Docket: 2008-235(EI)

BETWEEN:

SHANNON FRASER,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

Appeal heard on common evidence with the appeal of
Shannon Fraser (2008-236(CPP))
on October 9, 2008, at Lethbridge, Alberta

Before: The Honourable Justice Wyman W. Webb

Appearances:

For the Appellant:	The Appellant herself
Counsel for the Respondent:	Valerie Meier

JUDGMENT

The appeal from the decision of the Respondent that the Appellant was not engaged in insurable employment under a contract of service with Turning Point Counselling and Consulting Inc. during the period from July 17, 2006 to September 29, 2006 for the purposes of the *Employment Insurance Act* is dismissed, without costs.

Signed at Halifax, Nova Scotia, this 16th day of October 2008.

"Wyman W. Webb"

Webb J.

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BETWEEN:

SHANNON FRASER,

Appellant,

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THE MINISTER OF NATIONAL REVENUE,

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Appeal heard on common evidence with the appeal of
Shannon Fraser (2008-235(EI))
on October 9, 2008, at Lethbridge, Alberta

Before: The Honourable Justice Wyman W. Webb

Appearances:

For the Appellant:	The Appellant herself
Counsel for the Respondent:	Valerie Meier

JUDGMENT

The appeal from the decision of the Respondent that the Appellant was not engaged in pensionable employment under a contract of service with Turning Point Counselling and Consulting Inc. during the period from July 17, 2006 to September 29, 2006 for the purposes of the *Canada Pension Plan* is dismissed, without costs.

Signed at Halifax, Nova Scotia, this 16th day of October 2008.

"Wyman W. Webb"

Webb J.

Citation: 2008TCC569
Date: 20081016
Dockets: 2008-235(EI), 2008-236(CPP)

BETWEEN:

SHANNON FRASER,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

REASONS FOR JUDGMENT

Webb J.

[1] The Appellant has appealed the decision of the Respondent that the Appellant was not employed under a contract of service with Turning Point Counselling and Consulting Inc. during the period from July 17, 2006 to September 29, 2006 for the purposes of the *Employment Insurance Act* (the "*EI Act*") and the *Canada Pension Plan* (the "*CPP*"). The Respondent had, therefore, determined that the Appellant was not engaged in insurable employment for the purposes of the *EI Act*, nor was she engaged in pensionable employment for the purpose of the *CPP* while she was providing services to Turning Point in 2006.

[2] Turning Point had an agreement with the Blood Tribe pursuant to which Turning Point would provide counselling services at an office located on the Reserve. To provide these services Turning Point retained the services of counsellors who would attend at the office on the Blood Tribe Reserve.

[3] The issue in this case is whether the Appellant was retained as an employee or as an independent contractor in relation to the counselling services that she was providing in 2006 at the office located on the Blood Tribe Reserve.

[4] The question of whether an individual is an employee or an independent contractor has been the subject of several cases. In *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, [2001] S.C.J. 61, 2001 S.C.C. 59 ("*Sagaz*"), Justice Major of the Supreme Court of Canada stated as follows:

> 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 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.
>
> (emphasis added)

[5] It is therefore necessary to review the facts of this case in relation to the factors as identified by the Supreme Court of Canada.

Control

[6] Turning Point had access to the office on the Reserve during weekdays. The hours for which counsellors were provided by Turning Point were determined by the contract between the Blood Tribe and Turning Point. One counsellor was provided on Mondays and Tuesdays, and one on Thursdays and Fridays. Every second week two counsellors were provided on Monday and one on Tuesday, Thursday and Friday. Turning Point maintained a list of available dates and had a pool of counsellors available to provide the counselling services on the Reserve. The counsellors were able to select the day or days on which they chose to work from the list of available days.

