Citation: 2004TCC607
Date: 20040917
Docket: 2003-1372(EI)
2003-1373(CPP)

BETWEEN:

DOWN UNDER MECHANICAL INC.,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent,

Docket: 2003-1377(EI)
2003-1380(CPP)

AND IN BETWEEN:

NUTS & BOLTS CONSTRUCTION INC.,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

Agent for the Appellant: V. Russo
Counsel for the Respondent: A'Amer Ather

REASONS FOR JUDGMENT

(Delivered orally from the Bench at Toronto, Ontario, on June 24, 2004)

Bowie J.

[1] Between October 13, 2001 and June 4, 2002, Mr. Michael Naugle did certain work for Nuts & Bolts Construction Inc. (Nuts & Bolts), and he also did certain work for Down Under Mechanical Inc. (Down Under).

[2] The appeals before me are brought by those two companies from determinations made by the Minister of National Revenue (the Minister) that the work in question was insurable employment under the terms of the *Employment Insurance Act*, and pensionable employment under the terms of the *Canada Pension Plan*. To put it another way, the two Appellants are of the view that Mr. Naugle was an independent contractor when he worked for them, and the Minister has taken the opposite view and considers him to have been an employee.

[3] The only evidence before me is that of Mr. Robert Moroney. At the time in question he was the owner of all the shares of Down Under, and he owned half the shares of Nuts & Bolts. The other 50% of the shares of Nuts & Bolts was owned by Mr. Marty Gover at that time. Mr. Gover ran the Nuts & Bolts company practically without input from Mr. Moroney. It is unfortunate that Mr. Gover did not attend and give evidence, as most of the work done by Mr. Naugle for these two companies was done for Nuts & Bolts. Mr. Moroney estimated that 90% of the work was for Nuts & Bolts and 10% of it for Down Under. It is also unfortunate that Mr. Naugle was not present to give evidence. The Appellants sought an adjournment of the hearing because he was not present in court. I refused to grant the adjournment. This matter had been scheduled for hearing in February 2004 and it was adjourned at that time because Mr. Naugle was unavailable. He was not available again this week. Neither party had served him with a subpoena and neither party now has any idea of his whereabouts. There was no reason to believe that if I granted an adjournment he could be located and served with a subpoena to attend an adjourned hearing.

[4] Mr. Moroney testified that the business of Nuts & Bolts was general construction and that of Down Under was plumbing and heating. In the time period with which we are concerned, Mr. Naugle was paid about $12,000.00 by the two companies for his efforts, 90% of which, as I have said, was for Nuts & Bolts and 10% for Down Under. Mr. Moroney's evidence was quite vague as to the nature of the work that Mr. Naugle did. He described it at one point as being general labour, and that I think is probably an accurate description. He said that initially Mr. Naugle had got in touch with Mr. Gover to offer his services, and that he worked on a somewhat intermittent basis for Nuts & Bolts and to a lesser extent for Down Under. He also said that he was aware of Mr. Naugle having worked for some period of time for a company called Stranway Construction.

[5] My impression from Mr. Moroney's evidence is that Mr. Naugle did not have an impressive curriculum vitae and that Mr. Moroney and Mr. Gover were really doing him something of a favour by giving him an opportunity to work at all, even on a casual basis. The same may well be true for Mr. Stranway; I do not know. Mr.

Moroney was unable to tell us anything significant about the work that Naugle had done for Stranway. When asked about the work, and the working relationship, Mr. Moroney indicated that when he had a job that required the services of a general labourer he would get in touch with Mr. Naugle and offer him the work. Sometimes Mr. Naugle accepted it; sometimes he did not.

[6] All the work of Down Under is done by way of subcontract. Mr. Moroney bids on and receives contracts for work in his line of business from general contractors and he then subcontracts that to others. Perhaps it is for this reason that he felt Mr. Naugle should be treated as a subcontractor. He also said that Mr. Naugle was reluctant to give his social insurance number, but he was reluctant to give a GST registration number as well. None of these matters bear particularly on the mixed question of fact and law, whether when working for these two companies Mr. Naugle was an independent contractor or simply a casual labourer engaged for a short term under a contract of service. I have no real doubt that it is the latter.

[7] The test to be applied is well settled. As recently as 2001, the Supreme Court of Canada in *Sagaz Industries Canada Inc. v. 671122 Ontario Ltd.*[1] approved the decision of the Federal Court of Appeal in the *Wiebe Door Services Ltd. v. M.N.R.*,[2] which since 1986 has been consistently applied in this Court and the Federal Court of Appeal. In giving the reasons for judgment of the Supreme Court of Canada, Mr. Justice Major dealt with this issue at paragraph 25 and following. Although the issue in that case was vicarious liability, the question to be answered is exactly the same one that arises under the *Employment Insurance Act* all too frequently. Mr. Justice Major referred to the judgment of Mr. Justice MacGuigan in *Wiebe Door* and to his observation there that the court is bound to look at all of the evidence carefully and consider it under the four heads that have long been understood: the first being supervision and control; the second the opportunity for profit; the third the risk of loss; and the fourth ownership of the tools, as it is sometimes expressed.

[8] Justice Major went on at paragraph 44 to approve specifically the formulation of the ultimate question as that was done by Mr. Justice Cooke in *Market Investigations, Ltd. v. Minister of Social Security*,[3] a case earlier approved, and indeed a specific test earlier approved, not only in *Wiebe Door* but also by the Privy

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1 [2001] 2 S.C.R. 983.

2 87 DTC 5025.

3 [1968] 3 All E.R. 732.

