

Docket: 2006-2290(EI)

BETWEEN:

PREMIER CAREER MANAGEMENT GROUP CORP.,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent,

and

JOE LOPUSHINSKY,

Intervenor.

Appeal heard on April 24, 2007, at Vancouver, British Columbia

Before: The Honourable Justice T. O'Connor

Appearances:

For the Appellant:	Minto Roy
Counsel for the Respondent:	Christa Akey
For the Intervenor:	The Intervenor himself

JUDGMENT

The appeal is dismissed and the decision of the Minister dated March 27, 2006 is confirmed in accordance with the attached Reasons for Judgment.

Signed at Ottawa, Canada this 3rd day of May, 2007.

"T. O'Connor"

O'Connor, J.

Citation: 2007TCC264
Date: 20070503
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JOE LOPUSHINSKY,

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REASONS FOR JUDGMENT

O'Connor, J.

[1] The issue in this appeal is whether the Intervenor (“Lopushinsky”) was employed by the Appellant (“Premier”) under a contract of service during the period from October 31, 2004 to November 14, 2004 (“Period”). A related issue is whether the relationship was in the nature of a contract for service (independent contractor) during the Period.

Facts

[2] Some of the facts are stated in the Reply to the Notice of Appeal either as assertions or assumptions and the substance of those that were not refuted are mentioned below. Other facts were established by the evidence and are also mentioned below.

1. Both Lopushinsky and Minto Roy (“Roy”) worked for a company named BH Careers International (“BH”) based in the United States.
2. BH ceased its business operations some time in October, 2004.

3. As the Manager of the Vancouver branch of BH at 700 West Georgia Street, Suite 2920, Roy supervised approximately ten BH employees.
4. With the closing of BH's Vancouver branch, the employees of BH lost their jobs.
5. Roy was the 100% shareholder of Premier, which was incorporated on October 20, 2004 under the name 0706672 B.C. Ltd. It carried on business under the name of Premier Management Group Corp. or PCMG.
6. Lopushinsky testified that he received a cheque sometime in November, 2004, from Premier in the amount of \$355.50, and that details on the back of the cheque indicated that this represented an amount of \$450.00 from which tax had been withheld in the amount of \$94.50 thus leaving the face amount of the cheque at \$355.50. Lopushinsky testified further that the \$94.50 withholding did not show up on any tax slips.
7. In response to a request for a determination from Lopushinsky, the Rulings division of the Canada Revenue Agency ("CRA") determined that Lopushinsky was not employed by Premier in insurable employment during the Period. The Rulings division issued a decision dated October 28, 2005 that Lopushinsky was not employed by Premier under a contract of service during the Period within the meaning of paragraph 5(1)(a) of the *Employment Insurance Act*, S.C. 1996, c. 23 (the "EI Act").
8. Lopushinsky filed an appeal to the Minister of National Revenue (the "Minister") on November 8, 2005 pursuant to section 91 of the *EI Act*.
9. By letter dated March 27, 2006, the Minister decided that Premier had employed Lopushinsky under a contract of service during the Period within the meaning of paragraph 5(1)(a) of the *EI Act*.
10. In making his decision the Minister relied on several assumptions of fact. Those not covered above may be summarized to the extent relevant as follows:
 - a) Premier provided career counseling, career management and business management services to its clients;
 - b) Premier took over the office space, equipment and client list of BH on or about October 31, 2004;

- c) as of October 31, 2004, some of the former employees of BH commenced performing duties for Premier;
- d) the duties performed by Lopushinsky and the other workers were to meet with clients and provide career, management and business counselling (the "Duties");
- e) Lopushinsky was an employee of BH up to and including October 30, 2004;
- f) Lopushinsky commenced performing the Duties for Premier on October 31, 2004;
- g) Premier supplied Lopushinsky, Roy and others with business cards. These cards showed Minto Roy as "Managing Director" of Premier and Lopushinsky as "Senior Consultant" of Premier;
- h) Premier provided the office space, the telephone and fax lines, the supplies and the receptionist used by Lopushinsky in the performance of the Duties;
- i) Premier entered into a lease agreement with the former landlord and continued to occupy the premises; and
- j) Lopushinsky was fired by Roy on November 24, 2004.

[3] Premier's Notice of Appeal reads as follows:

Mr. Lopushinsky was never an employee of Premier Career Management Group.

Premier Career Management Group began operations in November of 2004. Prior to this Mr. Lopushinsky and I worked at the same corporation. A company named BH Careers International.

BH Careers unilaterally, without notice, closed its Canadian Operation in Oct. of 2004.

As the Manager of the Vancouver Branch of Bh *[sic]* Careers Int. I managed approx. 10 employees, Mr. Loposhinsky *[sic]* being one of them.

