

Dockets: 2009-2876(EI)
2009-3352(CPP)

BETWEEN:

PERSUADER COURT AGENTS INC.,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent,

and

JACQUELINE VAN OVERDIJK,

Intervenor.

Appeal heard on April 23 and June 2, 2010 at Toronto, Ontario

By: The Honourable Justice Judith Woods

Appearances:

Agent for the Appellant: Gerald Grupp

Counsel for the Respondent: Thang Trieu

Counsel for the Intervenor: Jordan M. Smith

JUDGMENT

The appeal with respect to decisions made under the *Employment Insurance Act* and the *Canada Pension Plan* is allowed, and the decisions are varied on the basis that Mrs. van Overdijk was engaged in insurable and pensionable employment with the appellant only for the period from December 1, 2007 to December 18, 2008.

The parties shall bear their own costs.

Signed at Ottawa, Canada this 18th day of June 2010.

“J. M. Woods”

Woods J.

Citation: 2010 TCC 335
Date: 20100618
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BETWEEN:

PERSUADER COURT AGENTS INC.,	Appellant,
and	
THE MINISTER OF NATIONAL REVENUE,	Respondent,
and	
JACQUELINE VAN OVERDIJK,	Intervenor.

REASONS FOR JUDGMENT

Woods J.

[1] Persuader Court Services Inc. appeals in respect of decisions of the Minister of National Revenue that Mrs. Jacqueline van Overdijk was engaged by the appellant in insurable and pensionable employment under the *Employment Insurance Act* and the *Canada Pension Plan*.

[2] The issue is whether Mrs. van Overdijk was an employee or an independent contractor for the period from July 31, 2006 to December 18, 2008 when she performed services as an administrative assistant for the appellant.

Background facts

[3] During the relevant period, the appellant carried on the business of providing paralegal services, including representation in small claims court and in informal procedure appeals in this Court.

[4] All of the appellant's paralegal services were provided by its owner, Mr. Gerald Grupp. Administrative services were provided by administrative assistants and a part-time bookkeeper.

[5] In July 2006, Mrs. van Overdijk was hired as a part-time administrative assistant to Mr. Grupp, who at that time also had a full-time assistant. Mrs. van Overdijk worked on an as-needed basis, generally working about 10 hours per week. She could not work in the mornings because she was going to school.

[6] Around the end of November 2007, the other administrative assistant was let go and Mrs. van Overdijk took over her position and commenced working on a full-time basis.

[7] The appellant's office hours were adjusted to between 9 a.m. to 5 p.m. in order to accommodate Mrs. van Overdijk's family obligations. Typically Mrs. van Overdijk would come to work at 8:45 a.m. and leave shortly before 5 p.m. On Tuesday's, she left work at 3:30 p.m. and would work through the lunch period.

[8] This arrangement lasted until the appellant ceased operations in December 2008.

[9] At the outset, Mr. Grupp informed Mrs. van Overdijk that no source deductions would be made by the appellant. He also suggested that she seek the advice of an accountant with respect to her tax situation.

[10] Mrs. van Overdijk was paid on an hourly basis and she submitted regular invoices every two weeks for the hours worked. A number of invoices were submitted into evidence by the appellant. Some of these indicate that the services were "contract services."

[11] When the arrangement was terminated, Mrs. van Overdijk sought a ruling from the Canada Revenue Agency as to whether she was entitled to employment insurance benefits as an employee of the appellant. The Minister determined that the relationship was one of employment.

Discussion

[12] The applicable principles in a case such as this are well known. The hallmark of being an independent contractor is that the person is in business for herself. The intention of the parties is very relevant, but it is not determinative. The applicable test was described by the Federal Court of Appeal in *Royal Winnipeg Ballet v. MNR*, 2006 FCA 87, 2006 DTC 6323 in the following manner:

64 In these circumstances, it seems to me wrong in principle to set aside, as worthy of no weight, the uncontradicted evidence of the parties as to their common understanding of their legal relationship, even if that evidence cannot be conclusive. The judge should have considered the *Wiebe Door* factors in the light of this uncontradicted evidence and asked himself whether, on balance, the facts were consistent with the conclusion that the dancers were self-employed, as the parties understood to be the case, or were more consistent with the conclusion that the dancers were employees. Failing to take that approach led the judge to an incorrect conclusion.

