

Docket: 2014-3338(CPP)

BETWEEN:

CHRISTINA MENOUDAKIS,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent,

and

CAITLIN NUGENT,

Intervenor.

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Appeal heard on September 18, 2015, at Toronto, Ontario

Before: The Honourable Justice Valerie Miller

Appearances:

|                             |                 |
|-----------------------------|-----------------|
| Agent for the Appellant:    | John Menoudakis |
| Counsel for the Respondent: | Kaylee Silver   |
| For the Intervenor:         | No Appearance   |

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**JUDGMENT**

The appeal from the decision made under the *Canada Pension Plan* dated June 20, 2014 is dismissed and the decision of the Minister of National Revenue is confirmed.

Signed at Ottawa, Canada, this 23<sup>rd</sup> day of October 2015.

“V.A. Miller”

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V.A. Miller J.

Docket: 2014-3339(EI)

BETWEEN:

CHRISTINA MENOUDAKIS,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent,

and

CAITLIN NUGENT,

Intervenor.

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Appeal heard on September 18, 2015, at Toronto, Ontario

Before: The Honourable Justice Valerie Miller

Appearances:

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|-----------------------------|-----------------|
| Agent for the Appellant:    | John Menoudakis |
| Counsel for the Respondent: | Kaylee Silver   |
| For the Intervenor:         | No Appearance   |

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**JUDGMENT**

The appeal from the decision made under the *Employment Insurance Act* dated June 20, 2014 is dismissed and the decision of the Minister of National Revenue is confirmed.

Signed at Ottawa, Canada, this 23<sup>rd</sup> day of October 2015.

“V.A. Miller”

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V.A. Miller J.

Citation: 2015TCC248  
Date: 20151023  
Docket: 2014-3338(CPP)  
2014-3339(EI)

BETWEEN:

CHRISTINA MENOUDAKIS,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent,

and

CAITLIN NUGENT,

Intervenor.

### **REASONS FOR JUDGMENT**

V.A. Miller J.

[1] Christina Menoudakis and John Menoudakis operated a music school as sole proprietors from June 2006 until June 2013 under the name “Rockstar Music School & Concert Hall” (“Rockstar”) in Bolton, Ontario. This appeal concerns five music teachers (the “Teachers”) who were hired to teach at Rockstar. The Minister of National Revenue (the “Minister”) reviewed the terms of the Teachers’ engagement and determined that they were employed under a contract of service. In other words, the Minister found that the Teachers were employees while engaged by Ms. Menoudakis. As a result, it was determined that their employment was both insurable under the *Employment Insurance Act* and pensionable under the *Canada Pension Plan*.

[2] Christina Menoudakis has appealed those determinations. It is her position that the Teachers worked for her as independent contractors.

[3] The Teachers who were affected by the Minister’s determinations were:

| Teacher           | Period                             | Instrument Taught |
|-------------------|------------------------------------|-------------------|
| Ayesha Barboza    | April 1, 2012 to June 30, 2013     | Piano and voice   |
| Joshua Marrocco   | January 1, 2012 to June 30, 2013   | Guitar            |
| Ginevra Mormile   | January 1, 2012 to June 30, 2013   | Piano             |
| Caitlin Nugent    | January 1, 2012 to May 31, 2012    | Piano and voice   |
| Daniel Piatkowski | September 1, 2012 to June 30, 2013 | Guitar            |

[4] Although Caitlin Nugent intervened in the proceedings, she did not appear at the hearing. The witnesses at the hearing were:

- a) John Menoudakis, the Appellant's spouse, who represented the Appellant and testified on her behalf. For the most part, he was a credible witness. However, where his evidence conflicted with that of the other two witnesses, I have accepted the evidence of the other witnesses.
- b) Both Ayesha Barboza and Daniel Piatkowski gave evidence under subpoena from the Respondent. Ayesha Barboza was a voice and piano teacher at Rockstar. During the period she worked at Rockstar, she was studying music at the University of Toronto. I found her to be credible.
- c) Daniel Piatkowski was a guitar teacher at Rockstar. He received his music training at Mohawk University and the Royal Conservatory of Music. During the period he worked at Rockstar, he had two other jobs - one of which was music related. I found that Mr. Piatkowski was credible.

