Dockets: 2014-4621(EI)
2015-282(CPP)

BETWEEN:

APEX LANGUAGE AND CAREER INC.,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent,

Appeal heard on September 25, 2015 at Halifax, Nova Scotia.

Before: The Honourable Justice Réal Favreau

Appearances:

For the Appellant:	Srini Pillay
Counsel for the Respondent:	Tokunbo Omisade

JUDGMENT

The appeal from the Minister of National Revenue's decision dated October 1, 2014 regarding the pensionability and insurability of the appellant's workers by virtue of paragraph 6(1)(*a*) of the *Canada Pension Plan*, paragraph 5(1)(*a*) of the *Employment Insurance Act* and subsection 2(1) of the *Insurable Earnings and Collection Premiums Regulations*, is dismissed in accordance with the attached reasons for judgment.

Signed at Ottawa, Canada, this 5th day of May 2016.

"Réal Favreau"

Favreau J.

Citation: 2016 TCC 109
Date: 20160505
Dockets: 2014-4621(EI)
2015-282(CPP)

BETWEEN:

APEX LANGUAGE AND CAREER INC.,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent,

REASONS FOR JUDGMENT

Favreau J.

[1] This is an appeal from the decision of the Minister of National Revenue (the "Minister") dated October 1, 2014 regarding the pensionability and insurability of the following 13 workers of the appellant (the "Workers"):

1. Matthew Creelman
2. Cynthia Goguen
3. Michelle D. Juurlink
4. Chris Moule
5. Sebastian O'Malley
6. Amanda Thalmann
7. Daniel F. Thompson
8. Erin Andrews
9. Daniel Borg
10. Emily Walsh
11. Michael Landry
12. Lizzie Bolton
13. James Skinner

Background Information

[2] The Employer Services Section of the Canada Revenue Agency (the "CRA") requested rulings on the pensionablity and insurability of the Workers' and Yoko Irisawa's employment with the appellant, that is a total of 14 workers.

[3] The Canada Pension Plan/Employment Insurance (the "CPP/EI") Rulings division decided on the insurability of a sampling of the following four workers' (the "Ruling Workers") employment for the following periods (the "Ruling Periods"):

RULING WORKERS	EMPLOYMENT	RULING PERIODS
Erin Andrews	teacher	Jan. 1, 2012 to Dec. 31, 2012
Amanda Thalmann	teacher	Apr. 23, 2012 to Dec.31, 2012
Michelle Juurlink	teacher	Apr. 23, 2012 to May 25, 2012
Yoko Irisawa	receptionist	Jan. 3, 2012 to Dec. 31, 2012

[4] By letters dated May 22, 2014, May 27, 2014, May 28, 2014, and May 30, 2014, the CPP/EI Rulings division notified the appellant and the Ruling Workers that it had been determined that they were employees of the appellant and their respective employment was pensionable within the meaning of paragraph 6(1)(*a*) of the *Canada Pension Plan* (the "*CPP* ") and insurable within the meaning of paragraph 5(1)(*a*) of the *Employment Insurance Act* (the "*EIA*") during the Ruling Periods.

[5] By letter dated June 20, 2014, the appellant filed an appeal to the Minister:

i. agreeing with the ruling of Yoko Irisawa;

ii. disagreeing with the ruling of Michelle Juurlink;

iii. disagreeing with the ruling of Erin Andrews ("Erin") in part;

- disagreeing that Erin was under a contract of service from January 1, 2012 to April 20, 2012; and
- agreeing that Erin was under a contract of service from April 21, 2012 to December 31, 2012; and

iv. disagreeing with the ruling of Amanda Thalmann ("Amanda") in part:

- disagreeing that Amanda was under a contract of service from April 23, 2012 to August 31, 2012; and
- agreeing that Amanda was under a contract of service from September 1, 2012 to December 31, 2012.

[6] As a result of the rulings on the employment status of the Ruling Workers, a Trust Accounts Examination (the "Trust Exam") was requested on the appellant's payroll records.

[7] As a result of the Trust Exam, the Minister assessed the appellant for CPP contributions of $8,432.88 payable on pensionable earnings and EI premiums of $5,361.16, payable on insurable earnings, both paid to the Workers and Yoko Irisawa for the 2012 taxation year.

[8] The appellant was notified of the assessment by the Notice of Assessment dated June 5, 2014 (the "Assessment").

