

Docket: 2006-209(EI)
2006-210(CPP)

BETWEEN:

STARSKY ENTERPRISES INC.,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

Appeals heard on June 20, 2007, at London, Ontario,

By: The Honourable Justice E.A. Bowie

Appearances:

Counsel for the Appellant: Jed L. Chinneck
Counsel for the Respondent: Andrew Miller

JUDGMENT

The appeals pursuant to subsection 103(1) of the *Employment Insurance Act* and section 28 of the *Canada Pension Plan* are allowed, and the decisions of the Minister of National Revenue are set aside, and the rulings are varied to provide that the employment of Lindsay Huber by the appellant was not insurable employment under the *Act*, and was not pensionable employment under the *Plan*.

Signed at Ottawa, Canada, this 4th day of April, 2008.

“E.A. Bowie”

Bowie J.

Citation: 2008TCC194
Date: 20080404
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2006-210(CPP)

BETWEEN:

STARSKY ENTERPRISES INC.,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

REASONS FOR JUDGMENT

Bowie J.

[1] This appeal is concerned with the perennial question, whether the worker is engaged in employment that is insurable employment under the *Employment Insurance Act* (the *Act*) and pensionable employment under the *Canada Pension Plan* (the *Plan*). That question, in turn, depends on the answer to the question whether the contract between the appellant and the worker is a contract of service or a contract for services. The original rulings under section 90 of the *Act* and section 26.1 of the *Plan* were that Lindsay Huber was engaged by the appellant in insurable and pensionable employment. Those rulings were affirmed on appeals to the Minister under sections 91 and 27 of the *Act* and the *Plan*.

[2] The sole shareholder of the appellant is Eric Lecompte. He and Ms. Huber were the only witnesses. Mr. Lecompte's evidence was clear and forthright. He founded the company and designed its method of operation. Ms. Huber worked for Starsky for less than three weeks. She seemed uncertain as to a number of aspects of their relationship. I do not doubt her truthfulness, but I have more confidence in Mr. Lecompte's understanding of the company's procedures and the terms on which it engaged workers than I do in hers. In the few instances where their evidence conflicts, I prefer his evidence to hers.

[3] Starsky is in the business of operating marketing campaigns, including door-to-door campaigns, for various non-profit and charitable organizations. It has developed a donor card system, which has space for up to 28 donors to indicate the

amount of their donation. When individuals make donations, they are issued an official tax receipt and a red ribbon. At the end of a day of canvassing, the workers submit their donor cards to Starsky and receive a commission based on total donations collected that day.

[4] On November 29, 2004, Ms. Huber commenced working for the appellant as a canvasser. She worked five days a week going door-to-door soliciting donations for Mothers Against Drunk Driving (“MADD”).

[5] A Letter of Agreement (the “Agreement”) was signed by Ms. Huber and Starsky on December 3, 2004. Ms. Huber testified that she went over the Agreement with Joe Blais, a manager at Starsky. She did not recall whether she read through the whole Agreement before signing it. The terms of the Agreement were, *inter alia*:

- [a] Ms. Huber was an independent contractor. She was responsible for her own transportation, remitting taxes, carrying liability insurance, and any other expenses incurred in the course of her work.
- [b] Ms. Huber’s role was to solicit money from individuals on behalf of the non-profit organizations.
- [c] She would be paid commission, which was calculated daily based on total dollars collected per donor card.
- [d] She was required to keep Starsky informed of the results of her work by filling out a street log and daily reports outlining total donations.
- [e] All donor cards, ribbons, receipts and brochures were the property of Starsky. Starsky would consign donor cards to Ms. Huber. Ms. Huber was required to compensate Starsky if any donor cards were lost, stolen or damaged.
- [f] Ms. Huber was restricted by the terms of the Agreement. The Agreement provided that she could not engage in any activities which, in Starsky’s view, were competitive with and directly related to the work Ms. Huber provided for Starsky.
- [g] Ms. Huber could not subcontract her rights, duties or obligations to another person without Starsky’s consent.
- [h] Ms. Huber agreed to abide by thirteen codes and standards set out in Schedule “C” to the Agreement. For example, she agreed to act in a professional manner, to wear an identification badge when canvassing, and not to abuse the trust of donors;
- [i] In the event that Ms. Huber breached any of her obligations under the Agreement, Starsky could terminate the Agreement upon written notice.

