

Docket: 2007-1569(EI)

BETWEEN:

JFJ AGENCY INC.,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

Appeal heard on common evidence with the appeal of
JFJ Agency Inc., (2007-1570(CPP)) on January 14, 2008,
at Winnipeg, Manitoba.

Before: The Honourable Justice Wyman W. Webb

Appearances:

Counsel for the Appellant: Ross A. McFayden
Counsel for the Respondent: Meghan Riley

JUDGMENT

The appeal in relation to the determination that Michael Mooney was engaged in insurable employment for the purposes of the *Employment Insurance Act* during the period from January 1, 2002 to February 14, 2006 is dismissed without costs.

The appeal in relation to the determination that Linda Casson was engaged in insurable employment for the purposes of the *Employment Insurance Act* during the period from January 1, 2002 to March 31, 2005 is dismissed without costs.

The appeals in relation to the determination that Maureen Purpur, Shawna-Lynn Skrudland and Karleen Small were engaged in insurable employment for the purposes of the *Employment Insurance Act* are allowed, without costs, and, for these three individuals, the matter is referred back to the Minister of National Revenue for redetermination and reassessment on the basis that Maureen Purpur and

Shawna-Lynn Skrudland were not engaged in insurable employment for the purposes of the *Employment Insurance Act* for the period from January 1, 2004 to December 31, 2004 and that Karleen Small was not engaged in insurable employment for the purposes of the *Employment Insurance Act* for the period from January 1, 2002 to December 31, 2002.

Signed at Halifax, Nova Scotia, this 6th day of February 2008.

“Wyman W. Webb”

Webb J.

Docket: 2007-1570(CPP)

BETWEEN:

JFJ AGENCY INC.,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

Appeal heard on common evidence with the appeal of
JFJ Agency Inc., (2007-1569(EI)) on January 14, 2008,
at Winnipeg, Manitoba.

Before: The Honourable Justice Wyman W. Webb

Appearances:

Counsel for the Appellant: Ross A. McFayden
Counsel for the Respondent: Meghan Riley

JUDGMENT

The appeal in relation to the determination that Michael Mooney was engaged in pensionable employment for the purposes of the *Canada Pension Plan* during the period from January 1, 2002 to February 14, 2006 is dismissed without costs.

The appeal in relation to the determination that Linda Casson was engaged in pensionable employment for the purposes of the *Canada Pension Plan* during the period from January 1, 2002 to March 31, 2005 is dismissed without costs.

The appeal in relation to the determination that Bryce Matlashewski was engaged in pensionable employment for the purposes of the *Canada Pension Plan* during the period from January 1, 2002 to March 7, 2006 is dismissed without costs.

The appeals in relation to the determination that Maureen Purpur, Shawna-Lynn Skrudland and Karleen Small were engaged in pensionable

employment for the purposes of the *Canada Pension Plan* are allowed, without costs, and, for these three individuals, the matter is referred back to the Minister of National Revenue for redetermination and reassessment on the basis that Maureen Purpur and Shawna-Lynn Skrudland were not engaged in pensionable employment for the purposes of the *Canada Pension Plan* for the period from January 1, 2004 to December 31, 2004 and that Karleen Small was not engaged in pensionable employment for the purposes of the *Canada Pension Plan* for the period from January 1, 2002 to December 31, 2002.

Signed at Halifax, Nova Scotia, this 6th day of February 2008.

“Wyman W. Webb”

Webb J.

Citation: 2008TCC83

Date: 20080206

Dockets: 2007-1569(EI) & 2007-1570(CPP)

BETWEEN:

JFJ AGENCY INC.,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

REASONS FOR JUDGMENT

Webb, J.

[1] The Appellant has appealed the determination that Michael Mooney, Linda Casson, Maureen Purpur, Shawna-Lynn Skrudland and Karleen Small were engaged in insurable employment for the purposes of *Employment Insurance Act* (“EI”) and that Michael Mooney, Linda Casson, Bryce Matlashewski, Maureen Purpur, Shawna-Lynn Skrudland and Karleen Small were engaged in pensionable employment for the purposes of the *Canada Pension Plan* (“CPP”) for certain periods of time.

