Docket: 2003-285(EI)

BETWEEN:

1280659 ONTARIO INC.,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent,

and

CONAL KLEIN,

Intervener.

Appeal heard together with the appeal of *1280659 Ontario Inc.* (2003-286(CPP)) on November 26, 2003 at Toronto, Ontario

Before: The Honourable Justice Michael J. Bonner

Appearances:

Counsel for the Appellant:	Natasha Miklaucic
Counsel for the Respondent:	P. Michael Appavoo
For the Intervener:	The Intervener himself

JUDGMENT

The appeal is dismissed and the decision of the Minister is confirmed.

Signed at Toronto, Ontario, this 18th day of February 2004.

"Michael J. Bonner"

Bonner, J.

Citation: 2004TCC138
Date: 20040218
Dockets: 2003-285(EI)
2003-286(CPP)

BETWEEN:

1280659 ONTARIO INC.,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent,

and

CONAL KLEIN,

Intervener.

REASONS FOR JUDGMENT

Bonner, J.

[1] The Appellant appeals from determinations by the Minister of National Revenue (the "Minister") that, during the period from February 9, 2001 to March 12, 2002, Conal Klein ("Klein") was employed by it in insurable and pensionable employment within the meaning of the *Employment Insurance Act* ("*EI*") and the *Canada Pension Plan* ("*CPP*"). Klein intervened in the appeals.

[2] The Appellant carried on business under the name "Agents Are Us". Its clients were manufacturers and importers whose goods were offered for sale in "big box" retail stores. The Appellant undertook to service displays of its clients' goods in such stores. Servicing involved visiting the stores periodically in order to keep the displays fully stocked, clean, tidy and otherwise attractive to shoppers. For this service, the Appellant's clients paid to the Appellant a commission based on sales of the clients' goods.

[3] The Appellant engaged a number of individuals sometimes described as "servicing agents" whose duty it was to service the displays of its clients' goods. Klein was one of those individuals.

[4] The issue in the appeals is whether Klein worked for the Appellant under a contract of service, as found by the Minister, or whether he worked under a contract for services, as the Appellant claimed he did. Klein, the Intervener, contended that the Minister's determinations were correct.

[5] The Respondent pleaded that the Minister's decisions were based on the following findings or assumptions of fact:[1]

(a) the Appellant acts as agent for various manufacturers and importers for which the business earns commissions, based on volume of sales;

(b) the Worker was hired to service various customers lines sold through Home Depot and Wall Mart, under a verbal agreement;

(c) the Worker's duties were as follows:

- setting displays
- stocking shelves
- picking up displays from Appellant for transport to the stores
- wiring and lighting fixtures

(d) the Worker had to prepare report after each customers' visit and send it to the Appellant;

(e) the Worker performed his duties at various stores, assigned by the Appellant;

(f) the Worker worked flexible hours, between Monday to Friday;

(g) the Worker's hours of work were determined by the needs of the Appellant's clients;

(h) the Worker was paid at the beginning $8.00 per hour and then got an increase to $10.00, $11.00 and finally $13.00 per hour;

(i) the Worker was paid by cheque, 30 days after he submitted his invoice to the Appellant;

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[1] The "Worker" is Klein.

(j) the Worker's invoices showed the actual hours of work, times the hourly rate;

(k) the Worker's invoices also included car expenses (gas);

(l) starting on September 1, 2001, the Worker received a monthly car allowance of $300.00;

(m) the Worker was also reimbursed for any out-of-pocket expenses by the Appellant;

(n) the Worker was supervised by the Appellant, Shlomo Bohbot;

(o) the Worker had to report to the Appellant at the beginning of each shift and from each store;

(p) the Appellant provided the necessary training to the Worker;

(q) the Appellant was responsible to resolve customer complaints;

(r) the Appellant provided the guarantee on the work performed;

(s) the Appellant covers the costs relating to bad debts;

(t) the Appellant was responsible to obtain and negotiate with the clients;

(u) the Appellant provided the liability insurance as required by the clients;

(v) the Appellant supplied all the necessary materials to the Worker;

(w) the Worker was required to wear a red shirt with the "Agents Are Us" logo on the chest;

(x) the Worker was required to purchase a book called "Best Practices" which is in fact methods and procedures outlined by the Appellant;

(y) the Appellant's clients decided if work had to be redone and the Appellant covered the related costs;

(z) the Worker had to perform his services personally;

(aa) the Appellant maintained the right to terminate the Worker's services;

(bb) the Worker's services were integral to the Appellant's business.

