Citation: 2008 TCC 658
Date: 20081222
Docket: 2007-4817(EI)
2007-4818(EI)

BETWEEN:

NU-TEA IMPORTS INC. and
ELISABETH CORNELIA BANDELIN
o/a NU-TEA IMPORTS,

Appellants,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent,

and

SUZANNE ASHLEY,

Intervenor.

Agent for the Appellants: Christia Roberts
Counsel for the Respondent: Mathew W. Turnell
For the Intervenor: The Intervenor herself

REASONS FOR JUDGMENT

**(Delivered orally from the bench on October 15, 2008,
at Vancouver, British Columbia)**

Mogan D.J.

[1] One appeal before the Court for the period July 1, 2005 to October 1, 2006 is by Elisabeth Bandelin, carrying on business as Nu-Tea Imports. On October 2, 2006, the Nu-Tea Imports business was transferred to a corporation, Nu-Tea Imports Inc. The balance of the period under appeal, October 2, 2006 to January 30, 2007, is by the corporation. At all relevant times, Ms. Bandelin was the only

shareholder and guiding force of the corporation. Therefore, I regard the two Appellants as one and the same entity for the purpose of these appeals. The two appeals were heard on common evidence.

[2] In the period July 1, 2005 to January 30, 2007, there was a commercial connection between Nu-Tea and Suzanne Ashley who intervened in these appeals. When that commercial connection ended in January 2007, it appears that Ms. Ashley made an application for employment insurance benefits; and the relevant Employment Insurance Commission made an inquiry as to whether there was insurable employment between Ms. Ashley and Nu-Tea or Ms. Bandelin in the relevant periods, 19 months from July 1, 2005 to January 30, 2007. The Minister of National Revenue ultimately determined that Ms. Ashley was engaged in insurable employment during those 19 months. When the determination was made, Ms. Bandelin appealed for the period July 2005 to September 2006, and Nu-Tea Imports Inc. appealed for the period October 2006 to January 2007. Also, Ms. Ashley intervened in both appeals, and appeared in Court on her own behalf.

[3] When the cases were called, there were four witnesses who testified. The first witness was Elizabeth Bandelin, the proprietor of Nu-Tea in the early stages of the relevant period and the sole shareholder of the corporation in the last four months. The second witness was Nancy Weisz-Gallagher, an experienced business woman and a mentor to Ms. Bandelin over the last four or five months of the relevant period. The third witness was Mr. Allard, an appeals officer with Canada Revenue Agency during the relevant period; and the last witness was Suzanne Ashley, the intervenor. The two witnesses who gave the most lengthy testimony were Ms. Bandelin and Ms. Ashley, which is understandable because they were the two principals who had to settle the terms of the work that was performed and they were in this payor/worker relationship throughout the 19 months under review.

[4] Nu-Tea Imports is a new business started by Ms. Bandelin in 2003. As its name implies, the business is designed to distribute organic, herbal teas, and teas under her own brand. She was the manager and sole owner of the enterprise. She sold her own product, and then worked with distributors to establish a network that would expand the sales of the tea product. She knew Ms. Ashley and they all lived in the Abbotsford area of British Columbia. At that time, Suzanne Ashley was the owner of a spa operated under the name "Body and Soul". She was approached by Ms. Bandelin to see if she might sell the tea products of Nu-Tea in connection with her spa. Apparently, an amicable arrangement was set up in

which Ms. Ashley became an agent, in the sense that she sold the Nu-Tea products through her spa.

[5] Circumstances changed in 2005, because Ms. Ashley was approached by a potential partner who agreed to put money into the business if she expanded it but, when she did the renovations, the potential partner withdrew and the capital was not available. In the end, she went bankrupt and lost her business around March 2005. She was an enterprising woman. She went and got employment right away in a retail store, but she remembered the connection with Nu-Tea. In June 2005, she approached Elizabeth Bandelin to see if she might become connected with Nu-Tea in some capacity and sell the product and, hopefully, work her way into some kind of partnership with Ms. Bandelin. That is when the relationship began.

[6] Basically, Ms. Bandelin was an organizer. She said she was good at analyzing and maintaining records, and Ms. Ashley was an effective salesperson. She has a talent for selling products and closing transactions, and so it seemed like a good arrangement. The two of them got together in July 2005 and Ms. Ashley commenced performing services as a sales representative for Ms. Bandelin (o/a Nu-Tea). There is some evidence as to what they thought the relationship was at the time. I have concluded from a number of factors that there probably was a common intent at the beginning of the relationship that Ms. Ashley would be an independent contractor and not an employee.

