Date: 20080411

Docket: A-199-07

Citation: 2008 FCA 132

CORAM: **LÉTOURNEAU J.A.**
PELLETIER J.A.
RYER J.A.

BETWEEN:

NATIONAL CAPITAL OUTAOUAIS SKI TEAM

Appellant

and

THE MINISTER OF NATIONAL REVENUE
and JEAN BELANGER

Respondents

Heard at Ottawa, Ontario, on April 9, 2008.

Judgment delivered at Ottawa, Ontario, on April 11, 2008.

REASONS FOR JUDGMENT BY: LÉTOURNEAU J.A.

CONCURRED IN BY: PELLETIER J.A.
RYER J.A.

Date: 20080411

Docket: A-199-07

Citation: 2008 FCA 132

CORAM: **LÉTOURNEAU J.A.**
PELLETIER J.A.
RYER J.A.

BETWEEN:

NATIONAL CAPITAL OUTAOUAIS SKI TEAM

Appellant

and

THE MINISTER OF NATIONAL REVENUE
and JEAN BELANGER

Respondents

REASONS FOR JUDGMENT

LÉTOURNEAU J.A.

Issue

[1] This is an appeal against a decision of Justice Campbell from the Tax Court of Canada (the judge) who confirmed a ruling of the minister of National Revenue (minister) that respondent Jean Belanger was employed in insurable employment by the appellant under a contract of service during the period September 1, 2004 to December 13, 2005 pursuant to paragraph 5(1)(*a*) of the *Employment Insurance Act*, S.C. 1996, c. C-23.

[2] The judge also affirmed the minister's decision that Mr. Belanger was employed in a pensionable employment pursuant to paragraph 6(1)(*a*) of the *Canada Pension Plan*.

[3] The appeal before us bears on these two legal findings made by the judge. The appellant contends that the respondent Jean Belanger was a contractor and, therefore, the nature of the contract between the parties was a contract for services.

Analysis of the grounds of appeal

[4] The appellant submits that the judge erred in law in looking first to the reality of the relationship between the parties based on the facts rather than looking first to see whether the intent of the parties is consistent with that reality. I believe this complaint is not founded.

[5] More frequently than not, the intention of the parties is not stated in writing and has to be ascertained. Where that intention is stated but the subject of a controversy as in this case, the alleged legal nature of the parties' contractual relationship and the genuineness of the contract are put in issue. It is then quite proper, indeed necessary, to look at all the facts to see what legal relationship they reflect. This is precisely what the judge did in the present instance.

[6] In paragraph 40 of her reasons for judgment, the judge acknowledged the conflicting opinions as to the nature of the parties' relationship. It is in that context that she asserted that "courts must evaluate all of the relevant facts and circumstances to determine if these reflect the intention that the parties originally stated".

[7] At paragraph 17 of its memorandum of fact and law and the hearing before us, the appellant contended that the judge should have started her analysis of the parties' relationship with the presumption that Mr. Belanger was a contractor.

[8] It is misleading and confusing to invoke the existence of a presumption with respect to the intention of the parties to the contract because it calls for a rebuttal of that presumption by the minister. Indeed, this approach runs contrary to the way the law and the system operate in matters of insurability of employment.

[9] As a matter of fact, the minister's assessment of the overall legal relationship of the parties to a contract is based on assumptions of fact that the minister makes. The assumed facts are presumed to be true unless they are rebutted: see *Le Livreur Plus Inc. c. Le Ministre du Revenu national et Laganière*, 2004 FCA 68, paragraph 12. The burden of rebutting the assumptions and the presumption of truth or correctness which attaches to the assumed facts is on the opposing party, either the employer or the employee as the case may be: *ibidem*, *Dupuis c. Canada (Ministre du Revenu national – M.R.N.)*, 2003 FCA 335, at paragraph 4.