[6] Mr. Lecompte testified that the canvassers were able to set their own hours and dates of work. They could pick up their supplies, which included ribbons, receipts and donor cards, from his office every day between 10:00 a.m. and 1:00 p.m. and were required to drop off completed donor cards and all donations that same day between 8:00 p.m. and 10:00 p.m. These hours were designated because Starsky does not have the resources to keep its office open 24 hours a day. Mr. Lecompte explained that the hours were chosen in order to allow canvassers to maximize their canvassing time. He testified that provincial regulations provide that a person can only canvass between the hours of 11:30 a.m. and 9:30 p.m. A canvasser could pick up supplies on Monday, and not work until Wednesday for example, but the canvasser would be required to return the donations and cards on Wednesday evening. This requirement was not followed by all canvassers.

[7] Mr. Lecompte explained that new canvassers had a full day of training before they started working where they would shadow another canvasser. The purpose of this training was for prospective canvassers to learn what the job was like and whether it was something they wanted to do. As he explained it, door-to-door canvassing is not for everybody. When canvassers start working for Starsky, they are sent out with an experienced worker on the first day. This is the only required training. Canvassers can request additional training at any time. There are also daily meetings in the morning which canvassers can attend to learn tips on selling technique. These meetings are all optional. Canvassers are not paid for attending training sessions or meetings.

[8] Mr. Lecompte testified that canvassers were free to hold other jobs and gave the example of working as a bartender in the evenings. He said that the non-competition clause had never been exercised. He understands it to mean that canvassers could not use the donation card system when they were canvassing for another organization, and that they would not be permitted to ask potential donors to support MADD or some other organization as this would be a conflict of interest. He said that canvassers were free to go door-to-door for other organizations, just not at the same time as they were canvassing for MADD.

[9] Ms. Huber considered herself a fulltime employee of Starsky. When she met with the manager to sign some preliminary paperwork, she indicated that she was looking for fulltime employment. During the three weeks that she worked as a canvasser, she worked every day. She also attended meetings nearly every morning before canvassing. She initially testified that these meetings were mandatory, although she later conceded that she may have misunderstood. She did not have any other source of income and said she would not have had time for another job.

[10] The Agreement provided that all workers must have access to a reliable vehicle. In reality, many canvassers relied on public transit. Mr. Lecompte explained that many canvassers were students, and he recognized that many of them could not afford a vehicle. Ms. Huber usually carpoled with other canvassers and gave the driver some money for gas. Starsky did not reimburse the canvassers for mileage or other transportation costs. Other than gas money, Ms. Huber did not incur any expenses as a canvasser.

[11] In the event that a canvasser loses a card or does not submit the donations to Starsky, Starsky would pay MADD for the lost donations and would then collect the money from the canvasser. In the event that the canvasser does not come back to work, Starsky would likely not be able to get the money back.

[12] Under the Agreement, workers are required to carry liability insurance. Mr. Lecompte said that he knew that most workers probably did not carry any insurance and that this was not a “serious requirement”. Ms. Huber did not know who was responsible for insurance.

[13] Mr. Lecompte described canvassing as each of the workers’ “own little mini business”. The canvassers choose how often and for how long they work and in which neighbourhoods they canvass. The canvassers are required to tell Starsky where they will be working to avoid duplication, and so that Starsky can advise the Police department. This is done so that the police know the canvassers are truly representing MADD. Nobody supervised the canvassers while they worked, or kept track of how many hours were worked.

[14] Ms. Huber testified that every morning when she arrived at the office, she was given a map with a highlighted area which set out where she could canvass that day. If she did not finish canvassing in that area in one day, she or another canvasser was sent back another day. Additionally, she was given a timesheet or calendar with an estimate of which days she would be working and how much money she expected or hoped to raise that day. Ms. Huber did not know what the schedules were for but guessed they might be for personal motivation. After the morning meeting, she would carpool with other workers and would get a ride back with the same driver in the evening. Ms. Huber was not sure whether she could have requested or chosen to work in a particular area.