[9] By letter dated July 11, 2014, the appellant objected the Assessment to the Minister, for all the assessed Workers except for Yoko Irisawa, on the grounds that the Workers had performed their services as independent contractors under contracts for services.

[10] By letters dated October 1, 2014, the Minister informed the appellant and the Workers that the rulings and Assessment under objection are confirmed, because the Workers were employed in pensionable and insurable employment by virtue of paragraph 6(1)(*a*) of the *CPP*, paragraph 5(1)(*a*) of the *EIA* and subsection 2(1) of the *Insurable Employment and Collection of Premiums Regulations* (the "*Regulations*").

[11] In determining that the Workers were engaged in pensionable and insurable employment while working for the appellant, the Minister relied on the following assumptions of fact:

The Appellant

(a) the Appellant operated a second language school in the province of Nova Scotia;

(b) the Appellant incorporated on January 26, 2004;

(c) the Appellant's T2 reporting to the Agency indicated Haiyan Sun owned 49% of shares, Ruiyan Yang owned 25% of shares, and Sandy Ho owned the remaining 25% of shares:

The Workers

(d) the Appellant engaged the Workers as English language teachers;

(e) the Appellant engaged all the Workers except Amanda (*sic*) under verbal contracts entered into in the province of Nova Scotia;

(f) the Appellant engaged Amanda under a written contract, entered into in the province of Nova Scotia, for the period from April 23, 2012 to June 15, 2012;

(g) the Appellant continued to engage Amanda after June 15, 2012 under substantially the same terms and conditions established in the written contract;

(h) the Workers' duties included teaching scheduled classes, lesson preparation, student evaluations, attending student conferences, and student/staff interactions;

(i) the Workers performed their duties at the Appellant's business location at 156 Dresden Row, Suite 800, Halifax, Nova Scotia.

(j) the Workers' work schedules were determined by the Appellant;

(k) the Workers' actual work hours were recorded by the Appellant;

(l) the Workers' required the Appellant's permission in order to take time off from work;

(m) the Appellant determined the Workers' class curriculums;

(n) the Appellant determined the Workers' deadlines;

(o) the Workers' were required to seek approval from the Appellant prior to performing certain actions, such as organizing field trips;

(p) the Workers were required to attend meetings;

(q) the Workers were required to submit reports to the Appellant;

(r) the Appellant observed the Workers when they performed their duties;

(s) the Workers could tutor students, in addition to teaching their classes, but only under arrangements by the Appellant;

(t) the Appellant determined the Workers' rates of pay;

(u) the Workers were paid $22.00 per hour, with the exception of Daniel Thompson, who was paid $23.00 per hour;

(v) the Workers were paid for their teaching hours in class and for tutoring hours;

(w) some of the Workers were paid an additional 10% of teaching hours as remuneration for the duties performed outside of teaching hours, such as grading student work;

(x) the Workers were paid bi-weekly by cheque;

(y) the Appellant paid the Workers even when no students attended a scheduled class;

(z) the Workers did not receive any employment benefits or vacation leave;

(aa) the Appellant provided the major tools and equipment necessary for the Workers to complete their duties;

(bb) some of the Workers provided some inexpensive supplies, such as prizes for classroom activities, but it was not a requirement;

(cc) the Workers did not incur any fixed or ongoing expenses in order to complete their duties;

(dd) the Workers did not have the ability to subcontract their work or hire an assistant;

(ee) the Appellant hired and paid for replacements when the Workers could not perform their duties;

(ff) the Workers did not invoice the Appellant;

(gg) the Workers did not charge the Appellant for Harmonized Sales Tax on payments for their services;

(hh) the Workers did not have registered business accounts with the Agency during the Period;

(ii) the Appellant did not make deductions for CPP contributions, EI premiums, or income tax (the "employment deductions") on payments made to the Workers, with the exception of Amanda and Erin, during the Period;

(jj) the Appellant did not make employment deductions on payments made to Amanda for the period from April 23, 2012 to August 31, 2012;

(kk) the Appellant did not make employment deductions on payments made to Amanda for the period from September 1, 2012 to December 31, 2012;

(ll) the Appellant submitted a T4 slip to the Agency which reported Amanda's earnings and employment deductions for the period from September 1, 2012 to December 31, 2012;

(mm) the Appellant engaged Amanda under substantially the same terms and conditions in the period from April 23, 2012 to August 31, 2012 and in the period from September 1, 2012 to December 31, 2012;