[7] Ms. Bandelin had never had an employee and said that she was not an employee herself but was a proprietor. She had distributors. She did not want to be involved as an employer with source deductions and the responsibilities that that entailed. It is also common evidence that Ms. Ashley asked that no source deductions be taken for income tax because, as a person who was bankrupt and had a dependent child, she needed all the cash she could get. Although the evidence is inconclusive on the other ordinary deductions like Canada Pension Plan contributions and Employment Insurance premiums, I am assuming that they were all lumped together throughout this period. Compensation flowing from Nu-Tea Imports to Ms. Ashley was on a gross income basis with no source deductions, and there was no complaint from either party in this regard.

[8] I draw the inference that, at the time, there probably was common intent that it be an independent contractor relationship because the hopes were high. By Ms. Ashley's own evidence, she hoped to become a partner in Nu-Tea Imports. There is no contemporary documentation to support employment, but there are

certain indications that Ms. Ashley was to be an independent contractor. There were no source deductions. She had had as many as 26 workers at her spa, Body and Soul. Some of them were genuine employees, and she knew what T4s were about since she had issued T4s to her own employees. So she knew very well that when she was not getting a T4 herself that she was not going to be regarded as an employee.

[9] Having concluded that there was a common intent at the beginning that Ms. Ashley be an independent contractor, that determination in itself is not conclusive. I refer to a judgment of Chief Justice Bowman in *Dean and Sharon Lang v. M.N.R.*, 2007 TCC 547, where he discussed the concept of intent at some length. In paragraphs 33 and 34, he states that intent, even a common intent, is not conclusive. Therefore, as to intent I say no more.

[10] I am more concerned with the substance of the transaction and, in my view, intent is only a persuasive factor when all of the other circumstances are in balance. If the parties had signed a document indicating clearly that they wanted to be in an independent contractor relationship, or an employment relationship, then I think the signed document, a contemporaneous document indicating common intent would be a factor. For reasons that I am about to give, it is not a factor here.

[11] The law as to employment or independent contractor is supported with many cases. One of the most celebrated is a decision of the Supreme Court of Canada in *671122 Ontario Ltd v. Sagaz Industries Canada Ltd.*, [2001] 2 S.C.R. 983, in which Justice Major wrote a lengthy judgment on behalf of the whole court. There were no dissenting judgments. The passage most frequently cited is paragraph 47. Because I am leading to the next test which is that of control, having already dealt with intent, the following is the relevant portion of paragraph 47:

> … 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. …

I think it is unfortunate that Major J. used the word "employer" because it begs the question on the kind of issue we are trying to decide. Frankly, with all due respect to the Supreme Court of Canada, it would have been better if the judgment had read, "In making this determination, the level of control the payor

has over the worker's activities will always be a factor". I believe that is what was meant.

[12] With respect to control in these appeals, Ms. Ashley was engaged to sell tea products. Ms. Bandelin set the price; she provided a list of leads on whom Ms. Ashley might call; and there was frequent contact between the two by telephone. For the territory to be covered, there was some conflict in evidence on that issue, and I will deal with that now.

[13] According to Ms. Bandelin, Ms. Ashley was free to establish her own territory and go wherever she thought she may effect sales. She started in the Lower Mainland which is the most populated area of British Columbia. Later in the year, in the fall of 2005, Ms. Ashley wanted to go to Alberta because her daughter was there and had some needs; and Ms. Ashley felt it important that she herself be living in Alberta. She indicated that she asked permission of Ms. Bandelin to move to Alberta, and Ms. Bandelin agreed, saying there were good sales opportunities to expand the business in Alberta. However, Ms. Bandelin's evidence is that because Ms. Ashley wanted to move to Alberta, she consented because she had such independence to set her own territory. If she wanted to abandon the Lower Mainland of British Columbia to sell in Alberta as an independent contractor, she had that latitude. I am inclined to think at that point that the evidence favours Ms. Bandelin. I think that Ms. Ashley clearly wanted to go to Alberta for personal reasons, her daughter's needs, and Ms. Bandelin went along with it. That indicates a great freedom on the part of the worker.

[14] Once Ms. Ashley settled in Alberta, living in her brother's home with him and her mother, the evidence is in conflict because Ms. Bandelin states that Ms. Ashley decided on her own that she would expand into Saskatchewan and Manitoba. Ms. Bandelin did not think this was fertile territory because the cities and towns were smaller and farther apart, which made it a high cost area to serve Nu-Tea outlets. She thought there was a better market in the Calgary area.

