

Citation: 2010 TCC 212
Date: 20100428
Docket: 2009-2090(EI)
2009-2091(CPP)

BETWEEN:

BRIAN CHRISTOPHER FLEMING,

Appellant,

and

MINISTER OF NATIONAL REVENUE

Respondent,

and

FERRELL BUILDERS' SUPPLY LIMITED

Intervenor.

For the Appellant:	The Appellant himself
Counsel for the Respondent:	Roxanne Wong
Agent for the Intervenor:	Rohinton Gatta

ORAL REASONS FOR JUDGMENT

**(Delivered orally by conference call on
February 2, 2010, at Ottawa, Ontario,
modified for clarity and accuracy)**

[1] Mr. Brian Fleming is appealing decisions made by the Minister of National Revenue under the *Canada Pension Plan* and the *Employment Insurance Act*.

[2] The issue raised in both appeals is whether Mr. Fleming was employed by Ferrell Builders' Supply Limited (who will be referred to as "Ferrell") in pensionable and insurable employment within the meaning of the above *Acts* during the period from November 1st, 2004 to July 25th, 2008.

[3] Mr. Fleming is taking the position that he was an employee of Ferrell. Ferrell, who intervened in the appeal, and the Respondent take the position that Mr. Fleming was an independent contractor.

[4] This issue has been considered by the Court on numerous occasions.

[5] As former Chief Justice Bowman noted in *Lang v. Minister of National Revenue*, 2007 DTC 1754, the majority of employee versus independent contractor cases are close. They require a balancing of a variety of factors and the application of judgment and common sense.

[6] The question that must be answered is whether Mr. Fleming performed his services as a person in business on his own account or was performing them in the capacity of an employee.

[7] In making this determination, the following four factors set out in *Wiebe Door Services Ltd. v. Minister of National Revenue*, 87 DTC 5025, must be considered: degree or absence of control exercised by the employer, ownership of tools, chance of profit, and risk of loss.

[8] Before considering these factors, I will briefly summarize the facts. The Court heard from two witnesses during the hearing: the Appellant, Mr. Fleming, and Mr. Gatta, the general manager of Ferrell.

[9] Mr. Fleming noted that he was hired by Ferrell as a sales representative. He did not enter into a written contract with Ferrell. However, he felt that he was an employee of Ferrell.

[10] Prior to working for Ferrell he had worked for Unilock, one of Ferrell's suppliers. He was clearly an employee of Unilock. He received a salary, benefits, and was issued a T4.

[11] Mr. Fleming testified that his arrangement with Ferrell was as follows:

- He was paid a four percent commission with no base salary.
- He did not receive any benefits or vacation pay.

- He received bi-weekly advances on his commission.
- In December of each year, Ferrell would compare the commissions that Mr. Fleming had earned with the amount that had been advanced and make any necessary adjustments.
- Ferrell paid for Mr. Fleming’s cell phone and business cards.
- Mr. Fleming paid for his computer, his home office, his fax machine, his email account, his desk, his car, his fuel and his travel expenses. He was not reimbursed by Ferrell for any of these expenses.

[12] Mr. Fleming testified that he received instructions from a Mr. Roy, the manager of Ferrell’s Waterloo facilities. He felt that Mr. Roy was his boss.

[13] In support of this position, Mr. Fleming provided the Court with emails that he had received from Mr. Roy in which Mr. Roy provided instructions to Mr. Fleming. In addition, Mr. Fleming described how Mr. Roy approved all orders that Mr. Fleming obtained from customers.

[14] Mr. Fleming provided a recommendation letter that Mr. Roy had written for Mr. Fleming. In the letter, Mr. Roy referred to himself as a “professional colleague and employer”.

[15] Mr. Gatta provided a similar description of the relationship between Mr. Fleming and Ferrell with one important difference. He did not feel that Mr. Roy was Mr. Fleming’s boss. He testified that Mr. Fleming operated on his own with little or no supervision.

[16] Mr. Gatta also described the structure of Ferrell’s sales operation. He noted that Ferrell had 3 to 5 independent sales representatives (including Mr. Fleming) who worked at most of its locations. However, its primary sales force was comprised of approximately 30 inside and outside salaried sales staff who were employees of Ferrell.

[17] He noted that the relationship between Ferrell and its outside salaried sales staff was substantially different than the relationship between Ferrell and its independent sales representatives. He provided the following examples:

- The outside salaried sales staff was paid a salary plus a small 0.6 percent commission. The independent sales representatives were only paid a four percent commission.