(nn) the Appellant did not make employment deductions on payments made to Erin for the period from January 1, 2012 to April 20, 2012;

(oo) the Appellant did make employment deductions on payments made to Erin for the period from April 21, 2012 to December 31, 2012;

(pp) the Appellant submitted a T4 slip to the Agency which reported Erin's earnings and employment deductions for the period from April 21, 2012 to December 31, 2012;

(qq) the Appellant engaged Erin under substantially the same terms and conditions in the period from January 1, 2012 to April 20, 2012 and in the period from April 21, 2012 to December 31, 2012;

(rr) the Appellant's intent was that:

i. the Workers, except for Amanda and Erin, were independent contractors during the Period;

ii. Amanda and Erin were independent contractors for the periods from April 23, 2012 to August 31, 2012 and January 1, 2012 to April 20, 2012 respectively; and

iii. Amanda and Erin were employees for the periods from September 1, 2012 to December 31, 2012 and April 21, 2012 to December 31, 2012 respectively; and

(ss) the intent of the majority of the Workers were that they were employees.

Other Material Facts

[12] The Minister relies on the following additional assumption of fact:

(a) the Appellant did not report the Workers' income on T4A slips during the Period.

[13] Mr. Pillay testified at the hearing. He denied paragraphs (c), (i), (j), (l), (m), (n), (o), (r), (s), (t), (y), (aa), (dd) (mm), (qq) and (ss) of the Reply to the Notice of Appeal.

[14] He explained that the appellant had two campuses in 2012 and employed up to twenty teachers where between 60 to 80 students received English lessons.

[15] Mr. Pillay had the responsibility to interview the candidates who applied for a teaching position. He said that he interviewed all the Workers, except for Sebastian O'Malley, Emily Walsh and James Skinner who were already attending the school.

[16] He explained that the successful candidates were offered two types of contract: a teaching sub-contract or an employment contract. A sample of each contract was filed as Exhibit A-1. All Workers except for Erin Andrews, had signed a written contract but the appellant did not keep a copy of any of the contracts. According to Mr. Pillay, the practice of the appellant was to offer a first contract for one to two months which can be renewed for two other successive periods. After approximately six months of satisfactory services as an English language instructor, the workers were made an offer to become employees of the appellant with employment benefits such as dental, health and life insurance after the six-month waiting period.

[17] From the list of Workers, only Amanda Thalmann became an employee after six months of employment with the appellant. Erin Andrews also became an employee but after a few years of employment. James Skinner remained a contractor for more than two years. All the other Workers were on a part-time basis and/or worked for a term of six months or less.

[18] Mr. Pillay explained that no exclusivity was required from the Workers. In case of sickness, the Workers were not paid and the appellant had to find a replacement. The appellant provided the teaching materials and the program's

guidelines. Complaints from students or parents were dealt with by the appellant. The Workers were required to fill daily timesheets and were subject to an evaluation by the students every two months. The contracts signed by the Workers could be terminated by either party on a two-week notice.

[19] Two of the Workers, Erin Andrews and Michelle Juurlink, testified at the hearing. Ms. Andrews worked for the appellant from the fall of 2011 to June 2014. She does not remember if she signed a contract when she started working for the appellant and she did not have it with her. She stated that she had been hired on probation for six months during which time, she was not entitled to any dental or health care benefits and there was no payroll deduction from her remuneration. She does not recall if she signed another contract after her initial six-month contract. She was teaching English grammar from level 1 to 3, according to the needs of the appellant. The classes were assigned by the appellant. The teaching materials were provided by the appellant. Ms. Andrews was on duty from 9 a.m. to 4 p.m. with one hour for her lunch break and a 15-minute break in the morning and in the afternoon. She was paid bi-weekly by cheque at a rate of $22 per hour. She stated that her remuneration was determined by the appellant without any negotiation. Her working schedule as well as the dates for examination were determined by the appellant. She prepared the final examination at the end of a course and was responsible for marking the various examinations. She had a desk and a chair in the staff room. In case of illness, the appellant had to find a replacement. She considered herself an employee despite the fact that there was no source deduction on her pay cheques. She thought that she would pay the tax when she would file her tax returns.

