

Docket: 2004-743(EI)
2004-744(CPP)

BETWEEN:

1277401 ONTARIO LIMITED O/A JSK EXPRESS,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

Appeals heard on January 26, 2005 at St. Catharines, Ontario

By: The Honourable Justice Judith Woods

Appearances:

Agent for the Appellant: Mark Thomas

Counsel for the Respondent: Nicolas Simard

JUDGMENT

The appeals in respect of assessments made under the *Employment Insurance Act* and the *Canada Pension Plan* are allowed, without costs, and the assessments are referred back to the Minister of National Revenue for reconsideration and reassessment on the basis that penalties in respect of the drivers shall be vacated and otherwise the assessments shall be confirmed.

Signed at Toronto, Ontario, this 22nd day of April, 2005.

“J. Woods”

Woods J.

Citation: 2005TCC289
Date: 20050422
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2004-744(CPP)

BETWEEN:

1277401 ONTARIO LIMITED O/A JSK EXPRESS,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

REASONS FOR JUDGMENT

Woods J.

[1] 1277401 Ontario Limited ("JSK Express") appeals assessments issued to it under the *Employment Insurance Act* and the *Canada Pension Plan* for failure to remit premiums for approximately 35 workers (the "Workers") during the period January 1, 2002 to August 31, 2003. Most of the Workers drove trucks for JSK Express during the relevant period and the question for determination is whether the Workers were engaged as employees or independent contractors. The amounts assessed were approximately \$46,000 and \$84,400, under the *Employment Insurance Act* and the *Canada Pension Plan* respectively, plus related penalties and interest.

[2] The appellant was represented at the hearing by its president and owner, Mark Thomas. In 1998, Mr. Thomas started a business under the name of JSK Express to deliver freight in the region between Buffalo and Toronto. The corporation now owns and operates about 17 trucks.

[3] When Mr. Thomas started the business, he decided to hire drivers as independent contractors. This decision was based on what he thought was standard practice in the industry which he had gathered from previous experience as a truck driver. Mr. Thomas also testified that he had discussed this approach with his accounting firm and that they had agreed with it.

[4] There were four witnesses at the hearing. Mr. Thomas testified on behalf of JSK Express and a dispatcher and two former drivers testified on behalf of the Minister. The testimony of one of the Workers, Scott Dutcher, was not particularly helpful because he had only worked for JSK Express for two months. The testimony of the other two workers was more helpful and generally consistent with Mr. Thomas' testimony. These witnesses were Norman Cudmore, who worked as a driver for a little over a year, and Allen Wiggins, who worked as a dispatcher for about three years and is still with the corporation. In general, I found all the witnesses to be credible.

[5] I will first summarize the evidence relating to the Workers who were drivers. There were approximately 31 drivers that the Canada Revenue Agency concluded were employees during the assessment period. Mr. Thomas stated that although they were hired strictly as drivers and they had no other duties, the drivers also routinely helped with the loading and unloading of trucks. Pick up and delivery instructions were provided to the drivers by the dispatchers who contacted the drivers throughout the day by means of a radio and cell phone provided by the corporation. Mr. Cudmore described his duties in a questionnaire provided to the Agency (Exhibit R-1) as follows:

Drove truck, load, unload, bills of lading, secure loads made sure truck was safe for road (circle check) organized loading to make deliveries as easy as possible, fax paperwork to U.S. brokers to clear U.S. customs, make sure fluid levels were topped up in the truck. Any major problem with truck we were to report it to Mark.

[6] The drivers had a regular five-day work schedule involving long days, often 12 to 14 hours. Some drivers had more routine hours than others depending on whether they had standard routes or not. The hours of work tended to vary in any event because of the unpredictability of the time needed to get through customs at Buffalo.

[7] In terms of remuneration, JSK Express paid most of the drivers on an hourly basis but a few received a weekly salary. Mr. Thomas stated that he looked at implementing a benefits plan suggested by the Chamber of Commerce but that it was not implemented because the drivers did not want it.