[6] In the main, the evidence adduced at the hearing either supported or at least did not contradict the assumptions. However, a few comments are in order. Regarding (f) and (g), it was the Appellant who determined when and where Klein was to work. Regarding (r), it was the Appellant not Klein who was contractually bound to the clients whose goods were on display in the stores. Obviously, if there was any "guarantee" at all it would have been given by the Appellant. Similarly, with regard to (s), (t) and (u), the author of the assumptions addresses the contractual relationship between the Appellant and the client whose goods were on display and not the contractual relationship between the Appellant and Klein. Regarding (z), this point was very much in dispute but for reasons which follow later I have concluded that the Appellant did not have the right to hire a substitute to perform his work.

[7] The two principal witnesses at the hearing of the appeals were Shlomo Bohbot (Bohbot), President of the Appellant, and Klein. Two other servicing agents who worked for the Appellant gave evidence but it is far from clear that the contractual arrangements between the Appellant and its various servicing agents were uniform. In arriving at a decision in this case, it is necessary to focus on evidence with respect to the contract between the Appellant and Klein.

[8] Klein was engaged by the Appellant in a rather informal way. A friend of Klein's worked for the Appellant. The friend and other workers were in the habit of meeting Bohbot at a parking lot each morning before embarking on the work of the day. The friend invited Klein to attend and introduced Klein to Bohbot. There was a brief discussion in which Bohbot told Klein that the pay was $8 per hour, that he would need a business licence and that he would require training. Bohbot also told Klein that he would be required to buy a "Best Practices" book and a T-shirt bearing markings identifying him as an Agents Are Us worker. It seems unlikely that in such circumstances any detailed discussion of the terms of Klein's engagement ever took place.

[9] Klein obtained a licence and commenced to work for the Appellant. In light of the emphasis placed on Bohbot's insistence upon a licence, a few comments are in order. There was no suggestion that the Province of Ontario which issued the licence made any attempt to look into or evaluate the nature of the relationship between Klein and the Appellant. It was not suggested that such a licence is a prerequisite to undertaking work in one's own name as an independent contractor. What is clear is that Bohbot thought that the possession of such a licence pointed to the existence of the contract for services relationship which he clearly preferred.

[10] Klein testified that after he secured his licence he showed up for work each morning at the parking lot with the other persons working that day and Bohbot would tell them which stores were to be serviced that day. On a few occasions, when Bohbot did not need anyone to service displays, the workers were sent home.

[11] Klein was initially paid $8 per hour. He received a raise after one month. Bohbot fixed the hours of work. He required Klein to record his hours and to invoice the Appellant for his compensation. Klein was paid monthly. He required a car for his work. During the last few months of the period in issue, the Appellant paid him a vehicle allowance of $300 per month plus gas. Klein's hours of work were variable though he generally started at 7:30 or 8:00 o'clock in the morning. The hours were set by the Appellant. Upon arrival at a store, Klein was required to report to Bohbot in case instructions with respect to special tasks were required.

[12] Klein and other workers were required to attend occasional meetings in Bohbot's basement for the purpose of discussion of new products or of complaints or for a pep talk.

[13] Klein required a few simple tools to do the work. They were furnished to him by Bohbot but Klein was required to pay for them. Bohbot suggested the tools were sold to Klein and repurchased later. Klein thought the payment to Bohbot for the tools was a security deposit. In any event the money was refunded when the tools were returned to Bohbot following Klein's termination.

[14] The Appellant issued a T4A information slip for 2001 in which the payments to Klein were described as "self-employed commissions".

[15] Klein signed an agreement with the Appellant in which he undertook to refrain from disclosing confidential or proprietary information which he had received for purposes of the ongoing business relationship with the Appellant. It is of course difficult to reconcile that agreement with Bohbot's contention that Klein was entitled to employ a substitute to do his work for him. The evidence as a whole does not persuade me that Klein had any such right. It does not appear that Klein was responsible for any identifiable group of displays in respect of which he might have employed an assistant to carry out the servicing work.

[16] In summarizing the facts, I have relied primarily on the testimony of Klein. Where his testimony was inconsistent with that of Bohbot, I prefer Klein's version of events. I formed the impression that much of what Bohbot had to say with

respect to the terms of the relationship reflected not terms actually agreed on between the two but rather terms as Bohbot wished them to be. In my opinion, Bohbot's evidence was greatly influenced by his wish to ensure that Klein and other workers be viewed as independent contractors.