[15] On the other side, Ms. Ashley stated that she was instructed by Ms. Bandelin to expand the territory and move into Saskatchewan and Manitoba to find new areas to sell the tea. Ms. Bandelin says that she had no control over her when she went to Saskatchewan and Manitoba. I do not accept that evidence. I think the person paying the worker always has control. In this circumstance where the compensation included reimbursement for travel, most of the travel up to then had been in the Lower Mainland without motel costs and only gasoline,

and the same could be said for Alberta. But once Ms. Ashley went off to expand her territory in Saskatchewan and Manitoba, she was going to have to stay overnight in motels, drive longer distances, and her travel costs were going to increase. Up to that point in time, her travel costs had been reimbursed by Nu-Tea.

[16] When Ms. Bandelin says "I had no control", she had all kinds of control. She could have said:

> If you go to Saskatchewan and Manitoba, I will not cover your expenses, since I do not consider it a prudent way to expand territory in sparsely populated provinces when you have Edmonton and Calgary more or less at your elbow in Alberta. Also you can come back to British Columbia, do the Okanagan Valley or the whole Lower Mainland. I am not going to finance travel in Saskatchewan and Manitoba.

On that evidence, I will resolve that conflict in favour of Ms. Ashley, and say that I think she was given consent or told to go. On a balance of probabilities, I do not accept Ms. Bandelin’s evidence that she had no control. The payor always has control.

[17] Ms. Bandelin is a compassionate person and, in these circumstances, her compassion may have played against what she seeks in this Court. In any event, there was an element of control, the control that a payor has over a worker. I would resolve that conflict in favour of employment. It surfaces in a number of other ways which I may come back to later. I will deal with what I call profit and loss and compensation together but they are woven together with control.

[18] Another test is who owns the tools. The legal concept is that if the payor owns the tools, it is employment, but if the worker owns the tools, it is more likely an independent contractor. This is particularly the case if a large corporation engages a skilled worker like a mechanic, an electrician, or a plumber. They often own their own tools and are responsible for them, which tools they bring to the site to work with. That is the kind of case where the ownership tools can be important.

[19] In this situation, while there are tools, they are a minor factor. The tools are display material for selling teas, brochures, business cards, tea pots, samples of tea, and they are all provided by Nu-Tea. Also, if the worker goes out to sell on commission, she cannot sell a product unless she has knowledge of it, and that knowledge comes from the manufacturer, the wholesaler, the distributor, the

provider, the payor. Therefore, the only way Ms. Ashley could become educated as to the type of product is by literature provided by Ms. Bandelin.

[20] Ms. Ashley is on commission, but the most significant tool she had was her boyfriend's car, which she used for over a year. Also, she was reimbursed for her gas for the car, and later as she traveled farther, she was reimbursed for gas and motels. After she had an accident with that car and could no longer use it, she could not earn a living without a car. When a new car had to be acquired in November 2006, it was Ms. Bandelin who put up the capital for the purchase of that vehicle. When the working relationship between the two came apart, Ms. Bandelin ended up with the automobile even though it began with an arrangement under which, if Ms. Ashley made the payments on the line of credit established to purchase the car, she would end up as the owner of the car. But it did not work out that way. The fact is that the payor put up the capital to purchase the car and Ms. Ashley used it in selling tea from the time it was acquired until there was a further accident toward the end in January 2007. At that time, Ms. Bandelin became owner of the car. Therefore, the tools run in favour of employment because, although the worker used her own car for the first 16 months, when her car was no longer available, the payor stepped in and made sure that a car was available.

[21] The final test is the opportunity for profit and risk of loss. This is the test which, in my opinion, clinches this case in favour of employment and not independent contractor for the following reasons. The compensation package that was agreed to from the start had three components. There was an amount described by Ms. Ashley as a base salary, and by Ms. Bandelin as an advance. It began as $300 per week, but quickly changed to become $1,200 a month, which is almost the same as $300 per week. It continued that way for the first year until June 2006.

[22] When Ms. Bandelin described it as an advance and stated that the worker was going to receive a 20% commission on sales, I concluded that the advance would be set off against the sales, and if the 20% was high enough, that the worker would live off the commissions. As the evidence continued, however, it turned out that the $1,200 was not really an advance, but was more in the nature of a base salary. Exhibit A-2 shows that it was paid as an advance; Ms. Ashley stated that she would not have worked on a commission-only basis. She needed a base amount like the $1,200 to begin with in case she was unable to build up enough sales to live off the commissions.

[23] Exhibit R-1, Tab 2 is a series of monthly commissions that Ms. Ashley earned throughout the calendar year 2006. These were put before both Ms. Ashley and Ms. Bandelin. I will use the page for the month of May 2006 as an example. It is entitled Sales Commission Suzanne Ashley, and includes columns for Customer, Date, Invoice number, Sales amount and Commission amount. For May 2006, the gross sales total $8,979. There is then calculated (i) the monthly base salary of $1,200; (ii) the Sales Commission of $1,795 which is 20% of the gross sales; and (iii) Expenses of $1,221. Those three items total $4,217. Ms. Ashley confirmed that she received that amount in May 2006 and there were no set offs. Ms. Bandelin was asked the same question, and she also confirmed that Ms. Ashley had received that amount in May. It appears for the months of May, June, July and August 2006, Ms. Ashley received $4,217, $3,659, $5,768 and $6,703, respectively. In July 2006, the base salary went up to $1,600 per month. If the income received is averaged, Ms. Ashley was earning in the range of close to $5,000 per month which is $60,000 a year.

