Docket: 2000-523(EI)

BETWEEN:

BUDGET PROPANE CORPORATION,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent,

and

MORLEY RAYMER,

Intervenor.

Appeal heard on common evidence with the appeal of Budget Propane Corporation (2000-525(CPP)) on April 29, 2003 at Toronto, Ontario

Before: The Honourable Deputy Judge N. Weisman

Appearances:

Counsel for the Appellant:	Samantha L. Callow
Counsel for the Respondent:	Andrea Jackett
For the Intervenor	The Intervenor himself

JUDGMENT

The appeal is dismissed and the decision of the Minister is confirmed in accordance with the attached Reasons for Judgment.

Signed at Toronto, Ontario, this 20th day of June 2003.

"N. Weisman"

D.J.T.C.C.

Citation: 2003TCC382
Date: 20030620
Dockets: 2000-523(EI)
2000-525(CPP)

BETWEEN:

BUDGET PROPANE CORPORATION,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent,

and

MORLEY RAYMER,

Intervenor.

REASONS FOR JUDGMENT

WEISMAN, D.J.T.C.C.

[1] The Intervenor Morley Raymer ("Raymer") was engaged by the appellant as General Manager of the Beaverton branch of its business which distributed propane gas and sold and serviced propane heating equipment. The respondent determined that during the period under review, November 19, 1996 to August 31, 1998, Raymer was employed under a contract of service and was therefore in insurable and pensionable employment within the meaning of paragraph 5(1)(*a*) of the *Employment Insurance Act*;[1] and paragraph 6(1)(*a*) of the *Canada Pension Plan*.[2] The appellant now appeals those decisions.

[1] S.C. 1996, c. 23

[2] R.S.C. 1985, c. C-8

[2] To resolve this matter, the total relationship between the parties and the combined force of the whole scheme of operations must be considered in order to determine the central or fundamental question as to whether Raymer was performing his services for the appellant as a person in business on his own account or was performing them in the capacity of an employee.

[3] To this end, the evidence must be subjected to the fourfold test laid down as guidelines[3] in *Wiebe Door Services Ltd. v. the Minister of National Revenue*[4], as confirmed in *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*,[5] and *Precision Gutters Ltd. v. Canada (Minister of National Revenue - M.N.R.)* [6] The four components of the test are control, ownership of tools, chance of profit, and risk of loss.

Control:

[4] It was the original intention of the parties that Raymer work as an independent contractor under a contract for services during the period under review. An agreement to that effect was executed on the 19th day of November 1996, and was filed as Exhibit R-1 in these proceedings. Raymer was to receive a "retainer" of $50,000.00 per annum in addition to ten percent of profits before taxes. He was also to be reimbursed all appropriate expenses for company business, and was entitled to a vehicle allowance of $500.00 per month. He submitted bi-monthly invoices upon which he collected and remitted Goods and Services Tax (GST).

[5] He moved the branch to new premises, and ran the company's operations, which included procuring office staff, propane delivery personnel, and heating and plumbing contractors. He also co-ordinated collections, the trucking and delivery of propane, and plumbing and heating installation, and repair. As a licensed technician, he inspected installations and dealt with customers as well. He had pricing discretion within minimum and maximum guidelines established by the appellant. There were no set hours of work, and he was free to come and go as he

---

[3] *Ranger v. Canada (Minister of National Revenue-M.N.R.*), [1997] F.C.J. No. 891 (F.C.A.)

[4] (1986), 87 DTC 5025 (F.C.A.)

[5] [2001] 2 S.C.R. 983

[6] [2002] F.C.J. No. 771 (F.C.A.)

pleased, save that his services were required when the servicemen and bulk drivers reported in to work at 7-8:30 a.m. The bulk drivers could be expected to return with their trucks through the day and as late as midnight.

[6] For the first twelve to fourteen months of the period under review, *de facto* control over him was minimal. Mr. William Callow, the President of the appellant, ("Callow") visited the branch site only once every three months, and conversations by telephone occurred only every other week. In Raymer's words "I'd run the operation with little input from the owner".

[7] Matters changed in the last seven to nine months of the relationship, when Callow heard rumours that Raymer was "tarnishing our reputation", and his inordinate absences from the business premises. Callow therefore hired an accountant to oversee the operation, held meetings from which Raymer was excluded, and became more and more involved in the daily operations of the business. Raymer testified that he started receiving increasingly frequent calls from Callow on his cellular telephone and that "He demanded and wanted to be heard when he called".

[8] There was consensus that Raymer had to perform his services personally. This is usually an indication that the worker is an employee unless he is possessed of highly specialized skills and expertise in which case the personal services requirement is not determinative of the issue. Raymer had no such specialized skills and expertise.

[9] It was Raymer's evidence, which I accept, that for the $50,000.00 retainer, the appellant acquired the right to control him throughout the period under review. In this regard, the law is that the distinguishing feature of a contract of service is not the control actually exercised by the employer over his employee, but the power the employer has to control the way the employee performs his duties[7]. This test is difficult to apply in the case of highly skilled and professional workers who possess skills far beyond the ability of their supervisors to direct[8]. In the matter before me the usual control test is applicable. Again, Raymer was not a highly skilled or professional worker.

---

[7] *Gallant v. Canada (Department of National Revenue)*, [1986] F.C.J. No. 330 (F.C.A.)

[8] See *Wolf v. The Queen*, [2002] F.C.J. No. 375 (F.C.A.)

[10] I find that Callow had the power to control Raymer throughout the period under review and exercised *de facto* control as well during the last seven to nine months thereof. The control factor accordingly indicates that Raymer was an employee.

