Dockets: 2015-2712(EI)
2015-2713(CPP)

BETWEEN:

SISTEMA TORONTO ACADEMY INC.,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent,

and

YVANNA O. MYCYK,

Intervenor.

Appeal heard on June 2, 2016,
at Toronto, Ontario.
Before: The Honourable Justice B. Paris

Appearances:

Counsel for the Appellant:	Jamie Knight
Counsel for the Respondent:	Peter Swanstrom
For the Intervenor:	The Intervenor herself

JUDGMENT

The appeals pursuant to subsection 103(1) of the *Employment Insurance Act* and section 28 of the *Canada Pension Plan* are dismissed, and the decision of the Minister of National Revenue dated March 19, 2015 on the appeal made to her under paragraph 5(1)(*a*) of the *Act* and the determination of the Minister on the application made to her under paragraph 6(1)(*a*) of the *Plan* are confirmed.

Signed at Toronto, Ontario, this 8th day of September 2016.

"B.Paris"

Paris J.

Dockets: 2015-3212(EI)
2015-3211(CPP)

BETWEEN:

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"B.Paris"

Paris J.

Citation: 2016 TCC 193
Date: 20160908
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REASONS FOR JUDGMENT

Paris J.

Introduction

[1] The Appellant is a non-profit organization that provides free after-school music instruction to disadvantaged youth in elementary schools in Toronto. The Appellant engages professional musicians to provide that instruction.

[2] This is an appeal from rulings by the Minister of National Revenue (the "Minister") that Laurissa Chitty, Julia Hambleton, Veronica Lee, Michele Jacot, Joaquin Nunez Hidalgo and Yvanna Mycyk, who were hired by the Appellant to provide musical instruction, were engaged in insurable and pensionable employment with the Appellant, within the meaning of paragraph 5(1)(*a*) of the *Employment Insurance Act* and paragraph 6 (1)(*a*) of the *Canada Pension Plan*. I will refer to these workers collectively as the “Instructors” .

[3] The issue to be determined is whether the Instructors were engaged by the Appellant under a contract of service or a contract for services during the periods covered by the rulings, as follows:

> Laurissa Chitty, Julia Hambleton, Veronica Lee and Yvanna Mycyk: September 1, 2013 - March 24, 2014;
>
> Michele Jacot: September 1, 2013 - March 18, 2014; and
>
> Joaquin Nunez Hidalgo: January 1, 2013 - March 24, 2014:

[4] Nothing turns on the slight variations in periods covered by the rulings.

[5] One of the Instructors, Yvanna Mycyk, has intervened in appeals 2015-2712 (EI) and 2015-2713 (CPP), and supports the position of the Minister that the Instructors were engaged by the Appellant under contracts of service.

[6] The Appellant's sole witness was its President and CEO, Mr. David Visentin, Ms. Mycyk also testified.

Test to be Applied

[7] In *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, 2001 SCC 59, Major J. wrote that, while there is no universal test to determine whether a person is an employee or an independent contractor, "the central question is whether the person who has been engaged to perform the services is performing them as a person in business on his own account. Major J. also referred to certain factors that a Court must take into consideration, as follows:

> In making this determination, the level of control the employer has over the worker's activities will always be a factor. However, other factors to consider include whether the worker provides his or her own equipment, whether the worker hires his or her own helpers, the degree of financial risk taken by the worker, the degree of responsibility for investment and management held by the worker, and the worker's opportunity for profit in the performance of his or her tasks.

[8] In *1392644 Ontario Inc. (o/a Connor Homes) v. M.N.R.*, 2013 FCA 85, the Federal Court of Appeal considered the question of the weight to be afforded to the parties' intention as to the nature of their relationship in determining whether a contract of service or a contract for services existed. The Court concluded that, according to two earlier decisions of that Court - *Wolf v. The Queen*, 2002 FCA 96,

2002 DTC 6853 and *Royal Winnipeg Ballet v. Canada (Minister of National Revenue)*, 2006 FCA 87 - a two-step process of inquiry should be followed. First, the subjective intention of each party must be ascertained. It must then be determined whether an objective reality sustains the subjective intent of the parties.

Analysis

A. Intention

[9] Mr. Visentin, testified that the Appellant began offering its program of instruction at Parkdale Elementary School in September 2011 and expanded to Yorkdale Elementary School in September 2013.

[10] Mr. Visentin stated that when the program started in 2011, instructors were engaged by the Appellant as employees. Mr. Visentin said that this was done because the Appellant's main benefactor and the benefactor's bookkeeper, who also kept the Appellant's books, felt that the instructors were employees. Upon being hired by the Appellant, instructors received an engagement letter setting out what are referred to in the letter as the "terms and conditions of their employment." The instructors were asked to sign and return the letter to indicate their acceptance of those terms and conditions, and in all cases they did so.