[17] The leading case on the distinction between a contract for services and a contract of service (employment) is *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, 2001 SCC 59. There, Major, J. delivering the judgment of the Court reviewed the control test, the four-factor test[2] and the integration test. He held that the key is set out in *Market Investigations Ltd. v. Minister of Social Security*, [1968] 3 All. E.R. 732, namely, whose business is it? At paragraphs 47 and 48, Major, J. stated:

> Although there is no universal test to determine whether a person is an employee or an independent contractor, I agree with MacGuigan J.A. that a persuasive approach to the issue is that taken by Cooke J. in *Market Investigations*, *supra*. 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. 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.
>
> It bears repeating that the above factors constitute a non-exhaustive list, and there is no set formula as to their application. The relative weight of each will depend on the particular facts and circumstances of the case.

[18] Applying the tests, it seems clear that Klein was an employee of the Appellant. He was hired by the Appellant to work for it at an hourly rate of pay at such times and in such stores as Bohbot might direct. The right to control the manner in which the work was to be done was clearly present.

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[2] A complex involving (1) control; (2) ownership of tools; (3) chance of profit; (4) risk of loss, all as set out in *Montreal v. Montreal Locomotive Works Ltd.*, (1947) 1 D.L.R. 161 at 169.

[19] The ownership of tools test does not loom large in this case. The tools required by Klein to do the work were few and basic and, I gather, not of great value. The arrangement with the Appellant required Klein to pay a small amount when the tools were supplied to him. That amount was ultimately treated as if it was a security deposit. The money was in fact refunded when Klein was fired. The arrangement bears only a faint resemblance to the case where a task is carried out under a contract for services which, typically, requires the contractor to do all that is necessary to carry out the work using his own forces, tools, ingenuity and managerial skills. Klein apparently used his car in the course of his work but he was paid an allowance to cover that expense. Klein acquired and used a pager for purposes of his work. Although that circumstance might appear to support the Appellant, that support is more than offset when it is remembered that the pager was required by Bohbot to enable him to exercise control over Klein in the performance of his work.

[20] Klein was not subject to financial risk arising from his relationship with the Appellant. He was in the same position in relation to such risk as any hourly-rated worker. It simply was not open to him to employ managerial skills with a view to maximizing revenue and reducing costs.

[21] Equally, it was not open to Klein to employ a substitute or assistant.

[22] In *Alexander v. M.N.R.*, 70 DTC 6006, Jackett, P. stated at page 6011:

> ...On the one hand, a contract of service is a contract under which one party, the servant or employee, agrees, for either a period of time or indefinitely, and either full time or part time, to work for the other party, the master or the employer. On the other hand, a contract for services is a contract under which the one party agrees that certain specified work will be done for the other. A contract of service does not normally envisage the accomplishment of a specified amount of work but does normally contemplate the servant putting his personal services at the disposal of the master during some period of time. A contract for services does normally envisage the accomplishment of a specified job or task and normally does not require that the contractor do anything personally.

[23] Klein's activities in relation to Agents Are Us do not involve carrying out any specified task or group of tasks as an independent contractor would. Rather, he agreed to put his personal services at the disposal of the Appellant on a pay per hour

worked basis. It must be emphasized that the description adopted by the parties as to the nature of their contractual relationship is not necessarily determinative.

[24] The appeal will be dismissed.

Signed at Toronto, Ontario, this 18th day of February 2004.

"Michael J. Bonner"

Bonner, J.

CITATION:	2004TCC138
COURT FILE NO.:	2003-285(EI) and 2003-286(CPP)
STYLE OF CAUSE:	1280659 Ontario Inc. and M.N.R. and Conal Klein
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	November 26, 2003
REASONS FOR JUDGMENT BY:	The Honourable Justice Michael J. Bonner
DATE OF JUDGMENT:	February 18, 2004

APPEARANCES:

Counsel for the Appellant:	Natasha Miklaucic
Counsel for the Respondent:	P. Michael Appavoo
For the Intervener:	The Intervener himself

COUNSEL OF RECORD:

For the Appellant:

Name:	Natasha Miklaucic
Firm:	Goodman and Carr LLP Toronto, Ontario

For the Respondent: Morris Rosenberg
Deputy Attorney General of Canada
Ottawa, Canada

For the Intervener:

Name:	
Firm:	