As a result of the closing of BH Careers, all employees lost their jobs. However, the office had no direction on how to close, how to service clients, how to deal with suppliers, vendors, what would happen with payroll etc.. It truly was a confusing time. The company announced by fax the closing the office. However, the infrastructure within the office remained open; phone lines remained operational, email servers, office space, etc...

As a result many employees of Bh *[sic]* Careers continued to come into the office using it as a place to conduct their next career search, contact and meet with clients etc.. I had no authority as a manager to ditate *[sic]* any policy or procedure because I was an employee and now without work.

I decided after a week to open up my own company. I asked two former employees to join my new Company, but Joe Lopushinsky was not one of them. I met with the landlord and negoitated *[sic]* a new lease agreement for my new company. After becoming the leaseholder and forming Premier Career Management Group I asked Mr. Lopushinsky to vacate the office. He actually refused and I had to have him removed by security. I have documented notes and statement from the security guards regarding this incedent *[sic]*.

Mr. Loposhinsky *[sic]* did recieve *[sic]* a check *[sic]* from me. The check *[sic]* was not for work done from PCMG Canada. The check *[sic]* was for owed commissions on a client that we both secured during our tenureship with BH Careers. I as a managers *[sic]*, I often had split commissions with sales consultants. However, my commissions were paid one payroll before any sales consultant. As such, I received funds and I simply felt it fair that Mr. Lopushinsky share in the transaction. I have a copy of the transaction as well as a copy of the cheque cashed by Mr. Lopushinsky indicating on the memo portion of the cheque the clients name.

...

Clarifications

[4] Although the Period was only from October 31, 2004 to November 14, 2004, the evidence indicated that, if there was an employee relationship between Premier and Lopushinsky, it lasted until November 24, 2004. I believe however that the

Judgment to be rendered herein must be restricted to the Period as that is the period covered by the decision of the Minister dated March 27, 2006, which is the decision against which Premier has appealed.

[5] It should also be noted that in most cases under employment insurance matters, the issue is whether a worker was engaged under a contract of service (“employee”) or under a contract for service (“independent contractor”). In this case, Premier, through its representative, Roy, indicated that the dispute was mainly as to whether Lopushinsky was an employee of Premier during the period. I believe, however, that to completely resolve the matter I must also decide on the employee versus independent contractor issue.

Submissions

[6] Premier’s manager, Roy, maintains that he did not supply the business cards, that the cheque referred to above was for work done for the former company, BH, that there was no contract of employment between Premier and Lopushinsky and that Lopushinsky was clearly not an employee of Premier. Lopushinsky submits that he clearly was an employee, that he continued to occupy the space only leaving the office after he was fired on November 24, that the cheque referred to above is an indication that there was an employee relationship between himself and Premier and this was further confirmed by the issuing of the business cards referred to above. Lopushinsky also submitted as Exhibit R-2 a working sheet indicating that he continued to work from the period November 1, 2004 to Friday, November 19, 2004.

Analysis

[7] In my opinion the credibility of Lopushinsky is to be accepted and his evidence was impressive. The evidence clearly indicates that there was an employee relationship during the Period. The strongest indications of the employee relationship were (i) the continuing operations carried on by Premier in the premises; (ii) the continuing work done by Lopushinsky (Exhibit R-2); (iii) the cheque given, notwithstanding Roy’s assertions that it represented splitting a commission for work done for BH; and (iv) the business cards (why prepare and issue these unless Lopushinsky was an employee of Premier?) One might also question how Premier’s manager, Roy, can have the authority to “fire” Lopushinsky on November 24 if indeed Lopushinsky was not an employee. Also questionable is Roy’s indication in his Notice of Appeal that “after a week” he decided to “open up my own company”, when he had already, prior to November

1, 2004, incorporated Premier on October 20, 2004. As to the employee versus independent contractor issue, I am satisfied that applying the four principals thoroughly canvassed by the jurisprudence of control, ownership of tools, chance of profit – risk of loss, integration and intention, that all of these point to a contract of service, i.e. an employee relationship.

[8] In conclusion, there was an employee contract during the Period, namely October 31, 2004 to November 14, 2004. Consequently the appeal is dismissed. There shall be no costs.

Signed at Ottawa, Canada this 3rd day of May, 2007.

"T. O'Connor"

O'Connor, J.

CITATION: 2007TCC264
COURT FILE NO.: 2006-2290(EI)
STYLE OF CAUSE: Premier Career Management Group Corp. v. M.N.R.

PLACE OF HEARING: Vancouver, British Columbia

DATE OF HEARING: April 24, 2007

REASONS FOR JUDGMENT BY: The Honourable Justice T. O'Connor

DATE OF JUDGMENT: May 3, 2007

APPEARANCES:

For the Appellant:	Minto Roy
Counsel for the Respondent:	Christa Akey
For the Intervenor:	The Intervenor himself

COUNSEL OF RECORD:

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