[11] Starting in September 2012, Mr. Visentin decided that new instructors would work as independent contractors rather than employees. However, he said the Appellant mistakenly continued to use the same engagement letter template. Mr. Visentin also said that the instructors originally hired by the Appellant before 2012 and who were re-engaged for subsequent years continued to be treated by the Appellant as employees.

[12] The only material difference in how the two groups of instructors were treated appears to be with respect to source deductions. Mr. Visentin said that instructors engaged for the first time in September 2012 or later did not have source deductions taken from their pay, while those hired in 2011 did.

[13] Mr. Visentin testified that the engagement letter was modified in January 2014 to clarify that the instructors were independent contractors. The new version was sent out to all of the instructors for them to sign and return. Mr. Hidalgo, Ms. Chitty, Ms. Lee and Ms. Hambleton apparently did so, but Ms. Jacot and Ms. Mycyk did not. The evidence showed that Ms. Jacot and Ms. Mycyk wished to continue as employees of the Appellant.

[14] The revised engagement letter modified certain of the material terms of the agreement as follows:

- The term "employment" was changed to "engagement"
- The Appellant no longer agreed to pay the instructors vacation pay and for statutory holidays.
- The Appellant no longer agreed to pay severance pay and to provide notice of termination.
- The instructors were now required to use their own instruments.
- The revised letter specifically set out that no taxes or other source deductions would be taken and that the instructors would be required to determine their obligations for HST.
- The restriction on taking other work that might conflict with the instructors' duties was deleted.

[15] Mr. Visentin said that none of the Instructors apart from Ms. Jacot and Ms. Mycyk expressed any concerns to him about the change to the engagement letter. He also said that none of the Instructors hired from September 2012 or ever expressed concern about the fact that no source deductions were made.

[16] The Appellant maintains that in the case of each of the Instructors except Ms. Mycyk, the Appellant and the Instructor had a common intention that the work was to be carried out under a contract for services.

[17] In the case of Ms. Mycyk, the Appellant concedes that the parties shared a common intention that she was to be an employee of the Appellant.

[18] In the case of Ms. Jacot, the Appellant maintained that, while she did not sign the revised engagement letter, she had accepted that source deductions were not being taken from her pay. With respect to the remaining Instructors, the Appellant asks the Court to infer their intention from their acceptance of the revised engagement letter and their acceptance of the Appellant's treatment of source deductions.

Analysis

[19] With respect to Ms. Jacot, I am unable to conclude that she intended to perform her duties for the Appellant under a contract for services. The evidence shows that she did not sign the revised engagement letter because she wanted to be an employee. Her expressed intention and the engagement letter she signed when she began with the Appellant overwhelmingly point to an intention to work as an employee.

[20] I am also of the view that there is insufficient evidence that the remaining Instructors, (Chitty, Hambleton, Lee and Hidalgo,) intended to work as independent contractors for the Appellant prior to the execution of the new engagement letters in January 2014. Their acquiescence to having no source deductions made is not convincing evidence of their intention, especially in light of the terms of the original engagement letter they signed, which clearly sets out an employment relationship. Also, I do not accept that the signing of the revised engagement letter in January 2014 amounted to a retroactive acceptance of the status of independent contractor, especially since the letter itself indicates that it was to become effective on the date it was signed.

[21] For the period after January 2014, I find that Chitty, Hambleton, Lee and Hidalgo all intended to perform their work for the Appellant as independent contractors, based on the execution of the revised engagement letter. This evidence was not challenged by the Respondent.

B. Objective reality of the parties' conduct

[22] I now turn to the second step of the two part enquiry into the nature of the contract between the Appellant and the Instructors,- namely, a determination of the objective reality of the parties' conduct based on a review of the relevant factors referred to by Major J. in *Sagaz*.

(1) Control

[23] In *Wolf,* at paragraph 74, Desjardins J.A. described the control test as follows:

> The control test, as it is commonly referred to, purports to examine who controls the work and how, when and where it is to be done. In theory, if the worker has complete control over the performance of his work once it has been assigned to

> him, this factor might qualify the worker as an independent contractor. On the other hand, if the employer controls in fact the performance of the work or has the power of controlling the way the employee performs his duties (Gallant v. Canada (Department of National Revenue) (F.C.A.), [1986] F.C.J. No. 330 (Q.L.), the worker will be considered an employee.