[2] The period in relation to the appeal of the determination for Maureen Purpur and Shawna-Lynn Skrudland is from January 1, 2004 to December 31, 2004 and for Karleen Small the period is from January 1, 2002 to December 31, 2002. At the commencement of the hearing, counsel for the Respondent confirmed that the Respondent agreed that the appeals in relation to Maureen Purpur, Shawna-Lynn Skrudland and Karleen Small should be allowed as the Respondent agreed that these three individuals were not engaged in insurable employment for the purposes of the *EI* nor were they engaged in pensionable employment for the purposes of the *CPP* for the periods referred to above.

[3] The remaining issue in this case is whether Michael Mooney, Linda Casson

and Bryce Matlashewski were engaged by JFJ Agency Inc. as employees or independent contractors. The periods in question for Michael Mooney, Linda Casson and Bryce Matlashewski are different for each individual and while the determination for all three under the *CPP* has been appealed, only the status of two of these individuals for the purposes of the *EI* has been appealed.

[4] The relevant periods under appeal and the applicable statutes for the appeals are as follows:

Individual:	Michael Mooney	Linda Casson	Bryce Matlashewski
Period under appeal:	January 1, 2002 to February 14, 2006	January 1, 2002 to March 31, 2005	January 1, 2002 to March 7, 2006
Applicable Statute(s)	<i>EI</i> and <i>CPP</i>	<i>EI</i> and <i>CPP</i>	<i>CPP</i>

[5] For the purposes of the *EI*, the Respondent determined that Bryce Matlashewski was not engaged in insurable employment with JFJ Agency Inc. on the basis that he was not dealing at arm's length with JFJ Agency Inc. and this determination has not been appealed. Bryce Matlashewski is Scott Johnson's nephew. Scott Johnson is the President of JFJ Agency Inc.

[6] JFJ Agency Inc. is a small business operating mainly in the province of Manitoba. It represents various suppliers of alcoholic beverages. Because of provincial legislation all sales of alcoholic beverages in Manitoba must be made to the Manitoba Liquor Control Commission ("MLCC") who in turn will sell the alcoholic beverages directly to consumers or to restaurants, lounges and other businesses that sell such beverages to consumers. JFJ Agency Inc. could not sell alcoholic beverages to customers and could only encourage customers to order from the MLCC the alcoholic beverages sold by the suppliers represented by JFJ Agency Inc.

[7] Each of the above individuals was engaged by JFJ Agency Inc. to solicit sales from various sources. Michael Mooney was engaged to increase the sales of the brands represented by JFJ Agency Inc. to the licensee market including restaurants and nightclubs. Linda Casson was engaged to increase sales of the wine products represented by JFJ Agency Inc. Bryce Matlashewski was engaged to increase sales to establishments attended by university age individuals. Each individual received some training from JFJ Agency Inc. mainly in brand familiarization.

[8] Each of the three individuals would set their own schedules. For each

individual, the amount that such person was paid was based on an estimate of the commissions that would be generated by the expected sales of products arising as a result of that person's efforts. The only individual for whom there was a written contract was Michael Mooney. The terms and conditions related to the engagement of Linda Casson and Bryce Matlashewski were substantially the same as the terms and conditions related to the engagement of Michael Mooney except the amount of the remuneration was different for each individual.

[9] The contract with Michael Mooney is dated June 12, 2000. This contract provided in part that the amount to be paid to Michael Mooney was \$36,000 annually. Payments were to be made to him on the 15th and 30th of each month. The contract also provided that he would be entitled to an annual bonus based on a mutually agreed upon incentive and the amount was described as "10% of annual". During the period in question, Michael Mooney was paid \$36,000 per year and although he did receive some bonuses he never received the maximum contemplated amount of the bonus.