[5] Both Christina Menoudakis and her spouse John Menoudakis controlled the day to day business of Rockstar and made all the major business decisions. When I wish to refer to both of them, I will refer to them as Rockstar.

[6] Rockstar operated a music school which provided private music lessons during the school year. It catered to school children and its business hours were Monday to Friday, 3:00 p.m. to 9:00 p.m. It closed during the summer.

[7] The school was located in a commercial building and it consisted of a large room with a stage and four small classrooms. Each classroom had a window which looked out into the large room and through which parents could watch their children being taught.

Law

[8] In order to determine whether the Teachers were engaged as employees or independent contractors, the essential question that must be answered is whether the Teachers were performing their services as persons in business on their own account: *671122 Ontario Ltd v Sagaz Industries Canada Inc* [2001] 2 SCR 983 at paragraph 47.

[9] In *1392644 Ontario Inc v Minister of National Revenue*, 2013 FCA 85 (“Connor Homes”), the Federal Court of Appeal stated that there is a two-step test which is to be used when deciding this question. Under the first-step, the Court must determine the subjective intent of each party to the work relationship. The second step of the test is to analyze the work relationship between the Teachers and Rockstar with a view to ascertaining whether their working relationship was consistent with their intention. The factors from *Wiebe Door Services Ltd v MNR*, [1986] 3 FC 553 (FCA) are to be used in this step of the test. Those factors include control, ownership of tools, chance of profit and risk of loss.

### Intention

[10] John Menoudakis testified that it was Rockstar’s intention to hire the Teachers as independent contractors and the Teachers had been informed of this intention. It was his evidence that he told each Teacher that they were each responsible for filing their own business name with the government. He stated that each Teacher agreed and signed a “Music Teacher Contract” (exhibit A-1) (the “Contract”) with Rockstar. Exhibit A-1 was signed by Caitlin Nugent.

[11] However, contrary to Mr. Menoudakis’ evidence, it is my opinion that the Contract was not an agreement that the Teacher was working with Rockstar as an independent contractor. Rather it was a non-competition agreement. The Teachers who may have signed the Contract agreed that they would not contact any of Rockstar’s clients with the intention of soliciting their business.

[12] Both Ayesha Barboza and Daniel Piatkowski stated that they intended to work for Rockstar as employees. Both witnesses stated that they did not sign and had never seen the Contract. They each testified that they did not register their own businesses nor did John Menoudakis tell them that they should register their own businesses. I believe both Ayesha Barboza and Daniel Piatkowski.

[13] In the Reply to Notice of Appeal, the Minister assumed that Joshua Marrocco was Christina Menoudakis’ nephew and that he considered himself to be self-employed. John Menoudakis agreed with these assumptions of fact.

[14] The Minister also assumed that Caitlin Nugent and Ginevra Mormile considered themselves to be employees. Rockstar did not bring evidence to rebut these assumptions.

[15] The majority of the Teachers and Rockstar did not share the same intention with respect to their work relationship.

## Second Step

### A. Control

[16] Mr. Menoudakis testified that neither he nor the Appellant supervised the Teachers. They didn't tell the Teachers how to teach. However, the test is not whether they supervised the Teachers but whether they had the right to do so: *Gagnon v Minister of National Revenue*, 2007 FCA 33 at paragraph 7. Rockstar did not have to instruct the Teachers on how to teach because it only hired Teachers who were proficient in music and in playing certain instruments. They required no supervision in how to perform their duties.

[17] The students were Rockstar's students. Rockstar assigned the students to the Teachers and made the work schedule for the Teachers at a time that the Teachers were available. If students had to reschedule a lesson, they contacted Rockstar to arrange the new schedule. There was evidence that Mr. Menoudakis told the Teachers to have more interaction with the parents of the students with a view to "selling" the lessons to them. I have inferred from this evidence that Mr. Menoudakis was asking the Teachers to promote Rockstar's business.

