

Citation: 2008 TCC 353
Date: 20080627
Docket: 2008-132(CPP)
2008-133(EI)

BETWEEN:

KEITH MILLARD,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent,

and

CONTINENTAL NEWSPAPERS (CANADA) LTD.,

Intervenor.

REASONS FOR JUDGMENT

**(Delivered orally from the bench on
May 2, 2008, in Thunder Bay, Ontario.)**

Mogan D. J.

[1] This is an appeal from a determination by the Minister of National Revenue that the Appellant was not engaged in insurable employment, as that phrase is defined in the *Employment Insurance Act*, and also that the Appellant does not have pensionable earnings within the *Canada Pension Plan*. I will address my comments only to the *Employment Insurance Act* in this appeal because the decision in that appeal will have the effect of deciding the *Canada Pension Plan* appeal.

[2] The Appellant was a carrier for the Chronicle Journal, the daily newspaper in Thunder Bay, Ontario, (“the paper”). There was extensive evidence given by the Appellant himself, and by Harry Brown, an executive of the paper, as to the terms and conditions under which a carrier operates. Mr. Brown stated that they advertise in the pages of the paper routes that are available for carriers. A person who is interested in earning money by delivering the paper will apply for a route, particularly if it is near his or her home and it would be convenient to deliver papers in that area. That is how the Appellant came to be a carrier for the paper. He applied

for and was granted a route. Over time, he acquired more routes until, according to his evidence, I think at one time he had five or six routes.

[3] The Appellant first began delivering papers on May 23, 1999 and he was a carrier continuously from then until December 3, 2005, when he stopped being a carrier. In his own evidence, he said it was a hassle at the end and he found it onerous, in circumstances which I will review.

[4] The relationship between a carrier and the paper starts with the carrier signing an agreement (Exhibit R-1, Tab 9). It is a simple document because some carriers are adults like the Appellant, and some are not adults, like teenage boys or girls. So it is a pretty fundamental document and can be read in two or three minutes. The "Carrier Agreement" which was signed by the Appellant, is as follows:

I, Keith Millard, agree to act as an independent carrier/salesperson for route 1315 starting January 20, 2002 for a period of at least three months and further agree to act as a seven day per week morning delivery carrier-person. As a seven day per week morning delivery carrier-person, deliveries will be completed on all days prior to 8:00 a.m. I will continue to pay my account at the standard carrier rate in full every billing period by cheque and will give The Chronical Journal at least 2 weeks notice to coincide with a billing period before giving up my route. The Chronical Journal includes twice weekly non-subscriber deliveries, Thursdays and Sundays. The Chronical Journal is also authorized to collect a weekly deposit from me in the amount of \$2.00 per week for a period of 10 weeks as of my starting as an independent carrier-salesperson. The amount will be reduced to \$1.00 per week in the eleventh week as an independent carrier-salesperson and will continue at this amount until the accumulated amount is the equivalent of three billing periods or \$500.00, whichever is greater. The accumulated amount will be returned to me within one month of my giving up the route. However, the Chronicle Journal is authorized to apply any portion of the accumulation to any unpaid balance owing by me upon termination of the route. I further agree that if my annual income from all sources exceeds \$30,000.00, I am liable for the remittance of any goods and services tax on any sales.

Exhibit R-1, Tab 13 includes the terms of the agreement which speak for themselves, and they are as follows:

- Both parties agree the claimant applies for a route.
- Both parties agree the claimant decides when the papers are delivered.
- Both parties agree the claimant sets his own hours of work.
- Both parties agree the claimant buys the papers and then is billed for them.
- Both parties agree the claimant uses his own tools to deliver the papers.
- Both parties agree the claimant collects money from the customers or the customers can pay the newspaper directly.

[5] I also refer to the "Carrier Information Handbook" (Exhibit R-1, Tab 10), written again in very plain language for both adults and teenagers so that they can understand what they are getting into if they take on the carrier job. At page 10, there are four simple computations of how a carrier can determine what he or she is making, and they are set as follows:

From each customer every
two weeks you
collect.....\$8.10

You are charged
a wholesale rate for
those newspapers
(4007 x 14 days).....\$5.61

GST 7%
charged on your retail rate
of the newspaper (.5407 x 14 days x 7%).....\$.53

Your profit every
two week collection
period per customer.....\$1.96

[6] For each customer, on a two-week basis, the carrier collects \$8.10. This obviously would change if the price of the newspaper changed, but at the time this is the price used. The carrier is charged a wholesale rate for the papers of about forty cents each, which is shown to be \$5.61 for the 14 days. Then there is GST charged of 53¢ on each paper. Therefore, the \$5.61 which the carrier has to pay to the paper, along with the GST of 53¢ is the wholesale price. If we deduct that amount (\$6.14) from the \$8.10, the carrier earns \$1.96 per paper over a two-week period. Then there is a computation that provides, in effect, that if a carrier has 40 customers over a two-week period, a fairly standard route for a boy or girl of 12 to 16 years of age, making \$1.96 per customer, the carrier would earn a profit of \$78.40. That is the concept spelled out in the handbook for any carrier, whether it happens to be an adult such as the Appellant or a younger person. However, if it is a younger person under the age of 18, the Carrier Agreement has a provision where the parent or guardian must approve the contract.