Council in the case of *Lee Ting Sang v. Chung Chi-Keung*.[4] Mr. Justice Cooke formulated the test this way. He said:

> The observations of Lord Wright, of Denning, L.J. and of the judges of the Supreme Court in the U.S.A. suggest that the fundamental test to be applied is this: "Is the person who has engaged himself to perform these services performing them as a person in business on his own account?". If the answer to that question is 'yes', then the contract is a contract for services. If the answer is 'no' then the contract is a contract of service. No exhaustive list has been compiled and perhaps no exhaustive list can be compiled of considerations which are relevant in determining that question, nor can strict rules be laid down as to the relative weight which the various considerations should carry in particular cases. The most that can be said is that control will no doubt always have to be considered, although it can no longer be regarded as the sole determining factor; and that factors, which may be of importance, are such matters as whether the man performing the services provides his own equipment, whether he hires his own helpers, what degree of financial risk he takes, what degree of responsibility for investment and management he has, and whether and how far he has an opportunity of profiting from sound management in the performance of his task.

In the context of the evidence in the present case the answer is obvious; Mr. Naugle could hardly be considered an entrepreneur. Dealing specifically with the factors so frequently enumerated, Mr. Moroney, I think, was an honest witness, but he did his best to put his evidence in a way that would be helpful to his case. He said that when Mr. Naugle was assigned a task nobody was there to give him direct supervision, he was simply given a job to do. He was told where the job was to be done and he went off and did it. If the job was for Nuts & Bolts he would submit an invoice when he was finished, billing at the rate first of $12.00 an hour and later $15.00 an hour, a figure agreed upon between them, Mr. Gover would check that the job was satisfactorily done before paying the invoice. He also would check to make sure that the number of hours that Mr. Naugle was submitting for payment was a reasonable number of hours for the task at hand. Certainly this is not close hour-by-hour supervision of Mr. Naugle's work, but in the context of the type of work that he was doing any more close supervision would probably have been wasteful.

[9] So far as the 90% of his work that was done for Nuts & Bolts was concerned, according to Mr. Moroney's evidence Nuts & Bolts would have other employees on the jobsite, and there would be a senior employee there. While he did not say in so many words that Mr. Naugle would be under the direct supervision of that senior

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4 [1990] 2 A.C. 374.

employee, it is logical to assume that there would be some level of supervision of him just as any other worker on the jobsite.

[10] I do not consider this to be a major factor in the present case. It is worth noting, however, that so far as the evidence reveals, instructions as to the job to be done were always given orally to Mr. Naugle. There was no question of written contracts specifying the job. He was simply given oral direction to the place and the task. Similarly, the ownership of tools, I think, is not a very large factor in the present case. It is clear from the authorities that the significance of the ownership of tools as part of the four-in-one test, as Mr. Justice MacGuigan called it, is that it gives an indication of investment in what may or may not be considered to be a business enterprise.

[11] In a case like *Montreal v. Montreal Locomotive Works Ltd.*,[5] obviously the amount of investment involved is very significant. In a case such as the present one there is no significant investment at all. Mr. Naugle owned a few hand tools that he took to work with him, and those it seems were all that he required. Mr. Moroney said quite candidly that if he were given a job that required a jackhammer they would probably rent that for him. Like so much of his evidence, and it is common not only of this case but all others as well, a great many of the questions asked and the answers given were in relation to hypothetical situations that might some day arise, but in fact have not arisen, between employer and employee or contractor and subcontractor, as the case may be. I do not find the answers to such questions to be significantly probative. Frequently Mr. Moroney was asked questions like: if there was an injury on the jobsite who would be responsible for it? If there were bad debts, who would be responsible for them? Who was responsible to provide insurance? Mr. Moroney did his best to answer those hypothetical questions, but the fact is that they were never discussed. They seldom are discussed in these situations, and frequently the answers call in any event for legal conclusions that the witness is not in a position to formulate. Why the questions are asked I do not know, but as I have said, when we are talking about hypothetical situations and what would have happened "if", I do not find it to be at all useful.

[12] Turning to the question of opportunity for profit and risk of loss, neither arises in the present case. It is quite obvious that Mr. Naugle was working for $12.00 an hour, later for $15.00 an hour. He would be paid on the basis of the hours that he said he had worked, at least insofar as Down Under was concerned, but only after Mr.

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5 [1947] 1 D.L.R. 161.

Gover had satisfied himself that he was not claiming an unreasonable amount of time for the work he had done. If he did the job faster he would make less money. There was no management to be done by him, so managing the work simply was not an issue.

[13] Having regard to all these factors, no reasonably informed and intelligent person would answer Justice Cooke's question otherwise than "no". That is to say that Mr. Naugle was not performing these services as a person in business on his own account. He was working for two or three employers on a very casual basis. The thrust of the argument of the Appellants' agent, Mr. Russo, was that since he worked for three different companies he must be a contractor and not an employee. That submission in my view simply has no credible basis at all. The question is not how many employers one has, the question is what is the nature of the relationship: is the person an entrepreneur with his own business?

[14] I have no hesitation in concluding in the present case that Mr. Naugle was an employee of Nuts & Bolts from time to time and he was an employee of Down Under from time to time. The appeals are therefore dismissed.

Signed at Ottawa, Canada, this 17th day of September, 2004.

"E.A. Bowie"

Bowie J.

CITATION:	2004TCC607
COURT FILE NO.:	2003-1372(EI), 2003-1373(CPP) 2003-1377(EI), 2003-1380(CPP)
STYLE OF CAUSE:	Down Under Mechanical Inc. and Nuts & Bolts Construction Inc. and The Minister of National Revenue
PLACE OF HEARING	Toronto, Ontario
DATE OF HEARING	June 22, 2004
REASONS FOR JUDGMENT BY:	The Honourable Justice E.A. Bowie
DATE OF JUDGMENT	June 29, 2004

APPEARANCES:

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