[10] The agreement also provided that Michael Mooney would be reimbursed for business fuel and regular vehicle maintenance. Shortly after he was retained, JFJ Agency Inc. provided him with a van, as it was determined that his vehicle was not reliable. The van that was provided by JFJ Agency Inc. to Michael Mooney was prominently painted with advertising for one of the products represented by JFJ Agency Inc.

[11] The agreement also provided that Michael Mooney would be entitled to five weeks of paid holidays, and that he would maintain a home office with computer capacity. Daily call sheets were to be submitted on the 15th and 30th of each month. The requirement for the submission of call sheets was applicable to all three individuals.

[12] Linda Casson was not provided with a vehicle and she received less compensation than Michael Mooney. Linda Casson was paid \$750 - \$800 every two weeks. The expectations for her time and potential sales were not as high as they were for Michael Mooney. There was no indication of the number of weeks of holidays to which she was entitled. Linda Casson was reimbursed for fuel and maintenance costs in relation to the operation of her vehicle.

[13] Bryce Matlashewski was paid \$120 per week. He was a part owner of a renovated school bus that was prominently painted with advertising for a product that was represented by JFJ Agency Inc. Either JFJ Agency Inc. or one of the companies

that it represented paid to have the bus painted. Although it is not entirely clear, it appears that JFJ Agency Inc. also reimbursed Bryce Matlashewski for fuel and maintenance costs in relation to the operation of his vehicle.

[14] Counsel for the Appellant relied upon the decision of the Supreme Court of Canada in *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, [2001] S.C.J. 61, 2001 S.C.C. 59, in which Major J. of the Supreme Court of Canada stated as follows:

46 In my opinion, there is no one conclusive test which can be universally applied to determine whether a person is an employee or an independent contractor. Lord Denning stated in *Stevenson Jordan*, supra, that it may be impossible to give a precise definition of the distinction (p.111) and, similarly, Fleming observed that "no single test seems to yield an invariably clear and acceptable answer to the many variables of ever changing employment relations ..." (p. 416). Further, I agree with MacGuigan J.A. in *Wiebe Door*, at p. 563, citing Atiyah, supra, at p. 38, that what must always occur is a search for the total relationship of the parties:

[I]t is exceedingly doubtful whether the search for a formula in the nature of a single test for identifying a contract of service any longer serves a useful purpose.... The most that can profitably be done is to examine all the possible factors which have been referred to in these cases as bearing on the nature of the relationship between the parties concerned. Clearly not all of these factors will be relevant in all cases, or have the same weight in all cases. Equally clearly no magic formula can be propounded for determining which factors should, in any given case, be treated as the determining ones.

47 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.

48 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.

[15] The only individuals who testified during the hearing were Scott Johnson, the President of JFJ Agency Inc., Michael Mooney, and Bryce Matlashewski. Linda Casson did not testify during the hearing. There was conflicting evidence with respect to the intention of JFJ Agency Inc. and Michael Mooney in relation to whether he was retained as an employee or as an independent contractor. While Scott Johnson indicated that each individual was retained as an independent contractor, Michael Mooney testified that in his tax return he reported this income as employment income. Linda Casson did not testify and Bryce Matlashewski did not indicate whether he intended to be an employee or an independent contractor and therefore there is no indication of the intention of either Linda Casson or Bryce Matlashewski in relation to this matter.

[16] Therefore I find that there was no common intent that these individuals would be hired as independent contractors. With respect to Michael Mooney, there is a serious concern arising as a result of the amount that he was paid. The contract with him provided that he would be paid \$36,000 annually. This is greater than the small supplier limit under the *Excise Tax Act* (“ETA”) yet there is no reference to GST in the contract. Michael Mooney had raised the issue of GST with Scott Johnson who assured him that he did not need to collect GST. This would be correct if Michael Mooney was an employee of JFJ Agency Inc. but not if Michael Mooney was an independent contractor as the total annual consideration for his services was greater than the small supplier limit.