- The outside salaried sales staff received medical and dental benefits and vacation pay. The independent sales representatives did not receive any benefits or vacation pay.
- The outside salaried sales staff was reimbursed for travel expenses, including fuel, costs incurred to entertain clients and the costs of their cell phones. The independent sales representatives were only reimbursed for the cost of their cell phones.
- The outside salaried sales staff was expected to work set hours including certain Saturdays. There were no set hours for the independent sales representatives and they were not required to work on Saturdays.
- The outside salaried sales staff was provided with desks, computers and an email account. The independent sales representatives were not provided with any of these items.
- The outside salaried sales staff was supervised. The members of the sales staff were required to physically report to Ferrell's offices each day. In Mr. Gatta's view, the independent sales representatives were not supervised. They were not required to report to Ferrell's office and no one kept track of when they worked.
- The outside salaried sales staff received formal sales training and attended health and safety programs. In addition, the outside salaried sales staff received computer training and training with respect to Ferrell's internal systems. This training was not provided to the independent sales representatives.

[18] I will now consider each of the relevant factors. I will first consider the degree or absence of control exercised by Ferrell. This is a difficult factor to apply since control may be found in both an employment relationship and an independent contractor relationship.

[19] It is clear from the evidence on the record that, while the Appellant had the freedom to set his own hours of work, he was to some degree supervised by Mr. Roy, the Waterloo general manager.

[20] However, when one compares Mr. Fleming's relationship with the relationship that Ferrell had with the outside salaried sales staff, it is clear that the

control exercised by Ferrell over the outside salaried sales staff far exceeded the control that Ferrell exercised over Mr. Fleming.

[21] With respect to ownership of tools, most of the tools required to perform the services were owned by Mr. Fleming. This included his home office, a desk, a computer, a fax machine, a car, a home phone and an email account.

[22] In addition, Mr. Fleming was not reimbursed for travel or entertainment expenses. The only items provided by Ferrell to Mr. Fleming were a cell phone and business cards.

[23] I will consider the remaining factors, chance of profits and risk of loss, together.

[24] When one compares the financial relationship between Mr. Fleming and Ferrell with the financial relationship between Ferrell and the outside salaried sales staff, one can see that Mr. Fleming controlled his profits and had a substantial risk of loss.

[25] Mr. Fleming had the opportunity to earn a higher profit than the outside salaried sales staff. He was paid a 4 percent commission while the outside salaried sales staff was paid a salary plus a 0.6 percent commission.

[26] He also bore an increased risk of loss. He did not receive medical or dental benefits. He was required to provide his own tools and he did not receive reimbursement for travel expenses, education programs or entertainment expenses.

[27] The outside salaried sales staff bore none of these risks. They received medical and dental benefits, were provided with the required tools and were reimbursed for travel expenses, education programs and entertainment expenses.

[28] In fact, Mr. Fleming had a substantial risk of loss. His income was 100 percent commission-based and he had substantial expenses. His income tax returns show that his annual expenses equalled approximately 50 percent of his commission income.

[29] In summary, factor one is close. However, when one compares the control that Ferrell exercised over its outside salaried sales staff with the control it exercised over Mr. Fleming, it is clear that the control Ferrell exercised over Mr. Fleming was less than the control one would normally exercise over an employee.

[30] Factors two, three and four clearly support a finding that the relationship was one of independent contractor.

[31] In addition to the factors in *Wiebe Door, supra*, the Court must also consider the intention of the parties.

[32] In this case, there is a dispute with respect to the intention of the parties. Mr. Fleming claims that the intention of the parties was to enter into an employee-employer relationship. The witness for Ferrell claimed that the intention was to enter into an independent contractor relationship.

[33] When one considers the facts, it is difficult to accept the Appellant's testimony that he intended to enter into an employee-employer relationship. The Appellant had worked in an employee-employer relationship in the past. It is difficult for the Court to accept that the Appellant did not realize that his relationship with Fleming was substantially different from his employee relationship with Unilock.

[34] Further, the Appellant must have been aware of the relationship between Ferrell and the outside salaried sales staff. He had to realize that his relationship was substantially different.

[35] For all of these reasons, the Court finds that Mr. Fleming performed his services as a person in business on his own account.

[36] As a result, the appeals are dismissed.

Signed at Ottawa, Canada, this 28th day of April, 2010.

“S. D’Arcy”

D'Arcy J.