[15] Canvassers could work as many or as few days as they liked. They would not be disciplined for not coming into work one day. Mr. Lecompte testified that he would occasionally receive complaints from a person in the neighbourhood regarding a canvasser’s attitude. He said in these cases, he would talk to the canvasser to hear

their side of the story and he would generally remind the canvasser to stay calm when dealing with people. In the event that the canvasser had breached the code of conduct, Starsky could choose not to consign the donor cards to that canvasser. This would effectively terminate the Agreement. Mr. Lecompte also testified that in most cases, canvassers who run into problems going door-to-door will likely decide on their own that they are not interested in this kind of work.

[16] The principles that govern this type of case are well-settled, and are found in the Supreme Court's decision in *671122 Ontario Ltd v. Sagaz Industries Canada Ltd.*¹ where Major J., writing for the Court, said at paragraphs 46 - 48:

46 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, supra*, 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, *supra*, 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.

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

¹ [2001] 2 S.C.R. 983; [2001] S.C.J. No. 61.

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.

[17] I turn now to the *Wiebe Door*² factors.

Control

There was no supervision and very little control. Ms. Huber was free to work when and for how long she wanted. She did not need to report to anyone. No one monitored her hours or her productivity. Although Ms. Huber testified that she was told where to canvass, I prefer the evidence of Mr. Lecompte who testified that canvassers could work where they wanted so long as they told someone at Starsky where that was. This level of coordination was necessary so that Starsky could keep local police departments informed, and to avoid canvassing the same homes more than once. I accept that Ms. Huber believed that she was a fulltime employee, who was required to attend daily meetings and canvass every day. However, I prefer the evidence of Mr. Lecompte, which established that Starsky exercised very little control over the canvassers, including Ms. Huber.

Ownership of Tools

The canvassers were responsible for their own transportation. Starsky supplied the ribbons, receipts and donor cards, although Mr. Lecompte testified that these were consigned to the canvassers. Should a canvasser lose any receipts or donor cards, they would have to reimburse Starsky. The fact is that the canvassers used no tools of any significant value. This factor is not a significant one in this case.

Chance of Profit/Risk of Loss

The method of remuneration in this case gives the workers some opportunity to increase their incomes, both by working longer hours, and also by organizing their efforts in a way that maximizes their efficiency. Clearly, not all workers who are paid

² *Wiebe Door Services Ltd. v. M.N.R.*, 87 D.T.C. 5025.

on the basis of commission can be said to be in business for themselves. Mr. Lecompte described his canvassers as having their own mini businesses, and no doubt the method of remuneration is one factor that leads towards that conclusion.

Conclusion

[18] Twenty years ago, in *Bradford v. M.N.R.*,³ Judge Taylor of this Court made the following observation:

The general principle that commends itself to me arising out of this appeal and the recent jurisprudence noted is that under a given set of circumstances within which there are certain aspects of 'employee', some others of 'independent contractor', and even others that are somewhat ambiguous, that the intentions and objectives of the parties, if clearly and unequivocally stated and agreed upon, should be a prime factor in the determination of the Court.

That proposition has since been followed by Judge Teskey in *Manhattan Multi-Marketing Inc. v. M.N.R.*,⁴ by Judge Sobier in *Whistler Mountain Ski Club v. M.N.R.*,⁵ and by O'Connor J. in *Armstrong v. M.N.R.*⁶

[19] In my view, the same principle should be applied in this case. While there are factors that tend towards a contract of service, and some that tend in the direction of a contract for services, the written agreement between the parties is unequivocal, and should be respected. The appeal will therefore be allowed, the decisions of the Minister will be set aside, and the rulings will be varied to provide that the employment of Ms. Huber by the appellant was not insurable employment under the *Act*, and was not pensionable employment under the *Plan*.

Signed at Ottawa, Canada, this 4th day of April, 2008.

“E.A. Bowie”

Bowie J.

³ 88 DTC 1661.

⁴ [1991] T.C.J. No. 347.

⁵ [1996] T.C.J. No. 876.

⁶ 2004 TCC 682.

CITATION: 2008TCC194

COURT FILE NO.: 2006-209(EI) and 2006-210(CPP)

STYLE OF CAUSE: STARSKY ENTERPRISES INC. and THE
MINISTER OF NATIONAL REVENUE

PLACE OF HEARING: London, Ontario

DATE OF HEARING: June 20, 2007

REASONS FOR JUDGMENT BY: The Honourable Justice E.A. Bowie

DATE OF JUDGMENT: April 4, 2008

APPEARANCES:

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