Federal Court of Appeal  Cour d'appel fédérale

Date: 20201222

Docket: A-144-19

Citation: 2020 FCA 219

CORAM: **RENNIE J.A.**
DE MONTIGNY J.A.
GLEASON J.A.

BETWEEN:

EUROPEAN STAFFING INC.

Appellant

and

THE MINISTER OF NATIONAL REVENUE

Respondent

Heard by online video conference hosted by the Registry on December 17, 2020.

Judgment delivered at Ottawa, Ontario, on December 22, 2020.

REASONS FOR JUDGMENT BY: RENNIE J.A.

CONCURRED IN BY: DE MONTIGNY J.A.
GLEASON J.A.

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REASONS FOR JUDGMENT

RENNIE J.A.

[1] The appellant appeals from the judgment of the Tax Court of Canada (2019 TCC 59, *per* Hogan J.), dismissing appeals from determinations by the Minister of National Revenue. The Minister determined that the appellant was a placement agency and had placed individuals in pensionable and insurable employment within the contemplation of the *Canada Pension Plan*, R.S.C. 1985, c. C-8 (CPP) and the *Employment Insurance Act*, S.C. 1996, c. 23, and their

corresponding regulations (para. 6(g) of the *Employment Insurance Regulations*, S.O.R./96-332 and s. 34(1) of the *Canada Pension Plan Regulations*, C.R.C., c. 385).

[2] The appellant, European Staffing, is in the business of providing specialized workers to clients. As described by the judge, the appellant's business is exclusively to connect skilled workers with businesses in need of specialized services. In the years in question, 2013 and 2014, the appellant had placed 45 and 51 workers in ten different occupational fields.

[3] The first question before the judge was whether the appellant was a placement agency within the meaning of the Acts. As the *Employment Insurance Act* and Regulations themselves contain no definition of "placement agency", the judge turned to precedent and the definition found in the CPP Regulations (*Wholistic Child and Family Services Inc. v. M.N.R.*, 2016 TCC 34; *Carver PA Corporation. v. M.N.R.*, 2013 TCC 125). This definition, found in subsection 34(2) of the CPP Regulations, provides:

34(2) For the purposes of subsection (1), placement or employment agency includes any person or organization that is engaged in the business of placing individuals in employment or for performance of services or of securing employment for individuals for a fee, reward or other remuneration.	34(2) Une agence de placement comprend toute personne ou organisme s'occupant de placer des personnes dans des emplois, de fournir les services de personnes ou de trouver des emplois pour des personnes moyennant des honoraires, récompenses ou autres formes de rémunération.

[4] In considering this question, the Tax Court judge correctly observed that the focus of the inquiry is on the nature of the service provided and who is under an obligation to provide it. If the entity alleged to be the placement agency is under an obligation to provide a service over and

above the provision of personnel, it is not placing people, but rather performing that service and is not covered by the Regulations (*S K Manpower Ltd. v. M.N.R.*, 2010 TCC 584 at para. 40).

[5] With this established, the judge considered the appellant's argument that it provided services beyond simply the placement of workers. He found that it was "unclear" as to what additional services European Staffing provided and noted there was no documentary evidence of any services beyond the placement of the workers. He noted that there was "minimal corroboration" to support the testimony of the appellant's owner that he regularly visited the workplaces and inspected working conditions; to the contrary, two witnesses testified that they never saw him on site. The judge concluded that the appellant provided no services to its clients beyond providing the workers (Reasons at para. 68).

[6] Turning to the second question, the judge applied the decision of this Court in *1392644 Ontario Inc. (Connor Homes) v. Canada (National Revenue)*, 2013 FCA 85 (*Connor Homes*).

[7] *Connor Homes* imposes both a subjective and objective test. Although the Court is to look at the intention of the parties, and whether they actually thought they were in an employment relationship or considered themselves to be independent contractors, the inquiry does not end there. The Court must also look at the overall circumstances through an objective lens. That inquiry is informed by the four objective criteria set forth in *Wiebe Door Services Ltd. v. Canada (Minister of National Revenue)*, [1986] 3 F.C. 553 (*Wiebe Door*) – the degree of control exercised over the worker, the ownership of tools, chance of profit and risk of loss and

the integration of the workers into the employer's business. There is no dispute that the judge correctly identified the governing legal tests.

[8] The judge heard testimony from eight witnesses: the owner of the corporate appellant, five workers, and two Canada Revenue Agency officials. These officials testified as to their interviews with 16 workers, the income tax returns of the 35 other workers and correspondence with four others (Reasons at paras. 23, 26). The documentary evidence before the judge included invoices and time sheets for 22 workers.

