Docket: 2005-2696(EI)
2005-2697(CPP)

BETWEEN:

DYNAMEX CANADA CORP.,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

Appeals heard on December 11, 2006, at Ottawa, Ontario

By: The Honourable Justice E.A. Bowie

Appearances:

Counsel for the Appellant: Guy Dussault
Counsel for the Respondent: Josée Tremblay

JUDGMENT

The appeals pursuant to subsection 103(1) of the *Employment Insurance Act* and section 28 of the *Canada Pension Plan* are allowed, and the decisions of the Minister of National Revenue made under section 93 of the *Act* and section 27.2 of the *Plan* are varied to provide that Gareth Palmer was not engaged by the appellant in insurable employment under the *Act*, or in pensionable employment under the *Plan* from August 13, 2003 to April 11, 2004.

Signed at Ottawa, Canada, this 31st day of January, 2008.

"E.A. Bowie"

Bowie J.

Citation: 2008TCC71
Date: 20080131
Docket: 2005-2696(EI)
2005-2697(CPP)

BETWEEN:

DYNAMEX CANADA CORP.,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

REASONS FOR JUDGMENT

Bowie J.

[1] These appeals are brought under section 103 of the *Employment Insurance Act*,[1] (the *Act*) and section 28 of the *Canada Pension Plan*,[2] (the *Plan*) from decisions of the Minister of National Revenue made under sections 93 and 27.2 of those statutes affirming rulings of the Canada Revenue Agency made under sections 90 and 26.1 that had determined that Gareth Palmer was engaged by the appellant in insurable and pensionable employment between August 13, 2003 and April 11, 2004 (the "period"). The single question in issue in each appeal is whether the contract between the appellant and Mr. Palmer was a contract of service, as the Agency and the Minister determined, or whether, as the appellant asserts, it was a contract for services.

[2] The appellant corporation is a common carrier and is engaged in a variety of business activities, many, but not all, of which involve transportation of goods. The

1 S.C. 1966, c. 23, as amended.

2 R.S.C. 1985, c. C-8, as amended.

particular aspect of its business with which these appeals are concerned is a courier service that it operates in the city of Toronto and the surrounding area. Mr. Palmer was engaged under a written contract on what is obviously a standard form of contract used by the appellant. While that form consists of 16 pages in all, the last 7 of which are Schedules A to D, the evidence was that, at least in some respects, the form was obsolete and the working relationship of Dynamex and Mr. Palmer was not exactly as described therein. An example of this is that the written contract required Mr. Palmer to convey the registered title to his vehicle to Dynamex during the period of his employment. That provision was inserted in the contract to meet a regulation that required the license to operate as a courier and title to the vehicle used to be in the same name. That regulation having been changed, the provision, although still in the contract, was not enforced. There was also a collective agreement between the appellant and the Teamsters Local Union 938 in force during the period, and it too provided some of the terms of their relationship.

[3] Mr. Peter Zeppieri is the Operations Manager of the Appellant. Mr. James Aitken is its President. They were the only witnesses. I have no reason to doubt the accuracy of any of the evidence they gave. The appellant has approximately 1,800 drivers performing the courier service that it provides to its customers throughout Canada, about 375 of them in the Toronto area, of whom Mr. Palmer was one. These drivers are referred to by the appellant as owner-operators, as they all provide their own vehicle, as well as their services. They are required to provide a reliable vehicle suitable for the goods that they deliver, which in the case of couriers generally means an automobile. They are required to keep the vehicle in good working order, and they are required to pay for the maintenance, repairs, and fuel that the vehicle requires. They also have to acquire and pay for liability insurance, and to pay any tickets for traffic violations. The appellant maintains cargo insurance to cover the customers' goods that are in the vehicle. In the event of an accident that immobilizes the driver's vehicle, he is required to contact Dynamex immediately to report it so that another owner-operator may be dispatched to take the cargo and see to its timely delivery.

[4] In addition to the drivers, the appellant has a sales staff whose function is to arrange courier contracts with businesses, it has dispatchers, and it has supervisory and administrative staff. In Toronto there are two supervisors for the 375 drivers. All these people are employees of Dynamex. There is no doubt that the customers are the appellant's customers in that they contract with the appellant for the carriage of goods, they are invoiced by the appellant and they make payment to the appellant. The appellant's position is that it provides the services to the customers not through employees, but through owner-operators to whom it subcontracts the work.

[5] There are essentially two kinds of service provided by these couriers, dedicated service and on-call service. Dedicated service consists of the courier providing service on an ongoing basis daily to one customer, such as a bank. On-call service consists of providing service on an *ad hoc* basis to many customers according to their immediate needs. Mr. Palmer provided dedicated services to Mercantile Bank during the period. He also provided on-call services from time to time. As a dedicated courier for Mercantile Bank, Mr. Palmer reported to the bank daily and received his assignments directly from the bank. He carried out these assignments as he saw fit, responsible only to ensure that deliveries were made accurately and within the timeframe contracted for. He completed a daily run sheet summarizing the deliveries made, and he turned this in to the Bank, not to the appellant. The appellant invoiced the bank periodically for the service, and Mr. Palmer was paid by the appellant on the basis of a percentage of that billing. Generally the rate was 55%, but Mr. Aitken testified that dedicated routes were posted and awarded to drivers on a seniority basis, and that there was some opportunity for the owner-operators to negotiate rates for these routes. On some occasions the percentage might be either higher or lower, depending on the particular circumstances.