[17] If Michael Mooney would have been an independent contractor receiving \$36,000 or more each year, at some point he would have ceased to have been a small supplier as defined in section 148 of the *ETA* and once he ceased to be a small supplier, the consideration for his supply of services would no longer have been excluded in calculating the GST payable in respect of the supply (s. 166 of the *ETA*), he would have been required to register under section 240 of the *ETA*, collect GST on the amount that he was paid pursuant to section 221 of the *ETA*, file a return pursuant to section 238 of the *ETA* and remit the net tax pursuant to section 228 of the *ETA*. The failure of JFJ Agency Inc. to address the GST issue raises concerns with respect to the true intention of JFJ Agency Inc. when Michael Mooney was retained.

[18] Counsel for the Appellant also relied on the case of *Qureshi v. M.N.R.*, [1992] 1 C.T.C. 2370, 92 DTC 1150 in which the individual was found to be an independent contractor. In that case the individual “primarily conducted business in the maritime provinces as a sales manager and district sales manager”. As a sales manager he would supervise field managers who controlled the sales representatives who were

selling encyclopedias door to door. The individual in that case incurred expenses ranging from \$11,870 in 1982 to \$40,138 in 1984. Tremblay J. made the following comments in that case:

The fact that the company (either Collier or Grolier) paid office rent and provided basic furnishings and telephone service (3.05), it has a fixed remuneration structure by which the appellant was paid, had final approval of all sales (3.19), and had the exclusive use of the appellant services (3.20) might suggest the appellant was an employee. However, these facts are not important enough to outweigh the absence of control on the appellant's conduct and the financial risk that were closely related to most of the appellant's expenses for his staff.

[19] In this case the only expenses incurred by the individuals for which they were not reimbursed by JFJ Agency Inc. were the costs of their own computer and cell phone and for Bryce Matlashewski, the cost of a staple gun and tape. Michael Mooney confirmed that the computer that he acquired was a home computer and therefore would have been used otherwise than in relation to his activities for JFJ Agency Inc. It is not clear what percentage of the time the computer was being used for activities related to JFJ Agency Inc. Bryce Matlashewski stated that he was using a computer that was purchased by his family. It is also not clear what percentage of time the cell phones were used in relation to the activities that each individual was performing for JFJ Agency Inc.

[20] In *O'Connor v. M.N.R.*, [2006] T.C.J. No. 502, the individual, who was engaged to arrange the sale of wines in Alberta, was found to be an independent contractor. However in that case the individual was paid based only on actual sales (as established by the Alberta Gaming & Liquor Commission) and the individual “paid all his car expenses, his cell phone, storage, accommodations and travel expenses” and therefore had a more significant risk of loss than the individuals in this case.

[21] In *B.L.R. Safety & First Aid Inc. v. M.N.R.*, [1992] T.C.J. No. 785, sales representatives were found to be employees and not independent contractors.

[22] The Supreme Court of Canada noted that “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 this case, the Appellant has failed to establish that each of Michael Mooney, Linda Casson and Bryce Matlashewski were in business for themselves. It seems clear from the evidence that each of these individuals was in business for JFJ Agency Inc.

[23] With respect to the test of control, each individual was free to set his or her own hours and to determine which customers or potential customers would be contacted at any particular time. However, any sales person would have some flexibility in setting his or her own schedule as he or she would be dependent on the customers and when the customers would be available to meet. The list of existing customers and potential customers was prepared by JFJ Agency Inc. with input from the particular individual to whom the list related. There was a level of subordination because each individual was required to submit daily call sheets before they were paid. As a result I find that the control test does not strongly support either relationship.

[24] Each individual worked from their own home and would attend the offices of JFJ Agency Inc. on a regular basis to pick up promotional materials or deliver call sheets or attend meetings. This is not inconsistent with the individuals being employees. In the modern workplace employees need not work at the employers place of business and for sales persons, whether employees or independent contractors, the nature of the work would require that they spend significant amounts of time at the customers' premises and not at their employer's or payor's premises.