[7] The Appellant did not report directly to Turning Point. Although the hours would be set by Turning Point this was as a result of the agreement with the Blood Tribe. This case is very similar to *Direct Care In-Home Health Services Inc. v. The Minister of National Revenue*, 2005 TCC 173. In that case, the appellant company had a pool of nurses that were available to provide home care/nursing services to the clients of the Community Care Access Centres of Ottawa and to its own clients. In analyzing the concept of control in that case, Justice Hershfield stated as follows:

> 11 Analysis of this factor involves a determination of who controls the work and how, when and where it is to be performed. If control over work once assigned is found to reside with the worker, then this factor points in the direction of a finding of independent contractor; if control over performance of the worker is found to reside with the employer, then it points towards a finding of an employer-employee relationship.[3] However, in times of increased specialization this test may be seen as less reliable, so more emphasis seems to be placed on whether the service engaged is simply "results" oriented; i.e. "here is a specific task -- you are engaged to do it". In such case there is no relationship of subordination which is a fundamental requirement of an employee-employer relationship.[4] Further, monitoring the results, which every engagement of services may require, should not be confused with control or subordination of a worker.[5]
>
> 12 In the case at bar, the Worker was free to decline an engagement for any reason, or indeed, for no reason at all. She could leave a client and still be engaged with another more to her liking. She was free to do other work as and when she pleased. Moreover, although nursing care tasks were offered to her, there was no promise of that and she was not supervised in her performance of those tasks. Each task offered was a results oriented task from the Appellant's perspective. The fact that the Appellant could offer such tasks from time to time and to some extent monitor performance does not militate toward a

> finding of an employee-employer relationship. As in D & J Driveway, where there was not a sufficient relationship of subordination between the company and drivers to warrant a conclusion that a contract of employment existed, there is not a sufficient relationship of subordination in the case at bar to warrant a conclusion that the relationship of the parties is that of employee-employer. In D & J Driveway specific delivery tasks were available to drivers who could agree or refuse to make deliveries when called upon. When drivers agreed to make a delivery no control was exercised over the way in which they carried out their duty. Similarly in Wolf, Justice Desjardins noted that a link of subordination had not been created where the worker, a free-lance mechanical engineer hired on a one-year renewable contract, was assigned tasks over which the worker was the "master".[6] As in these cases, I do not see the Worker, in the case at bar, as being in a subordinate relationship with the Appellant as is required to find a contract of service. That is, the control test points toward a finding of an independent contractor relationship.

[8] In the present case, the Appellant was also free to decline any engagement and she actually selected the days that she would work from the list of available days. There was no relationship of subordination between the Appellant and Turning Point. Therefore, this case is indistinguishable from *Direct Care In-Home Health Services Inc.* in relation to this issue and the facts in this case in relation to the control factor would lead to a conclusion that the Appellant was an independent contractor.

Tools and Equipment

[9] There were minimal tools and equipment that were required for the Appellant to perform her services. There were some reference materials available in the office and the office was provided for her on the Reserve. The Appellant used her own vehicle to travel to the Reserve and was not reimbursed for travelling costs. The Appellant's vehicle was not used in the performance of her duties but simply to travel to the place of work. Since the main tools that the Appellant would use would be her knowledge, experience and training, this factor is of little assistance in determining whether the Appellant was an employee or an independent contractor.

Opportunity for profit/risk of loss

[10] The opportunity for profit arose as a result of the Appellant accepting days of work providing counselling services at the Reserve. There was minimal risk of loss as the Appellant did not have any investment in any assets in relation to the services that she was providing. In *Direct Care In-Home Health Services Inc.*, Justice Hershfield made the following comments in relation to the opportunity for profit in a similar situation where individuals were able to accept or decline shifts:

> 19 In addition, the fact that the Worker was able to decline an engagement for any reason must not be overlooked. The Worker in that sense had control over how much money she could earn to an extent far greater than that exercised by most employees. The Worker could increase her earnings and chance of profit by accepting more engagements from the Appellant. On the other hand, since she was not assured any hours, she had a risk that some expenses such as vehicle expenses could exceed income. Of course many employees might be in similar circumstances so I would not put too much emphasis on this factor in characterizing the nature of the relationship.

[11] I agree with the comments of Justice Hershfield that the facts of this case, which are very similar to the facts in *Direct Care In-Home Health Services Inc.*, in relation to this factor are of little assistance in determining whether the Appellant was an employee or an independent contractor.

Ability to Hire Helpers

[12] In this particular case the Appellant could not have hired someone else to perform her services and since the services were only to be provided by her, she did not need any helpers. The nature of the activity would require that any person who is providing counselling services would have to be trained as a counsellor. As well, the arrangement was simply that counselling work was to be provided on certain days. Therefore if one counsellor could not work on a particular day, then another counsellor from the pool could work on that day.

