

Dockets: 2012-3576(EI)
2012-3577(CPP)

BETWEEN:

NAVEED BUTT,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent,

and

1383016 ONTARIO INC. O/A HELP UNLIMITED

Intervenor.

Appeal heard on July 2, 2013, at Toronto, Ontario

Before: The Honourable Mr. Justice Randall S. Boccock

Appearances:

For the Appellant:	The Appellant himself
Counsel for the Respondent:	Tony Cheung
Counsel for the Intervenor:	Inna Koldorf

JUDGMENT

The appeal pursuant to subsection 103(1) of the *Employment Insurance Act* (the “*Act*”) is dismissed and the ruling of the Minister of National Revenue (the “Minister”) on the appeal made to the Appellant under section 91 of the *Act* is confirmed.

The appeal pursuant to section 28 of the *Canada Pension Plan* (the “*Plan*”) is dismissed and the ruling of the Minister on the appeal made to the Appellant under section 27 of the *Plan* is confirmed.

Signed at Ottawa, Canada, this 13th day of September 2013.

“R.S. Boccock”

Boccock J.

Citation: 2013 TCC 284
Date: 20130913
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NAVEED BUTT,

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REASONS FOR JUDGMENT

Bocock J.

I. Introduction

[1] The Appellant, Naveed Butt, appeals the determination of the Minister of National Revenue (the “Minister”) that Mr. Butt was not an employee, but rather an independent contractor for the period of December 23, 2010 to April 15, 2011.

II. Facts

[2] Mr. Butt is a licensed truck driver. In response to an advertisement he appeared at a temporary worker placement agency named Help Unlimited on December 20, 2010. On that date he completed an employee application form, underwent appropriate interviews, safety orientation and was cleared for job placement. He started work a few days later on December 23, 2010.

[3] Help Unlimited itself hired workers as both employees and independent contractors for identical tasks. Contractors were required to use a numbered company as an intermediary between the worker and Help Unlimited. The intermediary numbered company was also required to register a business name and execute an indemnity undertaking in favour of Help Unlimited relating to tax remittances, vehicle damage deductibles and similar matters. This document also directed payment by Help Unlimited of any remuneration to the personal holding company of the independent contractor. As such, Help Unlimited required Mr. Butt to provide Articles of Incorporation for his personal company (the “Company”) before commencing remuneration as an independent contractor, evidence of its business registration and the executed undertaking.

[4] Mr. Butt suffered an injury in April of 2011 and was placed on lighter duties. When he fully returned to work, he requested to become an employee. With Help Unlimited’s consent he did just that.

III. Issues

[5] Although the main issue is whether Mr. Butt was employee, sub-issues based upon undisputed legal authority are as follows:

- 1) was the use of the intermediary company legally determinative of Mr. Butt’s status as an independent contractor;
- 2) what was the common intention of the parties; and
- 3) should the common intentions of the parties not be clear, what is the result from the review of the operative factors of the prevailing four-in-one test.

[6] Some additional facts before the Court are as follows:

- 1) Mr. Butt was the sole director and officer of his Company.
- 2) He held no other job.
- 3) He did execute the undertaking prior to commencing work.
- 4) Invoices were rendered with respect to pay by the Company.

[7] The initial application form executed by both employees and independent contractors of Help Unlimited was identical. The post-relationship confirmation of status letter received from Help Unlimited by Mr. Butt on November 22, 2011, confirms that he was employed by Help Unlimited notwithstanding the undertaking which identified his Company and his status as an independent contractor.

[8] With respect to the intentions of the parties it is noted by the Court that there were no complaints by the Appellant until mid-April as to his status of an independent contractor. The Appellant consented to the requests of Help Unlimited: incorporated a company, applied for a business information number and established a corporate bank account. The Company received the cheques or direct deposits on account of Mr. Butt's wages until the middle of April 2011.

[9] When Mr. Butt returned to work in his personal capacity in April 2011, Help Unlimited assented to his request to become an employee. TD-1 forms as an employee were completed in May of 2011. Throughout, the Workplace Safety and Insurance Board premiums were paid by Help Unlimited, the temporary agency provided no "supervision" of Mr. Butt's work and Mr. Butt initiated calls to Help Unlimited when he wanted work.