[13] The first question is whether the parties had an agreement that Mrs. van Overdijk would be an independent contractor.

[14] There is no question that the appellant intended that Mrs. van Overdijk be an independent contractor.

[15] Mrs. van Overdijk's intention is less clear. She testified that she had assumed that she was an employee. I was not convinced by this testimony.

[16] Although Mrs. van Overdijk would not be fully aware of the legal differences between employment and self-employment, she did agree to an arrangement that was clearly different from a typical employment relationship because no source deductions were made and she prepared invoices on the basis that the services were contract services. By agreeing to this arrangement, Mrs. van Overdijk implicitly agreed to work as an independent contractor.

[17] It remains to be determined whether the relationship was consistent with the agreement.

[18] The hallmark of being an independent contractor is being in business for oneself. The usual factors that courts look to are whether the worker is subject to control as to how the work is done, risk of loss and opportunity for profit, and ownership of tools.

[19] Based on the evidence as a whole, I have concluded that at the outset when Mrs. van Overdijk was retained to help out in the office on a part-time basis, the relationship was consistent with the parties' agreement that Mrs. van Overdijk was engaged as an independent contractor. However, the relationship changed when Mrs. van Overdijk began to work full-time as Mr. Grupp's sole administrative assistant. From that time onward, the relationship did not have sufficient characteristics of self-employment to support the agreement of the parties.

[20] I will first consider the part-time engagement. During this period, some of the facts point in the direction of employment. The appellant likely had significant control over how the work was done, it provided most of the tools and there was little chance for profit or loss. However, the arrangement was a loose one and Mrs. van Overdijk likely had significant ability to control her hours of work.

[21] Another factor is the type of work that Mrs. van Overdijk likely performed during this time. Mrs. van Overdijk testified that she received instructions from both Mr. Grupp and the full-time administrative assistant. Given that she worked only a few hours each week and that she was new to the office, it is likely that the work performed was less comprehensive and was more task-specific than the duties performed by the full-time assistant.

[22] These factors support the parties' agreement that Mrs. van Overdijk be an independent contractor. The relationship during this period is consistent with the parties' agreement and that agreement should be respected.

[23] The situation was different when Mrs. van Overdijk began to work full-time. At that time, she was the only one to whom Mr. Grupp would look for assistance. There were set hours in which she was expected to report for work, and she was under the close direction of Mr. Grupp to provide whatever assistance he required. The relationship had significant characteristics of a traditional employment relationship at that time and very few characteristics of self-employment.

[24] Mr. Grupp submitted that Mrs. van Overdijk required little supervision. However, the question is not how much supervision was required, but whether the appellant had the ability to dictate how the work was done. In the relationship, it is clear that Mr. Grupp was the "boss" and that Mrs. van Overdijk had to comply with his instructions.

[25] Mr. Grupp stated that sometimes Mrs. van Overdijk failed to show up for

work. Mrs. van Overdijk testified that on a few occasions she had to stay home at the last minute to care for a sick child. She testified that she called Mr. Grupp as soon as possible to notify him when that happened. This is an occurrence that routinely happens in the workplace with working mothers. It is not indicative of Mrs. van Overdijk being in business for herself.

[26] Mr. Grupp testified that Mrs. van Overdijk insisted on coming to work even when he did not need her. This suggests that Mrs. van Overdijk felt that the appellant was obligated to provide her with full-time working hours. It also suggests that the appellant agreed to employ her on this basis.

[27] Mr. Grupp submitted that Mrs. van Overdijk had an opportunity for profit because she earned money as a process server for clients of the appellant and in attending court when Mr. Grupp was double-booked.