[24] The Court also went on to point out that, in cases of highly skilled workers, the control test can be inadequate because the skills and expertise of the worker may exceed those of the employer, and therefore little supervision can be exercised over the manner in which the work is performed.

[25] The evidence showed that each Instructor had a high level of expertise and specialized training in music and music performance. They were engaged by the Appellant over the summer for the following school year and in many instances instructors who had worked for the Appellant during the previous school year were re-engaged and were required to sign a new engagement letter.

[26] Prior to the beginning of classes in September, instructors were required to take part in one or two safety procedure orientation sessions put on by the respective principal of the schools where the music program was offered. Instructors were also required to obtain a criminal record check, paid for by the Appellant, and were required to agree to abide by the terms of the Appellant's Crisis Management Policy and its Ethical Standards and Code of Conduct. The contents of those policies were drawn mostly from Toronto School Board policies, but Mr. Visentin said that about 20% of the material came from the Appellant, itself.

[27] From about mid-September to mid-June, instructors were required to provide their services four days a week beginning at 3:45 p.m. Classes were divided by instrument. They would pick up their students in the school cafeteria after the students had received a snack, and take them to a classroom for an hour of instruction. After this, some students would participate in larger group ensembles and some would take part in small group lessons, which the Instructors taught. Time spent setting up and cleaning up was unpaid. Each of the Instructors covered by these appeals provided 7 hours of instruction per week, except Ms. Mycyk, who worked one extra hour.

[28] While Mr. Visentin said that the Instructors did not have to submit lesson plans, Ms. Mycyk said that she was required to submit weekly lesson plans for a number of weeks at the beginning of two of the years during which she taught.

[29] The Appellant chose the repertoire of pieces to be played at the quarterly performances, but otherwise did not set the curriculum for the lessons given by the Instructors. Ms. Mycyk said that at the end of her first year teaching with the Appellant it held a meeting for instructors for the purpose of developing a common curriculum. Instructors were also required to use "universal terminology" in all classes, which Ms. Mycyk said refers to a uniform and consistent use of musical terms.

[30] Mr. Visentin said that there were ad hoc meetings every week or two to relay information to the instructors, but that attendance at such meetings was not compulsory. An email provided by Ms. Mycyk from the teacher coordinator at her school, however, referred to weekly meetings that all instructors were required to attend. That email was sent in September 2013. The Appellant also put on one or two professional development workshops for instructors each year, which workshop instructors were not required to attend.

[31] Instructors were required to prepare evaluations of their students, which were reviewed by Mr. Visentin before being given to parents, and instructors themselves were subject to informal evaluations and random classroom visits by the teacher-coordinator. Checks would be conducted to follow-up on any areas that required improvement.

[32] If an instructor encountered any difficulties disciplining a student, he or she was expected to contact the teacher-coordinator, who would then provide guidance and assistance. If the problem escalated, Mr. Visentin would be advised and might become involved. Instructors had walkie-talkies, supplied either by the Appellant or by the Toronto School Board, for security purposes.

[33] If an instructor was unable to teach a class, he or she was required to contact the centre coordinator, who would arrange for someone to fill in. In most cases, the replacements were paid by the Appellant, but apparently Mr. Hidalgo paid them himself from what he received from the Appellant. Mr. Visentin said that the Appellant tried to deal with requests for time off in a cooperative manner and that no request was ever refused. He also said, though, that the Appellant had an expectation that the Instructors would form a commitment to their students and that the teaching schedule did not leave much room for flexibility.

[34] In this case, counsel for the Appellant asserted that the Appellant exercised control over the Instructors only to the extent necessary to achieve its objectives, which were to put on four performances by the students during the school year and

to maintain the safety of and care for the children who participated in the program. He said that the Instructors were not told how to teach their classes, that there was minimal evaluation of the work done, that the Instructors were not restricted in what other work they could do and that there were no negative consequences if they were unable to teach on a particular day. Finally, the Appellant submitted that the Instructors are highly skilled professionals who required little or no direction in how they performed their duties.

[35] In my view, the evidence on the question of control favours the view that the Instructors were engaged under contracts of service and that the degree of control exercised by the Appellant, or which it had the right to exercise over the Instructors, was more consistent with an employment relationship. The Appellant's ability to control the Instructors appears to me to be a function of the nature of the Appellant's program, which put the Instructors in frequent contact with vulnerable elementary school students.

[36] The Code of Conduct and other policies that the Instructors were required to follow were a form of control over the Instructors' performance, as were the performance reviews and class spot checks. While the reviews and checks may not have been frequent, they are an illustration of the right the Appellant retained to monitor performance. The same can also be said of lesson plan reviews and staff meetings. I accept Ms. Mycyk's testimony that she felt that at least some of the meetings were obligatory. This is borne out by the email she produced from her teacher-coordinator. I also accept that she was required to submit lesson plans, although the Appellant's practice in this regard was not consistent.