[10] At the Hearing, Mr. Butt testified on his own behalf, but did not attend after a break in order to make submissions by way of argument at the Hearing. He was given 14 additional days after the Hearing date to do so. He made no such submissions.

a) Use of Holding Company

[11] Mr. Butt's proposition is, with respect to the use of his Company, that he was compelled to execute the undertaking and did not properly understand the document. With this particular proposition the Court cannot agree. Mr. Butt's actions after December 20, 2010 and prior to his being paid for work were clear and definitive. He carried out all the business steps requested, readily accepted the additional amount paid as an independent contractor of one dollar per hour. It was only when he became injured, in mid-April 2011, that he determined his status was unacceptable.

b) Intention of the Parties

[12] As to whether this use of the Company as an intermediary is determinative, it is not uniformly determinative, but leads the Court to an examination of the intention of the parties. To examine the intention of the parties, one must examine the other documents, namely: the original application which seems to suggest that Mr. Butt was to be an employee, the confirmation letter, executed undertaking together with the steps taken of incorporating the Company, opening a Company bank account and the directing of payment of remuneration to his Company.

[13] Mr. Butt suggests that the intention may be clearly indicated from the original application and the post-relationship confirmation letter. Again, with this interpretation the Court cannot agree. Whatever intention existed prior to getting the job is superseded by the clear agreement between the parties at the time of commencing work whereby Mr. Butt would be an independent contractor. To further buttress this evidence of the meeting of the minds, it is clear that Mr. Butt undertook and executed without question the proactive and cumbersome steps to incorporate a holding company, have it licensed, obtain the business information number, a goods and services number and, ultimately, to direct cheques to the corporate bank account.

[14] It should be noted as well that the Court finds that it was of no consequence to Help Unlimited as to whether its workers were employed by it or retained as independent contractors. Help Unlimited accepted both interchangeably. Moreover, in this very case, it did both with the same person upon request of the same person. It is clear to the Court that had the intention of Mr. Butt been at the time he commenced work with Help Unlimited to be an employee then he certainly would have been established in that status. The clear undisputed evidence before the Court is that Help Unlimited had no preference one way or another. Accordingly, the testimony by its manager was on balance disinterested.

[15] As to Mr. Butt's motivation, it is likely that the additional one dollar per hour of remuneration may have played a factor, but again motivation is not to be commingled with intention. It is clear that the intention of the parties in December of 2010 and January, February and March of 2011 was that Mr. Butt be an independent contractor.

[16] Clear legal authority instructs that the insertion of a company where a contract would otherwise exist directly between an employer and an employee is sufficient evidence of a contract for service and not a contract of service (*TBT Personnel Services Inc. v Canada*, 2011 FCA 256, [2011] FCJ No. 1340). More simply put, the use of the personal company is evidence of intention to create an independent contractor relationship and not that of an employee.

[17] The facts before the Court are clear in respect of the existence of the Company, its having executed the undertaking and the clear steps taken by Mr. Butt in ensuring that he put in place that business structure for the purposes of becoming a worker of Help Unlimited. These facts provide a common intention between the parties that there would be a legal relationship, business structure and corporate intermediary for the purposes of establishing and supporting a relationship of independent contractor.

[18] For the reasons stated above, the intention of the parties was clear at the outset and there is no need to examine the four-in-one test which would otherwise be required under the authority of *TBT*. Simply, during the material time there was no direct contractual relationship between the person of Mr. Butt and Help Unlimited. This structure reflected the common intention of the parties prior to mid-April 2011 that Mr. Butt be, through his Company, an independent contractor.

[19] For these reasons the Appeal is dismissed.

Signed at Ottawa, Canada, this 13th day of September 2013.

“R.S. Boccock”

Boccock J.

CITATION: 2013 TCC 284

COURT FILE NOS.: 2012-3576(EI)
2012-3577(CPP)

STYLE OF CAUSE: NAVEED BUTT AND THE MINISTER OF
NATIONAL REVENUE AND 1383016
ONTARIO INC. O/A HELP UNLIMITED

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: July 2, 2013

REASONS FOR JUDGMENT BY: The Honourable Mr. Justice Randall S.
Bocock

DATE OF JUDGMENT: September 13, 2013

APPEARANCES:

For the Appellant:	The Appellant himself
Counsel for the Respondent:	Tony Cheung
Counsel for the Intervenor:	Inna Koldorf

COUNSEL OF RECORD:

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Firm:	
For the Respondent:	William F. Pentney Deputy Attorney General of Canada Ottawa, Canada