[7] I shall also comment on the form of invoice set out at Exhibit R-1, Tab 20. Mr. Brown, on behalf of the paper, gave a helpful description of the invoice which was for route number 1227. Basically, he indicated the charges and credits and an amount carried forward from a previous invoice of \$35.09. There was a \$3 charge

which the carrier pays in his or her early months of work to create what is called a bond, which is really a security bond of \$400 held in trust by the paper for the carrier, so that when the connection with the paper terminates, it can be applied, if necessary, to pay any amount owing to the paper by the carrier. Otherwise, it is returned to the carrier.

[8] There is an actual invoicing for the papers, showing 560 papers over a two-week period for 40 customers; a charge for the GST (\$23.29); and then there is a credit for the customers who do not pay the carrier. Many customers wish to be billed by the paper directly, and they may pay for papers every three or six months, or annually. Those customers do not pay the carrier because they find it more convenient to pay the paper directly. Therefore, the carrier does not have to purchase and pay for all 40 papers each day, since some customers pay directly. As a result, the carrier is given a credit, which appears in the invoice as:

PIO daily Chronicle Journal 26.

It seems like a complicated accounting but, on the other hand, I am not in the business. Considering that the paper has between 700 and 1,000 carriers, with 600 in the Thunder Bay area, and another 300 odd in the towns where the paper is delivered, such as Kenora, Geraldton, Fort Francis and Dryden, it is a tried and true method for the paper.

[9] In my view, the invoice is important in the determination of these appeals, because it characterizes the financial relationship between the Appellant and the newspaper. It makes the carrier a middleman. He is buying wholesale and selling retail, and that is the way the supplier treats him, as a purchaser of product and a vendor to retail. He must also account to the supplier for the product and, indeed, that is the language used in the carrier's handbook at Tab 10 which I referred to above. It begins:

From each customer every two weeks you collect ... You are charged a wholesale rate --"

So it is clear that the carrier is a wholesaler, and he is charged the GST on the rate to the customer.

[10] When I integrate the words from "how you compute your profit" with the way the invoices work, as described by Mr. Brown, it has in substance made the carrier a middleman. Therefore, I conclude that the carrier cannot be an employee because he has set off with an enterprise of his own. Indeed, if we imagine a carrier delivering papers to 40 customers, let us say none of whom have paid the paper directly, he

really is going to make or break a profit depending on how efficient he is collecting his money, making sure he gathers it from customers, paying the paper and keeping the proceeds, which is the net to him. He is, in a sense, an entrepreneur.

[11] If he is efficient and keeps after his customers to collect, and cuts off such customers that do not pay, he has made the kind of profit and loss decision that anybody has to make in an entrepreneurial enterprise to stay ahead of the game. He has to ensure that he is collecting from the people who can pay and will pay, so that he will have their proceeds of sale in order to pay the paper for supplying him.

[12] Turning to the evidence, it was telling that counsel for the Intervenor, the paper, questioned the Appellant and took him through both the Reply to the Notice of Appeal, and the Notice of Intervention. He specifically dealt with the assumptions of fact that the Minister relied on in the Reply, and the allegations of fact alleged by the Chronicle Journal in its Notice of Intervention. In almost every instance, the Appellant agreed with Mr. Bickford that the facts contained in both documents were true. The most significant fact was, in my view, that the carrier could retain someone else to do the work, provided that the papers were delivered by 8:00 a.m. That was the only stipulation laid down by the paper.

[13] As Mr. Brown said, there was no other supervision or direction given to the carriers. The only condition was to have the paper at the subscriber's address by 8:00 a.m. There was no training provided and no tools, other than a canvas bag which the Appellant chose not to use. He said most carriers were youths but there were many adult carriers as well. So the absence of direction is one thing. The other was that the paper does not keep track of hours whatsoever. It has no idea how long it takes a particular carrier to deliver to his or her route. Further, they do not care if a carrier is delivering other papers at the same time, perhaps a competing newspaper, so long as the Chronicle Journal is delivered by 8:00 a.m., and the carrier is efficient in collecting from customers, in order to earn a profit.