[37] The finding that the Appellant retained the right to supervise and control the Instructors' work performance is also supported by the terms of the engagement letter, as it read both before and after January 2014. In particular, the Appendix A to the letter lists the duties of the Instructors, as follows:

> APPENDIX A – GENERAL DESCRIPTION OF DUTIES
>
> Your duties will be those determined by the Academy from time to time and may include:
>
> (a) To be "a (Insert instrument) Teacher" for the Academy Toronto program in Toronto, Ontario, teaching beginner, intermediate and senior level children, as required from time to time.

> (b) To prepare, in consultation with the program's Artistic Director and Coordinator, lesson plans and teaching schedules that deliver the core elements of the offered program.
>
> (c) To demonstrate/play musical examples as required.
>
> (d) To follow established policies and procedures, including policies and procedures with respect to issues as abuse, harassment, bullying, and health and safety.
>
> (e) To report each week and submit total weekly hours worked to the Teaching Coordinator or Executive Director.
>
> (f) Generally, to mentor and care for children who may be vulnerable or at-risk.
>
> Your non-teaching duties may include assisting in public relations functions to increase the recognition and appreciation of the Academy. These duties may include appearances as a performer in both solo and ensemble capacities.

[38] This description of duties is indicative of an ongoing level of supervision and control that is more consistent with a contract of service than that of an independent contract relationship.

[39] While the Appellant's counsel is correct in pointing out that the Instructors were highly trained in their field, this factor was also present in two similar cases involving music instructors whom the Court determined to be employees: *Lippert Music Centre Inc. v. M.N.R.*, 2014 TCC 170, and *Menoudakis v. M.N.R.*, 2015 TCC 248. The level of expertise of a worker is only one factor to be considered in assessing the level of control retained by the party for whom the work is performed.

(2) Who provided the equipment?

[40] In *Lippert* , the Court stated, at paragraph 23, that in a case of this kind, the test "is not whether the Workers supplied the tools necessary to operate a music school business but rather whether they supplied the tools necessary to operate a business of supplying music teachings services to a school."

[41] In this case, up to January 14, 2014 the Appellant made instruments available for the use of the Instructors, but some of the Instructors chose to use their own. The Appellant also provided the sheet music that was used. As well, Mr. Visentin said that the Appellant encouraged Instructors to use games and craft

activities as part of their teaching, and that the Appellant offered to reimburse the Instructors for any materials that were used.

[42] While the Appellant's counsel submitted that the Instructors' knowledge of music was a tool that should be taken into account in applying this test, and that this was the most important tool they used, I do not believe that such knowledge is property of the kind contemplated by this test.

[43] In summary, few tools were used by the Instructors in the course of their work. Given that for the majority of the periods under review the Appellant and the Instructors both provided musical instruments used by the Instructors, this test is inconclusive as to whether the Instructors were employees or independent contractors.

(3) Chance of profit and degree of risk taken

[44] The Instructors were paid a fixed amount of $50 per hour of instruction. The only opportunity they had to increase their earnings was by working more hours. Therefore, they did not have the chance of making a profit in the way that is normally the case for an independent contractor (see: *City Water International Inc. v. M.N.R* 2006 FCA 350 at para 24).

[45] Nor did the Instructors have any risk of loss. They were not required to incur any material expenses in the course of providing instruction. Of note as well, the Appellant had insurance that covered the Instructors, and the cost of such insurance was borne by the Appellant.

[46] These factors also support the position that the Instructors were employees.

(4) Other factors

[47] Other relevant factors are: whether the Instructors hired their own helpers and the degree of responsibility for investment and management held by the Instructors. There was no evidence to show that the Instructors ever hired assistants or that they had any investment or management responsibilities with the Appellant. These factors therefore also support the finding that the Instructors were employees of the Appellant.

Determination

[48] A weighing of all of the relevant factors leads me to conclude that the Instructors were employed under contracts of service during the relevant periods and did not perform the services as persons in business on their own account.

[49] To the extent that the Appellant and Ms. Chitty, Ms. Hambleton, Ms. Lee and Mr. Hidalgo shared a common intention that they work as independent contractors after January 2014, this intention is not consistent with the objective reality of the terms and conditions of the work relationship.

[50] For all of these reasons, the appeals are dismissed.

Signed at Toronto, Ontario this 8th day of September 2016.

"B.Paris"

Paris J.

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APPEARANCES:

Counsel for the Appellant:	Jamie Knight
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