[8] As for control, Mr. Cudmore stated that Mr. Thomas would closely monitor the drivers throughout the day. In regards to training, a new driver would be trained by accompanying a more experienced driver on the first day of work. Mr. Thomas indicated that this was done mainly to show the driver how to do the paperwork at customs. Drivers were required to buy gas at stations where JSK Express had accounts, they were required to stay in frequent contact with the dispatchers, they

were required to wear uniforms and they were required to provide advance notice when they wanted a day off. Mr. Thomas stated that he imposed these requirements for business reasons as he had difficulty with some of the drivers not showing up for work when expected and with their appearance and he also expressed frustration that his directions were not always followed. In the questionnaire filled out by Mr. Cudmore, he indicated that Mr. Thomas would permit passengers to ride in the trucks, "as long as the drivers used their heads about it."

[9] As for expenses, it appears that JSK Express generally picked up all the drivers' expenses. On cross-examination, Mr. Thomas stated that the drivers would often purchase things like gloves and put it on the corporate account. Mr. Cudmore stated that it was his understanding that the corporation generally paid traffic tickets although it appears from his questionnaire that there was some dispute about JSK Express refusing to pay one of his tickets.

[10] Of the five Workers who were not drivers, two were dispatchers. Mr. Thomas testified that one of them could not handle the job and did not last as a dispatcher beyond a short training period. It would be reasonable to consider that his status would be the same as the other dispatcher, Allen Wiggins, because they would have had the same duties.

[11] The dispatchers' general duties were to provide instructions to the drivers concerning pick ups and deliveries and to load and unload freight. Mr. Wiggins worked on a full-time basis although his hours would vary because he could not leave the warehouse until all the drivers had gone home. He was paid a weekly salary.

[12] There were three other Workers. Their jobs could be described generally as administrative or managerial. One of the administrative staff, Doug Free, was the office manager. He did general administration and accounting and worked on a full-time basis with regular hours. He was paid a weekly salary. Another Worker, Ann Thomas, was Mr. Thomas' sister. She acted as second-in-command to Mr. Thomas and was involved in all aspects of the business. The remaining administrative Worker was Mr. Thomas' wife who did clerical work.

[13] Mr. Wiggins and Mr. Free generally worked out of the corporation's office and warehouse but they also did some work from home.

Analysis

[14] I will begin the analysis with intention. The intention in this case is not disputed. JSK Express made it clear to the Workers that it was intending to hire them

as independent contractors. Mr. Cudmore testified that he was not happy with this arrangement but he decided to live with it.

[15] Often, if parties mutually agree to enter into an independent contractor relationship, this fact is given significant weight (*Wolf v. The Queen*, 2002 D.T.C. 6853 (F.C.A.)). There are limits, however. If parties enter into a relationship that has the hallmarks of employment, their calling it an independent contractor relationship, or a “broker” relationship as JSK Express did, will not make it so. In *Wolf*, Noël J.A. stated:

[122] [...] I acknowledge that the manner in which parties choose to describe their relationship is not usually determinative particularly where the applicable legal tests point in the other direction. [...]

[16] In my view the above description is apt in this case. The relationship between JSK Express and the Workers was consistent with a contract of employment pursuant to the legal tests described by Major J. in the leading case of *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, [2001] 2 S.C.R. 983 (S.C.C.):

[47] [...] 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.

[17] The elements of an employment relationship that are present in this case are: security of a steady job, hours of work corresponding to full-time employment, the ability of the employer to control the manner in which the work is done, no financial contribution by the Workers and a regular wage computed either on an hourly or weekly basis.

[18] The evidence showed that some of the drivers had a tendency not to comply with company policies such as wearing uniforms and giving notice of absences. This shows that Mr. Thomas expected the Workers to comply with the reasonable directions of the corporation. The failure on the part of some Workers to comply with these directions is not evidence of a flexible work arrangement that is common for an independent contractor but rather is evidence of substandard performance by an employee.