[14] In the test for employment or independent contractor, the frequently used phrases are control, who owns the tools, whether the work is integrated into the payor's operation, and whether there is a risk of profit or loss. Counsel for the Intervenor referred me to the well-known decision of the Supreme Court of Canada, *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, [2001] 2 S.C.R. 983, where Justice Major set out a list of tests which really were adopted from a decision of the Federal Court of Appeal, *Wiebe Door Services Ltd. v. M.N.R.*, 87 DTC 5025. Those are the standard tests. But briefly, as I apply those tests to the carrier in this appeal, they all point to his being an independent contractor, and none point to employment. I will go through them briefly:

[15] With respect to control, the Chronicle Journal has no control over the carrier as to how or when he delivers the papers, so long as it is done by 8:00 a.m. There are no tools involved, other than the paper provides a canvas bag, which is available if the carrier finds it convenient. Some people deliver by car at 3:00 or 4:00 a.m. Some deliver the paper by pulling a wagon, but it can hardly be held that there is any significant tool involved here.

[16] The operation of the carrier is not integrated with that of the newspaper. Mr. Brown gave a brief description of what the Chronicle Journal does, and how they collect news, assemble it, prepare the paper, print it, put it in trucks, and deliver it out to the sites where the carriers are. That is the business of this paper. The invoice which appears at Tab 20 describes the business of the carrier. He buys the papers from the Chronicle Journal, takes them out, delivers them to his customers and collects the money from them. I think those are two quite separate operations, and it cannot be said that the operation of the carrier is integrated into the operation of the paper.

[17] Lastly, the risk of profit and loss, to which I have already alluded. The invoice makes it clear that if the carrier is efficient, and if he or she is lucky and has steady clients who honour their debts and pay, then there can be a regular stream of revenue from which the carrier will make a profit. If the carrier is not lucky and has people who will not pay their debts and do not honour their obligations to the carrier, the carrier has difficulty. If the carrier is not decisive, then he or she might end up losing money. But that is what happens in many businesses if the vendor carries people who do not pay up for too long, and the receivables build up.

[18] Therefore, there is an element of entrepreneurship here that is referred to in *Sagaz* as an opportunity for profit and a risk of loss. In my view, that captures the position that the carrier is in. Therefore, I find that the determination made by the Minister is totally supported by the evidence, and by the law. I have considered a decision of this Court by Judge Porter in *Thomson Canada Ltd. (c.o.b. Winnipeg Free Press) v. Canada (Minister of National Revenue)*, [2001] T.C.J. No. 374. The issue before Judge Porter was whether a carrier delivering newspapers and inserts was an employee or an independent contractor. In the course of deciding that the worker was not an employee, Judge Porter made a finding similar to the one I make here.

[19] It is an open and shut case. I regret to have to deliver that message to the Appellant, but it is also on all fours with Mr. Millard's own appeal to the Ontario Ministry of Labour where he applied under the *Employment Standards Act*. At Tab 13 of Exhibit R-1 there is a decision of the investigating officer who found

against Mr. Millard that there was any employment. On the third page of that exhibit, where it says, "Findings", the investigating officer made the following finding:

When a claim is filed against an employer alleging a violation of the *Employment Standards Act*, the onus lies with the employer to prove that they did not contravene the *Act*. Based on the information provided to me, I find there is no employer/employee relationship and as a result, the *Employment Standards Act* does not apply.

[20] That decision is not binding on me, but it is very persuasive because it is a decision by an authorized person in a collateral institution trying to make the same decision that this Court has to make in this appeal, as to whether there was employment. I am supported by the fact that, when this situation was put to another tribunal, such as the Ontario Government, they reached the conclusion that I am reaching independent of that finding, on the evidence presented before me today.

[21] Therefore, I will support the Minister's determination. The appeal will be dismissed with respect to the *Employment Insurance Act*. As I indicated earlier, it will also be dismissed with respect to the *Canada Pension Plan*.

Signed at Ottawa, Canada, this 27th day of June, 2008.

“M.A. Mogan”

Mogan D.J.

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COURT FILE NO.: 2008-132(CPP) and 2008-133(EI)

STYLE OF CAUSE: KEITH MILLARD and M.N.R. and
CONTINENTAL NEWSPAPERS
(CANADA) LTD.

PLACE OF HEARING: Thunder Bay, Ontario

DATE OF HEARING: May 2, 2008

REASONS FOR JUDGEMENT BY: The Honourable Justice M.A. Mogan

DATE OF JUDGMENT: May 7, 2008

APPEARANCES:

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