[28] In my view, the process server activity was outside the employment relationship and was separate from Mrs. van Overdijk's engagement as an administrative assistant. Mrs. van Overdijk essentially had a very small business as a process server. She also had employment as an administrative assistant.

[29] As for attendance at court, I was not satisfied from the evidence that Mrs. van Overdijk made a profit from this activity apart from her hourly pay as an employee.

[30] Mr. Grupp also submitted that Ms. Van Overdijk could have sent someone else in her place, provided that he trusted the person. Based on the evidence as a whole, it is likely that Mr. Grupp would have welcomed someone selected by Mrs. van Overdijk as her replacement on the few occasions that she could not be at work. If that had occurred, which it did not, it would not be evidence that Mrs. van Overdijk had her own business. It would have been an instance of Mrs. van Overdijk helping her employer out. The relevant factor is that authority over who performed the work remained with the appellant.

[31] Mr. Grupp also testified that Mrs. van Overdijk sometimes took work home outside office hours. This happened on only one or two occasions. This is a neutral factor. The nature of the business was that deadlines had to be met and Mrs. van Overdijk proved to be a diligent worker in assisting Mr. Grupp in meeting these deadlines. The circumstances do not suggest that this was indicative of Mrs. van Overdijk having her own business.

[32] Mr. Grupp testified that Mrs. van Overdijk was absent frequently due to family

responsibilities. Mrs. van Overdijk disagreed with this and suggested that Mr. Grupp was confusing her with the other administrative assistant.

[33] To the extent that there were inconsistencies between the evidence of Mr. Grupp and Mrs. van Overdijk, I prefer Mrs. van Overdijk's evidence. In general, she had a much better recollection of the relevant events than Mr. Grupp. I would also mention, however, that the evidence of both individuals was self-interested and I viewed the testimony of both of them with some caution.

[34] The appellant's bookkeeper, Ms. Patricia Lepper, also provided testimony on behalf of the appellant. She testified that Mrs. van Overdijk did not act as if she was an employee and that she performed specific functions.

[35] This evidence is also neutral in my view. I would first comment that Ms. Lepper appeared to side with Mr. Grupp in this dispute because she felt that Mrs. van Overdijk was wrong to pursue employment insurance benefits given the agreement that she had with the appellant. In any event, Ms. Lepper's evidence was not nearly as detailed as the other witnesses. Her conclusion that Mrs. van Overdijk did not act as an employee may reflect that Mrs. van Overdijk had family responsibilities that she had to juggle with her work. It does not suggest that Mrs. van Overdijk was in business for herself. As for performing specific functions, this is the case with most administrative assistants who are engaged on an employment basis. The important factor is that Mrs. van Overdijk was obligated to perform whatever duties were assigned by Mr. Grupp.

[36] Parliament has provided that employed persons are entitled to employment insurance benefits. If parties wish to contract on some other basis they need to ensure that the terms of the engagement are consistent with self-employment. This was not done when Mrs. van Overdijk commenced to work full-time.

[37] For these reasons, I conclude that Ms. Van Overdijk was engaged in insurable and pensionable employment only for the period from December 1, 2007 to December 18, 2008. The appeal will be allowed on this basis.

[38] The parties, including Mrs. van Overdijk, will bear their own costs.

Signed at Ottawa, Canada this 18th day of June 2010.

“J. M. Woods”

CITATION: 2010 TCC 335

COURT FILE NOS.: 2009-2876(EI)
2009-3352(CPP)

STYLE OF CAUSE: PERSUADER COURT AGENTS INC. and
THE MINISTER OF NATIONAL
REVENUE and JACQUELINE VAN
OVERDIJK

PLACE OF HEARING: Toronto, Ontario

DATES OF HEARING: April 23 and June 2, 2010

REASONS FOR JUDGMENT BY: The Honourable Justice J. M. Woods

DATE OF JUDGMENT: June 18, 2010

APPEARANCES:

Agent for the Appellant: Gerald Grupp

Counsel for the Respondent: Thang Trieu

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