[19] I would note that the office manager had greater freedom in the manner in which he performed his duties because Mr. Thomas deferred to his greater experience with accounting and computers. This deference is typical of an employment relationship where a person has specialized skills and the degree of actual control is generally less in these circumstances. In my view, the relationship with the office manager is also typical of employment and lacks the flexibility that one would associate with someone who has their own business.

[20] I would also note that the conclusion with respect to the drivers is consistent with a number of court cases. I refer specifically to the following authorities that all found truck drivers to be employees: *Dewdney Transport Group Ltd. v. M.N.R.*, 2004 FCA 183 (F.C.A.); *Barclay Lutz v. M.N.R.*, 2004 TCC 319 (T.C.C.); and *F.G. Lister Transportation Inc. v. M.N.R.*, [1998] T.C.J. No. 558 (T.C.C.).

[21] The facts in these decisions may be contrasted with cases in which the courts have found drivers to be independent contractors. For example, in *D & J Driveway Inc. v. M.N.R.*, 2003 FCA 453 (F.C.A.), Létourneau J.A. stated:

[15] We feel that it is legally incorrect to conclude that a relationship of subordination existed, and that there was consequently a contract of employment, when the relationship between the parties involved sporadic calls for the services of persons who were not in any way bound to provide them and could refuse them as they saw fit.[...]

[22] Similarly, in *Livreur Plus Inc. v. M.N.R.*, 2004 FCA 68 (F.C.A.), the court found that drivers who provided their own vehicles and were free to find replacements had the requisite potential for profit and risk of loss to be in business for themselves, that is, independent contractors.

[23] In contrast to these cases, JSK Express' relationship with the Workers had the hallmarks of a typical employment relationship as described by Décary J.A. as follows: "continuity, security, subordination and integration." (*Attorney General of Canada v. Les Productions Petit Bonhomme Inc.*, 2004 FCA 54 (F.C.A.)).

[24] I turn now to penalties. Counsel for the Minister stated that interest and penalties were imposed automatically without any consideration of whether Mr. Thomas exercised due diligence. Courts have generally accepted that there should be a due diligence defence for penalty provisions in taxing statutes (*Pillar Oilfield Projects Ltd. v. Canada*, [1993] G.S.T.C. 49 (T.C.C.); *Canada v. Consolidated Canadian Contractors Inc.*, (1998) 165 D.L.R. (4th) 433 (F.C.A.);

Corp. de l'École Polytechnique v. Canada, 2004 FCA 127 (F.C.A.)). I see no reason why the same approach should not be applied in statutes similar to taxing statutes such as the *Canada Pension Plan* and the *Employment Insurance Act* (see: *Intria Corp. v. Canada*, [2001] T.C.J. 819 (T.C.C.)).

[25] In relation to JSK Express, I accept Mr. Thomas' evidence that it was his bona fide belief, based on his background, that it was standard practice in the trucking industry for drivers to be hired as independent contractors. In these circumstances I think it would be appropriate to vacate the penalties with respect to Workers who were drivers. This defence would not be available with respect to Workers who were not drivers, however, and the assessment of penalties with respect to Workers who were not drivers is confirmed.

[26] In the result, the appeals will be allowed to vacate the penalties as they relate to the drivers. In other respects, the assessments will be confirmed.

Signed at Toronto, Ontario, this 22nd day of April, 2005.

“J. Woods”

Woods J.

CITATION: 2005TCC289

COURT FILE NO.: 2004-743(EI) and 2004-744(CPP)

STYLE OF CAUSE: 1277401 Ontario Limited o/a JSK Express
v. M.N.R.

PLACE OF HEARING: St. Catharines, Ontario

DATE OF HEARING: January 26, 2005

REASONS FOR JUDGMENT BY: The Honourable Justice Judith Woods

DATE OF JUDGMENT: April 22, 2005

APPEARANCES:

Agent for the Appellant: Mark Thomas

Counsel for the Respondent: Nicolas Simard

COUNSEL OF RECORD:

For the Appellant:

Name:

Firm:

For the Respondent:

John H. Sims, Q.C.
Deputy Attorney General of Canada
Ottawa, Ontario