[6] On-call work consists of deliveries that have been ordered by a customer on an individual basis, generally by telephone. They are passed on by the Dynamex dispatcher to the couriers, who may accept or reject any job offered to them. If Mr. Palmer accepted an on-call delivery, he would go to the customer's premises to receive the goods and the waybill and then make the delivery. This had to be done within the time prescribed by the customer in its order, but within that parameter Mr. Palmer could organize the pickup and delivery as he wished within his schedule for the day. At the end of the day, the drivers all drop their waybills for the day at any one of three drop points that have been established by the appellant throughout the metropolitan Toronto area. These drop boxes are opened and the way bills removed by one of the Dynamex administrative staff. Mr. Palmer was never required to go to the appellant's premises at all. Mr. Aitken testified that some on-call jobs might have to be paid at a rate higher than that established as the norm.

[7] Mr. Palmer was provided by the appellant with a uniform consisting of blue trousers and shirt with a Dynamex logo on it, and a jacket in winter. Mr. Zeppieri testified that this was done because customers wanted their couriers to be not only respectably dressed, but also identifiable. He carried an identification card that was provided to him by Mercantile Bank. This was provided so that he could identify himself to the bank's customers as its courier when making deliveries. The card also identified him on the reverse side as a Dynamex courier. Like all the

owner-operators, Mr. Palmer was required to have a pager and two-way radio in order to communicate with the Dynamex dispatchers. The pagers were leased by Dynamex, and it owned the radios, which it purchased for between $250.00 and $300.00. Dynamex rented a radio and a pager to each courier for $27.50 for each 15 day period, which was the interval at which Dynamex settled accounts with the owner-operators. Some owner-operators had their own radios, in which case they did not have to rent one.

[8] Mr. Palmer and all the other owner-operators were required to complete a form by March 15 each year indicating the periods of time off that they wished to take for annual leave. Leave was then assigned to them in accordance with their requests, operational requirements and their seniority. The owner-operators could hire a replacement driver if they were sick, or otherwise unable to work, but any replacement driver had to be pre-approved by the company. The reason for the pre-approval requirement was the company's concern that it not be represented in public, and with its customers, by unsuitable individuals. The use of replacement drivers was restricted to those occasions when the owner-operator was unable to work; otherwise the Dynamex company policy was one driver only for each vehicle.

[9] Dynamex paid Mr. Palmer, and all its owner-operators, at the end of each 15-day period. The amount was made up of his percentage of the Dynamex billing to the Mercantile Bank for his dedicated work, and his percentage of the way bills for on-call work during the period. The rental for the radio and pager of $27.50 and an amount for union dues were withheld from the payment, but there were no withholdings for income tax, employment insurance or *Canada Pension Plan.* Dynamex has never issued T4 forms under the *Income Tax Act* to its owner-operators, as it has always taken the position that they were not employees. However, Mr. Aitken testified that it does issue T4A forms to them, at the request of the Canada Revenue Agency which expressed some concern that not all the owner-operators were filing income tax returns and declaring their income.

[10] Counsel for the appellant referred me to some specific cases in which the facts were at least superficially similar to those of the present case. Counsel for the respondent bases her case largely upon two things: the decision of the Federal Court of Appeal in *Dynamex Canada Inc. v. Mamona et al*,[3] and the fact that Mr. Palmer, and all the other Dynamex couriers in Toronto, are covered by a collective agreement negotiated between the Teamsters Union and the appellant.

---

[3] (2002) 218 F.T.R. 269 (FCTD); aff'd. (2003) 305 N.R. 295 (FCA).

[11] The *Mamona* judgment concerned several couriers working for Dynamex in Winnipeg. Mr. Aiken testify to that they had formerly worked for a firm called Zipper Courier which had been acquired by Dynamex, and that at the time to which the decision pertained, their terms of employment were not the terms on which Dynamex couriers elsewhere worked. More important, the decision in question originated with an inspector who had concluded for the purposes of Part III of the *Canada Labour Code*[4] (the *Code*) that Mamona and the other couriers were employees of Dynamex, and so were entitled to vacation pay under the labour standards provisions found in Part III. This decision was affirmed by a referee under the *Code*, and the referee's decision in turn was affirmed by the Federal Court Trial Division and the Federal Court of Appeal following judicial review under section 18.1 of the *Federal Courts Act*.[5] The decisions of the Federal Court and the Federal Court of Appeal were concerned almost entirely with the principles governing judicial review, although the Federal Court of Appeal did find that the referee's decision met a test of reasonableness. What is more significant for present purposes, however, is that, upon a request made by one of the couriers for a ruling, the Canada Revenue Agency determined that the employment of the couriers was not insurable employment under the *Act*.[6] This ruling does not appear to have been appealed to the Minister or beyond. The *Mamona* decision is therefore of no assistance to the respondent in the present case.

