement and was hired by the Appellant to drive the leased tractor/trailer;
- i) the Appellant assigned Burgess to Bronco to drive the tractor/trailer;
- j) Burgess was required to follow Bronco’s policies, procedures and dispatch orders;
- k) Burgess was not permitted to have passengers in the tractor/trailer;
- l) Burgess’ hours and days of work were determined by the Bronco dispatcher;
- m) Burgess worked exclusively for the Appellant during the Period;
- n) the Appellant was responsible for the gas, repairs, general maintenance, and toll charges for the tractor/trailer it leased to Bronco;

- o) Burgess was liable for traffic violations incurred during the time he drove the tractor/trailer;
- p) Burgess made no investment in the tractor/trailer;
- q) Burgess provided steel-toed boots, a small set of tools, maps, a cellular phone, pens and paper;
- r) Burgess could not subcontract the driving of the tractor/trailer to another driver;
- s) the Appellant paid Burgess between 25% and 30% of the tractor/trailer profits;
- t) Burgess did not have the potential for profit;
- u) Burgess was required to consult with the Appellant in the event of any issues between Burgess and Bronco;
- v) Burgess did not charge Goods and Services Tax (“GST”) to the Appellant; and
- w) Burgess did not have a business presence while driving the tractor/trailer.

B. THE ISSUE TO BE DECIDED

- 14. The issue is whether the Appellant employed Burgess in pensionable employment during the Period.

[3] Assumptions 13(a) to (h), inclusive, (j), (k) and (l); (n) to (r), inclusive and (v) are correct. Respecting them, as to:

(d) Bronco also got all the hauling contracts from, and billed and collected from its customers and then paid the parties;

(h) the Intervenor was interviewed by the Appellant but was hired by Bronco after its interview, tests and document requirements were met;

(i) the Appellant merely referred the Intervenor to Bronco which, on the evidence, was the only hauler that the Appellant leased his tractors and trailers to (he had two and, later three);

(k) Burgess did put passengers in the tractor, one of whom (McPherson) also drove at times;

(l) Bronco and Burgess determined when Burgess would work;

(n) Burgess testified that he only drove the Appellant's tractor, but he told the Appellant he also drove for others – the Appellant is believed because Burgess admitted that he was down graded as a driver by Bronco for refusing trips;

(q) Burgess also provided gloves, small tools, lights and tapes; and

(r) Burgess had McPherson driving for him at times.

[4] Respecting the remaining assumptions, the Court finds:

(s) The Appellant and the Intervenor and Bronco divided the customer's payments to Bronco 70%, 75% – 30%, 25% of 85%; and 15% to Bronco;

(t) Burgess controlled the possible profits to the Appellant and Burgess or the risk of loss to them by his willingness to take trips, his travel time on trips; and his demeanor towards Bronco and its customers. He admitted that Bronco was unhappy with his services and began to “starve” him “out”, so that he could not profit from his trips. As a result, neither could the Appellant;

(u) Burgess was not required to consult with the Appellant if there was an issue with Bronco and dealt with Bronco directly;

(w) Burgess had a business presence and passed himself off to third parties as being in business for himself, as owning the Appellant's tractor/trailer and as planning to sell it – he also had business cards calling himself “Nexxt Transportation Group LP”, which he gave to third parties and used for repairs to the tractor in February and May, 2005.

[5] This Court does not believe Burgess and where his testimony conflicts with Preston's, Preston is believed. Burgess' record through the Period is that he drove or not when he chose; he allowed McPherson to drive which was illegal and jeopardized Bronco and Preston; he created problems with Bronco; and he falsely used the “Nexxt Transportation Group LP” which was a fiction, was not a registered partnership, and falsely portrayed his business status to third parties for what he considered to be his benefit.

[6] Using the criteria set out in *Wiebe Door Services Ltd. v. M.N.R.* [1986] 3 F.C. 553 the Court finds:

1. Control – The actual operating control of the use of the tractor/trailer and Burgess' services was with Burgess. His hiring was by Bronco and it gave work out based on Burgess' performance. The Appellant had no control over Burgess or his work.

2. Ownership of Tools – In fact, there were two contracts with Bronco: The Appellant's for the property, the tractor/trailer; and Burgess' for his personal services and his own small tools as an operator.

3. and 4. Chance of Profit, Risk of Loss – Burgess controlled his chance of profit/risk of loss and he also controlled the Appellant's. Both had these chances, but they were entirely dependent on Burgess' relationship with Bronco and his services to Bronco and its customers and his willingness and ability as a driver.

5. Integration – There was no true integration. Bronco did or did not award loads. Burgess did or did not drive. Preston's tractor/trailer was or was not used by either of them.

[7] Burgess signed a contract with the Appellant to be an independent contractor. That was their deal and Burgess conducted himself independently of both Preston and Bronco. He was not only in it for himself, he was in business for himself on any basis that he chose from time to time.

[8] The appeals are allowed. The Appellant is awarded such costs and disbursements as are permitted by the *Employment Insurance Act*.

Signed at Calgary, Alberta this 13th day of September, 2007.

"D.W. Beaubier"

Beaubier, D.J.

CITATION: 2007TCC511

COURT FILE NO.: 2006-1569(EI)

STYLE OF CAUSE: Guy Perston dba Gladiator Transport SS v.
MNR and Derek W. Burgess

PLACE OF HEARING: Kelowna, British Columbia

DATE OF HEARING: February 6, 2007

ORAL REASONS FOR
JUDGEMENT BY: The Honourable Justice D.W. Beaubier

DATE OF ORAL REASONS
FOR JUDGMENT: September 13, 2007

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