[25] There appeared to be three tools that were used by each individual – a cell phone, a vehicle and a computer. Each individual paid for their own cell phone but there was no evidence with respect to the percentage that the cell phones were used in relation to their activities for JFJ Agency Inc. and the percentage that the cell phones were used for personal calls. A vehicle was provided by JFJ Agency Inc. to Michael Mooney and either JFJ Agency Inc. or one of the companies that it represented paid for the painting of the bus used by Bryce Matlashewski. Each individual was reimbursed for the operating costs of the vehicles incurred while carrying on their activities. Michael Mooney used a computer that was a family computer and hence used by other members of his family and Bryce Matlashewski used a computer that was paid for by his family. As a result I find that the ownership of tools, on balance, indicates an employer/employee relationship.

[26] There was no indication that any of these three individuals hired their own helpers or could have hired their own helpers. It seems logical that each one of these individuals was hired personally to perform the sales tasks assigned to that person and therefore these individuals would not be allowed to hire helpers without the consent of JFJ Agency Inc.

[27] Each individual was paid a fixed amount. Only Michael Mooney indicated that

he received bonuses in addition to this fixed amount but receiving bonuses is not inconsistent with being an employee. There was little if any opportunity for profit above their fixed compensation. There was no risk of loss as JFJ Agency Inc. never sought to recover any amount from an individual as an overpayment if the commissions did not materialize as anticipated. The remedy of JFJ Agency Inc., if the activities of the individuals did not generate the sales that were contemplated, would be to fire the individual. This would be the same situation for employees who do not produce and run the risk of losing their jobs.

[28] The expenses incurred by the individuals were minimal and it is not clear, with respect to the cell phones, the actual amount that was incurred in relation to the activities for JFJ Agency Inc. and the amount incurred for the personal calls.

[29] There is an additional factor in this case that indicates an employer/employee relationship. JFJ Agency Inc. provided each individual with business cards that identified JFJ Agency Inc. with its address and contact information. No copies of the business cards were submitted into evidence. The President of JFJ Agency Inc. and two of the individuals testified. Not one of these individuals introduced a copy of the business cards after this issue had been raised by counsel for the Respondent in her cross examination of the first witness. Therefore, I assume that the business cards must have identified JFJ Agency Inc. with the name of each particular individual and with no indication that such individual was not an employee of JFJ Agency Inc. It seems logical to assume that any person who received such a card with the name of the individual and with the address and contact information for JFJ Agency Inc. would assume that the individual named is an employee of JFJ Agency Inc. Since JFJ Agency Inc. supplied these cards to these individuals, JFJ Agency Inc. should accept that it was portraying these individuals as its employees.

[30] As a result, I find that Michael Mooney, Linda Casson and Bryce Matlashewski were employees of JFJ Agency Inc. and therefore engaged in pensionable employment for the purposes of the *CPP* during the periods for each as set out above and that each of Michael Mooney and Linda Casson were engaged in insurable employment for the purpose of the *EI* during the periods for each as set out above.

[31] As a result, the appeals in relation to the determination that Michael Mooney, Linda Casson and Bryce Matlashewski were engaged in pensionable employment for the purposes of the *CPP* during the periods for each as set out above and that each of Michael Mooney and Linda Casson were engaged in insurable employment for the

purpose of the *EI* during the periods for each as set out above, are dismissed without costs.

[32] The appeals in relation to Maureen Purpur, Shawna-Lynn Skrudland and Karleen Small are allowed, without costs, and, for these three individuals, the matter is referred back to the Minister of National Revenue for redetermination and reassessment on the basis that Maureen Purpur and Shawna-Lynn Skrudland were not engaged in insurable employment for the purposes of the *EI* and were not engaged in pensionable employment for the purposes of the *CPP* for the period from January 1, 2004 to December 31, 2004 and that Karleen Small was not engaged in insurable employment for the purposes of the *EI* and was not engaged in pensionable employment for the purposes of the *CPP* for the period from January 1, 2002 to December 31, 2002.

Signed at Halifax, Nova Scotia, this 6th day of February 2008.

“Wyman W. Webb”

Webb J.

CITATION: 2008TCC83
COURT FILE NOS.: 2007-1569(EI) and 2007-1570(CPP)
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APPEARANCES:

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