[13] The fact that she was to personally provide the services would suggest that the Appellant was an employee but since there are other situations where a professional person is retained as an independent contractor to personally provide services (for example a doctor who is specifically retained to perform a particular surgery or a lawyer who is specifically retained to try a particular case), little weight will be given to this factor.

Investment and management

[14] The Appellant did not have any responsibility for investment or management of Turning Point which would suggest that the Appellant was an independent contractor. However, there are also many situations where employees may not have any responsibility for investment and management. If a counsellor is hired as an employee to provide counselling services, that individual, although he or she is an employee, may not have any responsibility for investment or management. He or she is hired as a counsellor, not as a manager. Therefore this factor is of little assistance

in determining whether the Appellant was an employee or an independent contractor in this case.

Conclusion

[15] In this case, when the above factors are viewed in isolation many of the factors are of little assistance in determining whether the Appellant was an employee or an independent contractor. However, another factor that is significant in this case is that the Appellant had previously worked for Turning Point in 2002. The Appellant acknowledged that when she worked for Turning Point in 2002, she was working as an independent contractor and not as an employee. The Appellant also acknowledged that she has worked as an employee for other persons. Therefore she was aware of the distinction between being an employee and an independent contractor.

[16] When she worked for Turning Point in 2002, she signed a contract which clearly stated that she was not an employee of Turning Point and that her contract with Turning Point was for services. Keith Houston, who is a director of Turning Point, stated that when the Appellant was retained to provide services again in 2006, he informed the Appellant that the terms of her previous contract would still apply. The Appellant did not deny that she was informed that the terms of her previous contract would still apply.

[17] I accept the testimony of Keith Houston and find that it was a term and condition of her engagement by Turning Point in 2006 that she would be retained as an independent contractor.

[18] Therefore in my opinion, there would have been a common intent for the Appellant to be retained as an independent contractor when she was hired in 2006. When she later applied for maternity leave benefits, she decided to apply for a ruling to see if the arrangement could be viewed as an employer/employee relationship.

[19] The time that the agreement between the Appellant and Turning Point was made would be the relevant time to determine if they had a common intent. It seems to me that since they would have had a common intent at that time for the Appellant to be an independent contractor, that this is a significant factor to support a finding that the Appellant was an independent contractor (*Royal Winnipeg Ballet v. M.N.R.*, 2006 FCA 87, 2006 DTC 6323, *Panache Fine Cabinetry v. M.N.R* 2008 TCC 513.).

[20] The Appellant was retained for a flat amount of $32 per hour with no source deductions. The Appellant stated that her only other source of income in 2006 was

employment income. She was paid $2,440 in 2006 by Turning Point and therefore if she was an independent contractor, she would have been a small supplier for the purposes of the *Excise Tax Act*. Since there was no indication that she was registered for the purposes of the *Excise Tax Act*, no GST would have been collectible on fees of only $2,440 if she would have been an independent contractor. The Appellant did not remit any GST in relation to the amounts that she was paid but since she would have been a small supplier in any event, the fact that the Appellant did not remit GST is not material.

[21] In my opinion, the facts in this case more strongly support a finding that the Appellant was an independent contractor than that she was an employee and, just as the facts in *Direct Care In-Home Health Services Inc.* led to a conclusion that the registered nurse was an independent contractor, the facts in this case lead to a similar conclusion and therefore in this case, the Appellant was an independent contractor.

[22] The appeals are therefore dismissed, without costs.

Signed at Halifax, Nova Scotia, this 16th day of October 2008.

"Wyman W. Webb"

Webb J.

CITATION:	2008TCC569
COURT FILE NO.:	2008-235(EI) & 2008-236(CPP)
STYLE OF CAUSE:	SHANNON FRASER AND M.N.R.
PLACE OF HEARING:	Lethbridge, Alberta
DATE OF HEARING:	October 9, 2008
REASONS FOR JUDGMENT BY:	The Honourable Justice Wyman W. Webb
DATE OF JUDGMENT:	October 16, 2008

APPEARANCES:

For the Appellant:	The Appellant herself
Counsel for the Respondent:	Valerie Meier

COUNSEL OF RECORD:

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Firm:	

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