[18] Either the Appellant or Mr. Menoudakis was always present when the school was open. They recorded when the Teachers were present and their hours of work. The Teachers were required to inform Rockstar if they were going to be absent for a scheduled class. They could not send a replacement teacher. Ayesha Barboza stated that she never missed a scheduled class. However, there was one occasion when she called Mr. Menoudakis to see if she could miss a dress rehearsal. Mr. Menoudakis refused her request; he told her that it would be inconvenient because there were numerous students.

[19] Generally, Rockstar required the Teachers to teach "rock" music and to prepare the students for the year-end concert. Mr. Menoudakis stated that the Teachers were supposed to teach music which accorded with the name of the

school. However, if a student wanted to learn another style of music, the Teacher could teach it.

[20] I have concluded that Rockstar exercised control over the Teachers. It set their work schedules albeit at a time they were available. Rockstar generally told the Teachers what style of music to teach. The Teachers had to get permission to be absent and could not send a replacement. The evidence showed that even when a Teacher requested time off Mr. Menoudakis exercised the right to refuse the request. Mr. Menoudakis even instructed the Teachers on how they were to interact with the students' parents.

[21] It is my view that the control factor indicates that the Teachers were employees.

#### B. Ownership of Tools

[22] Rockstar provided the classrooms, pianos, keyboards, microphones, music books, amplifiers and music stands. The Teachers who taught guitar and voice used their own instruments. Mr. Menoudakis testified that many of the Teachers used their own laptops to obtain songs. However, this was not a requirement of their work relationship. It was a choice that the individual teachers made.

[23] The test for tools in the circumstances of this case is whether the Teachers were required to supply the tools necessary to operate a business of supplying music lessons to a school: *Lippert Music Centre Inc v The Minister of National Revenue*, 2014 TCC 170 at paragraph 23. The evidence showed that the Teachers were not required to provide their own instruments or sheet music or laptops. Mr. Menoudakis stated that he plays the guitar and most guitar instructors prefer to use their own guitars. It was not shown that the guitar teachers were required to use their own instruments.

[24] It is my view that ownership of tools factor supports the conclusion that the Teachers were employees.

C. Chance of Profit

[25] The Teachers were required to provide their services personally. They could not hire an assistant or replacement and thus subcontract their work. They were paid \$7.50 per half-hour session. Their rate of pay was not negotiated but was determined by Rockstar. They were paid every two weeks by cheque.

[26] Rockstar determined the number of students which would be assigned to each Teacher. It is clear that the Teachers had absolutely no chance of profit in the entrepreneurial sense. They were paid a flat fee per half hour. The Teachers had no client base. The students and their parents were the clients of Rockstar.

[27] This test also supports the intention of the majority of the Teachers to be employees.

D. Risk of Loss

[28] The Teachers did not invest in the business of supplying music lessons. Those Teachers who used Rockstar's instruments had no financial risk whereas those who used their own instruments had a minimal financial risk. It was limited to the cost of their guitar and laptop.

[29] All things considered, I conclude that the facts with respect to financial risk are more consistent with the Teachers being employees than being independent contractors.

[30] It is my view that an analysis of the *Wiebe Door* factors supports the Teachers' intention to be employees. The Appellant's intention that the Teachers were independent contractors is not consistent with the evidence presented at the hearing.

[31] For these reasons, I dismiss the appeals.

Signed at Ottawa, Canada, this 23<sup>rd</sup> day of October 2015.

“V.A. Miller”

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V.A. Miller J.



CITATION: 2015TCC248  
COURT FILE NO.: 2014-3338(CPP); 2014-3339(EI)  
STYLE OF CAUSE: CHRISTINA MENOUDAKIS AND  
M.N.R. AND CAITLIN NUGENT  
PLACE OF HEARING: Toronto, Ontario  
DATE OF HEARING: September 18, 2015  
REASONS FOR JUDGMENT BY: The Honourable Justice Valerie Miller  
DATE OF JUDGMENT: October 23, 2015

APPEARANCES:

|                             |                 |
|-----------------------------|-----------------|
| Agent for the Appellant:    | John Menoudakis |
| Counsel for the Respondent: | Kaylee Silver   |
| For the Intervenor:         | No Appearance   |

COUNSEL OF RECORD:

For the Appellant:

Name:

Firm:

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