[24] In my view, for a new business and a new worker, that is a fairly generous start at $60,000 per year, even though she has paid her expenses out of that. Also, I find it very difficult to conclude that Ms. Ashley is an independent contractor when she is paid a base salary of $1,200 or $1,600 a month. Surely that takes away her independence, as an independent contractor, and makes her dependent on the business. She was paid a base salary and the *Employment Insurance Act* provides that one of the tests of insurable employment is where a person is compensated with a salary determined by time, or piece work. Therefore, I find the compensation package very strong evidence of employment.

[25] I come back now to “control” and Ms. Bandelin's evidence that she had no control. When she was paying approximately $5,000 a month, she had very much control over where the worker worked, and where the worker was going to visit leads. I cannot imagine that in these circumstances, the payor would not have that control.

[26] The problem that overshadows this case is the compassion of Ms. Bandelin. It is perfectly clear from the many emails put into evidence that she had real compassion for the financial difficulties of Suzanne Ashley. She was bankrupt; she did not have a car; and she needed this advance of $1,200 a month from July 2005 to June 2006 which became $1,600 a month in July 2006. Often, Ms. Ashley could not even wait for the first of the month to receive the base salary, and frequently came to Ms. Bandelin for early payment. Ms. Bandelin never said no, even if the request for funds was in mid-month. On at least one

occasion, Ms. Bandelin described that when Ms. Ashley was on the road, and needed the money to cover a cheque from her bank account, Ms. Bandelin went to Ms. Ashley's bank and actually deposited a cheque for $1,200 or $1,600 in Ms. Ashley's bank account, so the funds would be there. That is friendship. It is compassion. It is a close working relationship.

[27] Also, when the accident occurred with the car in October 2006, Ms. Bandelin put up the money for Ms. Ashley to acquire a car. These acts of compassion indicate a strong connection between these two people. Ms. Bandelin felt sorry for Ms. Ashley and could not see her lose her job and her income if she did not have a car. Ms. Bandelin assisted with the new car, even though when they parted, because she put up the money, she claimed the car as rightly belonging to Nu-Tea. But the compassion, the financial assistance, the understanding that appears in the emails, all show a close relationship between employer and employee. And much less so a relationship between a payor and an independent contractor who is truly standing alone, and operating on his or her own account.

[28] I come back to what Justice Major said in *Sagaz*:

> … 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. …

An example is a plumber. A pipe bursts in your home; you find a plumber in the yellow pages; someone comes to your driveway; gets out of a truck; carries in his tools; shuts off the main water to the house; does all that is required to repair the burst pipe; writes out a bill and walks out the door. That is an independent contractor. That is a person who is truly performing services in business on his own account. I know this is an extreme example, but once we move to a worker being paid by one source (sometimes called an employer), and not being paid by the public, the payor has some control. Once a worker uses all the information provided by the payor in terms of literature and display advertising, that worker has moved farther and farther away from the stand-alone independent contractor.

[29] I also find that the compensation package took all the risk away from Suzanne Ashley. She had no capital in the business and there was no risk of loss. If the inventory of tea stored in Ms. Bandelin’s warehouse went bad and she was not insured, she would have a financial disaster while Ms. Ashley would be skating free with no financial risk. I find that not only was there no risk of loss to Ms. Ashley, there was an opportunity to make income, but not a profit. Any

employee could work overtime and be paid additional income, but that is not an opportunity for profit. It is simply being compensated for extra work.

[30] I conclude that throughout the period in question, the character of Ms. Bandelin and her company Nu-Tea Imports Inc., was that of employer, and Ms. Ashley was an employee. Ms. Ashley was opportunistic. She did not think of herself as an employee in the summer of 2005, but as the end of the relationship approached, she realized it was important to be an employee. What I said about there being common intent in the summer of 2005, I drew as an inference from the way the parties reacted. But, as the cases have stated, a common intent is not determinative and not conclusive. The important evidence is the ongoing circumstances between the payor and the worker, the way they work together, with objective tests like control, tools, profit and loss. The tests are the ones that count, and in this case, they point strongly to employment. For these reasons, the appeals are dismissed.

Signed at Ottawa, Canada, this 22nd day of December, 2008.

"M.A. Mogan"

Mogan D.J.

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