[10] In the case at bar, the minister made no exception. He assumed a number of facts which led him to conclude that Mr. Belanger was in an employer/employee relationship. He assumed as a fact that the parties were engaged in that type of relationship. The burden was on the appellant to rebut that assumption.

[11] On an appeal from the decision of the minister, the role of the judge is to verify the existence and accuracy of all the facts and the assessment that the minister made of them with a view to determining if the decision of the minister still appears reasonable: *ibidem*, at paragraph 13. The judge cannot be blamed for having done that in the present instance and, as she said quoting our Court in *Combined Insurance Company of America v. M.N.R. and Drapeau*, 2007 FCA 60, at paragraph 35, "there is no predetermined way of applying the relevant factors and their importance will depend on the circumstances and the particular facts of the case".

[12] The appellant also contends that the judge erred in law in focusing its analysis on the four factors test set out in *Wiebe Door Services Ltd. v. M.N.R.*, [1986] 3 F.C. 553. It submits that its situation is similar to that which prevailed in the case of *Royal Winnipeg Ballet v. Minister of National Revenue*, 2006 FCA 87 (*RWB*) in which this Court, notwithstanding an extensive degree of control over the dancers, characterized the relationship between the dancers and the Royal Winnipeg Ballet as one of independent contractor. I disagree with the appellant.

[13] In the *RWB* case, there was an umbrella agreement between the parties as to their legal status and relationship. There was uncontradicted evidence that the parties shared a common understanding that the dancers were self-employed and not employees. Unlike our case, there was no *lis* between the parties with respect to their relationships.

[14] In addition, the notion of control in the *RWB* case had a different tinge. It was "needed to stage a series of ballets over a well planned season of performances": *ibidem*, at paragraph 66. In other words, the control aimed at orchestrating a choreographic performance. This is not the case with Mr. Belanger.

[15] The appellant argues as a fourth ground of appeal that the judge ignored some evidence which, it says, would have tipped the scale in favour of leaving unquestioned the contractor relationship which existed between the parties.

[16] There is no need to review the specific allegations made by the appellant in this respect because either they bear on issues which, for the most part, have been considered by the judge or were not sufficiently material to overcome the conclusion that she reached.

[17] Finally, the appellant submitted that it is a not-for-profit organization and not a business *per se*. It is, it says, merely a framework which gives athletes an opportunity to strive towards national team status. While that may be how the appellant perceives itself, the fact remains that it is a corporation which, legally, can be an employer within the meaning of the *Employment Insurance Act* and the *Canada Pension Plan.* This is what the minister found and the judge affirmed.

[18] After a careful analysis of the impugned decision and the written and oral submissions of the parties, I am satisfied that the judge correctly ascertained the facts and the law applicable in these matters. I am also satisfied that she made no reviewable errors when she applied the law to the facts.

[19] For these reasons, I would dismiss the appeal without costs. As the appellant did not seek costs in case of a successful appeal, I think it is only fair that it should not be made liable to pay them if it lost the appeal.

"Gilles Létourneau"
J.A.

"I agree
J.D. Denis Pelletier J.A."

"I agree
C. Michael Ryer J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-199-07
STYLE OF CAUSE:	NATIONAL CAPITAL OUTAOUAIS SKI TEAM v. THE MINISTER OF NATIONAL REVENUE and JEAN BELANGER
PLACE OF HEARING:	Ottawa, Ontario
DATE OF HEARING:	April 9, 2008
REASONS FOR JUDGMENT BY:	LÉTOURNEAU J.A.
CONCURRED IN BY:	PELLETIER J.A. RYER J.A.
DATED:	April 11, 2008

APPEARANCES:

Catherine Coulter	FOR THE APPELLANT
Geneviève Léveillé Catherine Letellier de St-Just	FOR THE RESPONDENTS

SOLICITORS OF RECORD:

Fraser Milner Casgrain Ottawa, Ontario	FOR THE APPELLANT
John H. Sims, Q.C. Deputy Attorney General of Canada	FOR THE RESPONDENTS