[20] Mrs. Yuurlink worked for the appellant for only four weeks - from April to May 2012. She said that she thought she signed a contact but did not have a copy. She taught level 4 English. Her teaching program was based on textbooks provided by the appellant. She had to evaluate the students and she participated in some staff meetings. Her work schedule was determined by the appellant and there was no flexibility to switch her lunch time. She earned $22.50 per hour and was paid every two weeks. She stated that the program's guidelines were provided by the appellant who also supplied the textbooks needed by the students. All teaching materials (internet, fax, laptop) were provided by the school. Deadlines for essays or examinations were set by the appellant. Complaints were dealt with by the appellant. Replacements were found by the appellant. In performing her duties, she did not incur any expenses on her own. She did not send invoices to the appellant for her services nor did she charge goods and services sales tax. She considered herself an employee.

The Legislative Framework

[21] The definition of "insurable employment" under the *EIA* is set out in paragraph 5(1)(*a*), which reads as follows:

> employment in Canada by one or more employers, under any express or implied contract of service or apprenticeship, written or oral, whether the earnings of the employed person are received from the employer or some other person and whether the earnings are calculated by time or by the piece, or partly by time and partly by the piece, or otherwise;
>
> . . .

[22] The definition of "pensionable employment" under the CPP is set out in paragraph 6(1)(*a*), which reads as follows:

> (1) **Pensionable employment** – Pensionable employment is
>
> (a) employment in Canada that is not excepted employment;
>
> . . .

[23] Subsection 2(1) of the *Regulations* determines the earnings from insurable employment for the purposes of the definition of "insurable earnings" in subsection 2(1) of the *EIA*. Subsection 2(1) of the *Regulations* reads as follows:

> For the purposes of the definition "insurable earnings" in subsection 2(1) of the Act and for the purposes of these Regulations, the total amount of earnings that an insured person has from insurable employment is
>
> (a) the total of all amounts, whether wholly or partly pecuniary, received or enjoyed by the insured person that are paid to the person by the person's employer in respect of that employment, and
>
> (b) the amount of any gratuities that the insured person is required to declare to the person's employer under provincial legislation.

Analysis

[24] The appellant relies essentially on the contractual relationship that exists between itself and the employees and its presumption that the Workers' intentions are to be hired as independent contractors. These factors were definitely a premise to their employment and were keys to the remuneration that was offered to them.

[25] The Workers considered themselves to be employees. This was clearly spelt out by two of the Workers who testified in this appeal.

[26] Case law has established a series of tests to determine whether or not workers are employed under a contract of service (as employees of the payor) or were performing their services under a contract of services (as self-employed individuals). The tests considered by the Courts include the following elements: the intention of the parties and the contractual arrangements, the degree of control exercised by the payor over the workers, the ownership of tools, the financial risks – the chance of profit or risk of loss, the degree of responsibility, the ability to hire assistants or subcontract the work, and any other relevant factors applicable to a particular industry. There is no single element that is decisive and all the elements must be considered in appreciating the relationship between the parties and in determining whether the relationship as a whole supports the intention of the parties.

Intention of the Parties and the Contractual Arrangements

[27] Only one signed and dated contract was filed in Court. The said contract is between Amanda Thalmann (referred to in the agreement as the "sub-contractor") and the appellant (referred to in the agreement as the "Company") and is dated April 23, 2012. The intention of the parties to the agreement is clearly indicated in the following paragraphs:

> WHEREAS the Company desires to engage the English Language Instructor to provide services to the Company as s sub-contractor for the term of this Agreement and the sub-contractor has agreed to provide such services, all in consideration and upon the terms and conditions contained herein:
>
> . . .
>
> The Sub-contractor will receive a payment of $22 per hour during the contract period, which will be paid bi-weekly and will not be subject to statutory deductions. The Sub-contractor is responsible for all applicable taxes.

[28] Despite what appears to be the clear intention of the parties to the agreement, there is some doubt concerning the true nature of the relationship that existed between the Worker and the appellant because the contract refers in many paragraphs to the Worker as being an employee. Here are a few examples of this. The paragraph titled "Renewable of contract' reads as follows:

> This contract may be renewed on the same terms and conditions upon written notification by the company to the employee, prior to the termination of the contract.

The second paragraph of the termination clause reads as follows:

> Upon termination of the employment contract, the Employee agrees to deliver to the Company all Company property including computers, documents, manuals, keys, records, reports and notes and copies thereof which are in the Employee's possession and which related in any way to the business of the Company and its clients.