Ownership of Tools:

[11] It is common ground that Raymer worked at the appellant's premises except when inspecting installations, or seeing customers. All necessary tools, supplies, equipment, offices and furnishings were supplied to him by the appellant. The tools factor accordingly also indicates that he was an employee.

Chance of Profit:

[12] With a contractual right to ten percent of the branch profits before taxes per annum, one would have thought that Raymer had a clear chance of profit through the exercise of enterprise and initiative. This, however, is illusory. Callow wrote off all the expenses of starting up the business in the first year, thereby obviating any chance of profit. In fact, Callow admitted that the business did not record a profit until the 2001 fiscal year. As compensation, Raymer was orally promised a guaranteed bonus of $10,000.00 at year's end. The $10,000.00 was in fact withheld and paid only when Raymer executed the Mutual Release filed as Exhibit A-3 in these proceedings, upon termination of the relationship on the 31st day of August 1998.

[13] The evidence diverged as to whether Raymer was encouraged or forbidden to seek outside sources of income. Raymer's evidence was that he had to hold himself available any time in case delivery or installation problems arose. This seems the more credible view. I am satisfied that he was normally on the job from 7:00 a.m. when the servicemen reported in and there is no evidence of his neglecting his duties thereafter in order to work elsewhere. There were three occasions on which Raymer did earn extra income with Callow's prior permission. He taught a one-week course at Georgian College for which he was paid $400.00 as an employee. One day he trained Callow's son Jamie and several others on the appellant's premises for which the appellant paid him an additional $1,000.00. Finally, he performed similar training services at the premises of one of the appellant's bulk distributors who paid him for his time. I do not therefore find that Raymer had a chance of profit in his relationship with the appellant. This factor also indicates that he was an employee.

Risk of Loss:

[14] With all business expenses being assumed by the appellant, including a $500.00 per month vehicle allowance, it is clear that Raymer bore no risk of pecuniary loss in the traditional sense.

[15] In *Wolf* the Court found it helpful to elaborate upon the traditional concept to determine whether the worker in that case was performing his services as a person in business on his own account, or in the capacity of an employee. The Court distinguishes between independent contractors who choose to accept the risks associated with business in exchange for mobility, independence, and higher pay, and presumably the opportunity to deduct from income allowable expenses under the *Income Tax Act*.[9] Employees, on the other hand, are not risk-takers, and opt in favour of the safety net provided by legislation such as the *Employment Insurance Act*,[10] as well as health insurance, pension plans, job security, union protection, educational courses, and job promotion.[11]

[16] In the matter before me, it is clear that Raymer was not a risk-taker. He sought the security of a retainer of $50,000.00 per annum, and a guaranteed bonus of $10,000.00 as well. All his expenses were underwritten by the appellant including $500.00 per month toward his vehicle expenses. He took no financial risks. This factor, accordingly, also indicates that he was an employee.

[17] While all four guidelines indicate that Raymer was an employee during the period in question there are other relevant considerations in assessing the total relationship between the parties.

[18] The original intention was clearly that Raymer was to be an independent contractor under a contract for services. The law is clear, however, that this is not determinative of the issue.[12] The characterization of the relationship is a matter of law because other interests are involved, such as vicarious liability, employment legislation, the availability of an action for wrongful dismissal, the assessment of

---

[9] R.S.C. 1985 (5th supp.) c.1

[10] (*supra*)

[11] See *Wolf* (*supra*)

[12] *Wiebe Door Services (supra); Ready Mixed Concrete v. Minister of Pensions,* [1968] 1 ALL E.R. 433 (Q.B.)

business and income taxes, the priority taken upon an employer's insolvency, and contractual rights.[13] The terms of the contract will be given weight only if they properly reflect the relationship between the parties, or in a close case where application of the fourfold test produces neutral results.[14] In the matter before me, the contract does not properly reflect the relationship between the parties.

[19] In *Wolf*, the worker was granted four percent of his earnings in lieu of vacation because the time demands of the project upon which he was then engaged afforded him no opportunity for a vacation. This was accordingly held to be a neutral factor in the particular circumstances of that case. This is distinguishable from the present case where Raymer took a two week vacation with his family, invoiced the appellant for the time away, and was paid. This is consistent with his being an employee.

[20] Raymer possessed a GST number, and charged and remitted GST on his bi-monthly invoices. This is consistent with his being an independent contractor. However, in my view it merely reflects the original intention of the parties and is not determinative. The same reasoning applies to the garnishee which was served upon the appellant but was not honoured because the parties considered Raymer an independent contractor.

[21] Upon examining the total relationship between the parties I do not find that Raymer was performing his services as the General Manager of the appellant's business as a person in business on his own account. He performed them in the capacity of an employee. The appellant has failed to discharge the burden of demolishing the assumptions contained in the respondent's Reply to the Notice of Appeal.

[22] The appeals are dismissed and the decisions of the Minister of National Revenue are confirmed accordingly.

Signed at Toronto, Ontario, this 20th day of June 2003.

---

[13] *Sagaz Industries (supra)*

[14] *Wolf (Supra)*

"N. Weisman"

D.J.T.C.C.

CITATION:	2003TCC382
COURT FILE NO.:	2000-523(EI), 2000-525(CPP)
STYLE OF CAUSE:	Budget Propane Corporation and M.N.R. and Morley Raymer
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	April 29, 2003
REASONS FOR JUDGMENT BY:	The Honourable Deputy Judge N. Weisman
DATE OF JUDGMENT:	June 20, 2003

APPEARANCES:

Counsel for the Appellant:	Samantha L. Callow
Counsel for the Respondent:	Andrea Jackett
For the Intervenor:	The Intervenor himself

COUNSEL OF RECORD:

For the Appellant:

Name:	Samantha L. Callow
Firm:	Samantha L. Callow Toronto, Ontario

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

For the Intervenor:

Name:	
Firm:	