[9] Insofar as the subjective intention of the parties was concerned, the judge concluded that it was far from clear that the workers agreed to provide their services as independent contractors (Reasons at para. 45).

[10] Looking at the situation objectively, the judge concluded, based on the *Wiebe Door* criteria, that the reality was that the workers were not independent contractors but rather were placed into contracts of service. European Staffing's clients exercised significant control and supervision over the workers. The criteria of ownership of tools, chance of profit and risk of loss and degree of integration with the client's workforce all pointed to an employment relationship. The judge found that the workers were paid an hourly wage based on a schedule set by the appellant's clients, and not by the appellant. He found that the workers did not, generally, provide their own tools (Reasons at paras. 46, 55 and 58). To the extent that there was some evidence by two witnesses indicating that they would not, at times, show up for work, either for personal reasons or to take on other jobs, the judge concluded that this was evidence

characteristic of short term, casual employment. It did not suggest that the workers controlled their own hours as would an independent contractor (Reasons at para. 47).

[11] In reaching these conclusions, the judge had the benefit of hearing and observing the demeanour of the witnesses. In this regard, he found the evidence of the appellant's owner to be "self serving and rehearsed", and that the answers to direct questions were vague if not evasive. He also identified discrepancies between the appellant's testimony and that of some of the appellant's clients, whose testimony he found more compelling.

[12] As noted, the appellant does not dispute that the judge considered the correct legal principles applicable to the questions before him; the two-step analysis in *Connor Homes*, and the four criteria in *Wiebe Door*. Instead, the thrust of the appellant's argument is that the judge erred in his application of the facts to the law. It is well established that an appellant seeking to overturn findings of fact or mixed findings of fact and law, as is the case here, must establish a palpable and over-riding error (see, *e.g.*, *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235).

[13] A palpable error is one that is obvious; an over-riding error is one that may affect the outcome of the case (see *Canada v. South Yukon Forest Corporation*, 2012 FCA 165 at para. 46; *Benhaim v. St-Germain*, 2016 SCC 48, [2016] 2 S.C.R. 352 at para 38). No such error has been identified in the judge's assessment of the evidence and the application of the legal principles. The judge's reasons for accepting the evidence of some witnesses and rejecting that of the

appellant's, reflecting as they do his assessment of the credibility and probative value of the testimony documents before him, is unassailable.

[14] The appellant next contends that the judge erred in his understanding and application of the law with respect to the onus on a taxpayer to demolish the Minister's assumptions. He points to the fact that there was some evidence before the Court that was not contradicted.

[15] In order to demolish the Minister's assumptions, the taxpayer must " […] establish facts upon which it can be affirmatively asserted that the assessment was not authorized by the taxing statute, or which bring the matter into such a state of doubt that, on the principles alluded to, the liability of the appellant must be negatived" (*Hickman Motors Ltd. v. Canada*, [1997] 2 S.C.R. 336). Thus, the onus is on the taxpayer to establish, on a balance of probabilities, the facts that demolish the Minister's assumptions (*Sarmadi v. Canada*, 2017 FCA 131 at para. 46; *Eisbrenner v. Canada*, 2020 FCA 93 at paras. 24-52; *Van Steenis v. Canada*, 2019 FCA 107 at para. 13; see also *F.H. v. McDougall*, 2008 SCC 53, [2008] 3 S.C.R. 41).

[16] The appellant points to the fact that there was some evidence from the owner and one of the workers which supported the view that it was not a placement agency. The existence, however, of some evidence is insufficient; it must also be credible and sufficiently convincing on a balance of probabilities. The judge concluded that there was no such evidence before him. His observations that there was no corroborating evidence, was simply an observation of what would be required to confirm evidence that he considered unconvincing. The appellant bore the onus to demolish the Minister's assumption with respect to all the workers subject to the determinations.

This it did not do. An assumption cannot be demolished on “some” evidence, or evidence which is not credible.

[17] Nor was there any error by the judge in applying the results of his analysis to all of the workers subject to the determinations. The appellant chose to call only two workers, whose testimony the judge considered. If the appellant wished to displace the Minister’s assumption based on the circumstances of other workers, the burden to do so was on the appellant, not the Minister. In sum, no error of law has been identified in the judge’s approach to the onus of proof.

[18] I would therefore dismiss the appeal with costs.

"Donald J. Rennie"
J.A.

“I agree.
Yves de Montigny J.A.”

“I agree.
Mary J.L. Gleason J.A.”

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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APPEARANCES:

Duane R. Milot Kris Gurprasad	FOR THE APPELLANT
Sandra K.S. Tsui Pallavi Gotla	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Milot Law Toronto, Ontario	FOR THE APPELLANT
Nathalie G. Drouin Deputy Attorney General of Canada	FOR THE RESPONDENT