The non-solicitation clause reads as follows:

> The Employee agrees that during the course of the employment, and for a period of one (1) year after the Employee ceases to be an employee of the Company for any reason, the Employee will not, in any capacity whatsoever, directly or indirectly solicit students from the company.

[29] Amanda Thalmann signed the agreement as being an employee.

[30] As shown above, the contract is poorly drafted and contains many technical deficiencies concerning the legal status of one of the signatories.

[31] In *1392644 Ontario Inc. v. Minister of National Revenue*, 2013 FCA 85, Mainville J.A. stated at the end of paragraph 37 that "the legal status of independent contractor or of employee is not determined solely on the basis of the parties' declaration as to their intent. That determination must also be grounded in a verifiable objective reality. For this purpose, the factors considered in *Wiebe Door Services Ltd. v. Minister of National Revenue*, 87 D.T.C. 5012 and *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, 2001 SCC 59, such as the degree of control, the ownership of tools, the right to sub-contract, the chance of profit and the risk of loss, are relevant.

Control

[32] Based on a review of the facts, it is clear that the appellant exercised a high level of control over the duties performed by the Workers and the manner in which these duties were carried out. The element supporting the existence of a contract of service includes the following:

- the duties were performed on the appellant's premises during the business hours of the appellant;
- the appellant determined the Workers work schedule, the timing and duration of their lunch break, the number of working hours with the possibility to work overtime or to work at non-regular working hours in response to business demands of the school;
- workers were required to attend teaching staff meetings;
- the appellant determined the deadlines for the work and provided the program's guidelines;
- an evaluation of each student's progress had to be made following the program and written reports had to be submitted to the appellant for review before they were sent to the students by the appellant.

Ownership of Tools

[33] This element also supports the existence of a contract of service, as the appellant provided at no cost, all the major tools and equipment necessary for the Workers to execute their duties including a laptop computer.

Right to Subcontract the Work or to Hire a Replacement

[34] The Workers did not have the ability to subcontract their work or to hire an assistant. In the case of absence of a worker, the appellant had the responsibility to find a replacement. This element supports the existence of a contract of service.

Chance of Profit or Risk of Loss

[35] The Workers had no financial interest or investment in the business. They were paid by the hour at a pre-determined rate for the time they worked. They did no incur any significant amount of expenses in carrying out their duties.

[36] The Workers did not have the ability to hire any replacement or substitute workers to increase their profitability.

[37] The risk of loss was minimal. If some students did not show up for class, the Workers were still paid their hourly rate as long as the appellant was paid and the Workers performed other related duties.

[38] The preceding facts also support the existence of a contract of services. The Workers did not conduct themselves as if they were carrying on a business on their own account. They did not obtain any registration for income tax and goods and services tax purposes and they did not invoice the appellant in order to be paid for their services. There is no evidence that the Workers did report their income as an independent contractor and claimed expenses in respect of their business activities.

Other Relevant Factors

[39] The terms and conditions of the Workers' employment were the same whether the Workers were self-employed or employees of the appellant, with the exception that the Workers could participate in the appellant's benefit plan and were required to work exclusively for the appellant once they were considered to be employees. The duties performed by the Workers were essentially the same whether they were self-employed or employees.

Conclusion

[40] Despite the intent of the appellant to characterize its relationship with the Workers as independent contractors, the facts of this case suggest otherwise. Based on the facts, I cannot conclude that the Workers were providing their services to the appellant as self-employed contractors running their own business. The significant degree of control that the appellant exercise over the Workers in the execution of their duties, the unlikeliness for the Workers to make a profit or incur a loss clearly shows that the Workers were employees of the appellant.

[41] For all these reasons, the appeal is dismissed.

Signed at Ottawa, Canada, this 5th day of May 2016.

"Réal Favreau"

Favreau J.

CITATION:	2016 TCC 109
COURT FILE NOs.:	2014-4621(EI), 2015-282(CPP)
STYLE OF CAUSE:	Apex Language and Career Inc. and the Minister of National Revenue
PLACE OF HEARING:	Halifax, Nova Scotia
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REASONS FOR JUDGMENT BY:	The Honourable Justice Réal Favreau
DATE OF JUDGMENT:	May 5, 2016

APPEARANCES:

For the Appellant:	Srini Pillay
Counsel for the Respondent:	Tokunbo Omisade

COUNSEL OF RECORD:

For the Appellant:

Name:

Firm:

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