[12] I understood the position of counsel for the respondent to be that the existence of a collective agreement covering these owner-operators militates greatly in favour, or perhaps is determinative, of the conclusion that their status was that of employees rather than service providers. It is clear from both the *Code* and the collective agreement itself, however, that this is not so. The *Code* specifically defines the word “employee” as including a “dependant contractor”, and it defines that expression in terms that clearly include certain persons who are engaged under contracts for services rather than contracts of service. Those definitions, and the definition of “employer” leave no room to doubt that Part I of the *Code* specifically contemplates that there will be collective bargaining between dependant contractors who are engaged under contracts for services rather than

4 R.S.C. 1985, c. L-2.

5 R.S.C. 1985, c. F-7.

6 305 N.R. 295 @ p. 12.

contracts of service and the firms to which they provide those services. Those definitions are:

> 3(1) In this Part,
>
> "dependent contractor" means
>
> (*a*) the owner, purchaser or lessee of a vehicle used for hauling, other than on rails or tracks, livestock, liquids, goods, merchandise or other materials, who is a party to a contract, oral or in writing, under the terms of which they are
>
> (i) required to provide the vehicle by means of which they perform the contract and to operate the vehicle in accordance with the contract, and
>
> (ii) entitled to retain for their own use from time to time any sum of money that remains after the cost of their performance of the contract is deducted from the amount they are paid, in accordance with the contract, for that performance,
>
> (*b*) a fisher who, pursuant to an arrangement to which the fisher is a party, is entitled to a percentage or other part of the proceeds of a joint fishing venture in which the fisher participates with other persons, and
>
> (*c*) any other person who, whether or not employed under a contract of employment, performs work or services for another person on such terms and conditions that they are, in relation to that other person, in a position of economic dependence on, and under an obligation to perform duties for, that other person;
>
> "employee" means any person employed by an employer and includes a dependent contractor and a private constable, but does not include a person who performs management functions or is employed in a confidential capacity in matters relating to industrial relations;
>
> "employer" means
>
> (*a*) any person who employs one or more employees, and
>
> (*b*) in respect of a dependent contractor, such person as, in the opinion of the Board, has a relationship with the dependent contractor to such extent that the arrangement that governs the performance of services by the dependent contractor for that person can be the subject of collective bargaining;

The collective agreement refers throughout to the courier drivers as "owner-operators", as Mr. Zeppieri and Mr. Aitken were careful to do throughout their evidence. The intention of the parties as to their relationship is made clear by Articles 1.01 and 1.04:

> 1.01 The Company does hereby recognize the Union as the sole and exclusive bargaining agent for all Dependant Contractors contracted by the Company at all Company operations save and except supervisors, those above the rank of supervisor, office staff, sales staff, dispatcher and tracer.
>
> The term "Dependant Contractor" shall mean all "Owner/Operators"
> …
>
> 1.04 The company and the Owner-Operators consider their relationship to be that of Owner/Dependant Contractor and not employer/employee and nothing herein shall be read as expressing a contrary intent.
> ….

Mr. Palmer's personal contract contains essentially the same provisions:

> 1.01 The term "Dependant Contractor shall mean all "Owner-Operators. Any Owner-Operator as a condition of their engagement, are subject to this contract, the terms of which may expand but not conflict with the terms of the collective agreement …
>
> 1.02 The Company and the Owner-Operator consider their relationship to be that of Owner/Dependant Contractor and not employer/employee and nothing herein shall be read as expressing a contrary intent.

[13] Not only does the existence of a collective agreement not assist the respondent, these terms are fatal to the respondent's case, unless they are shown to be inconsistent with the application of the common law to the facts of the case.[7]

[14] The principles governing cases of this type are well-established. They were conveniently summarized in the Federal Court of Appeal's decision in *Wiebe Door v M.N.R.*[8] The Supreme Court of Canada has recently reaffirmed them in *671122*

---

7 *Royal Winnipeg Ballet v. M.N.R.*, [2007] 1 F.C.R. 35.

8 [1986] 3 F.C. 553 (FCA).

Ontario Ltd. v. Sagaz Industries Inc.[9] My task is to consider the facts of this case in light of those principles, having regard in particular to the factors enumerated in those cases, but bearing in mind that those factors are not exhaustive, and that the weight to be given to each may vary from case to case depending on the circumstances.

[15] The appellant had the right to exert some control over Mr. Palmer in relation to certain aspects of his work. This related to such matters as his dress and appearance, and other matters as to which his conduct might reflect poorly on the appellant in its relations with its customers. He was required, of course, to maintain schedules and to deliver reports to the Bank and way bills to the appellant's drop boxes, but again these were operational requirements. He was free, within the parameters of the contractual obligations of Dynamex to its customers, to perform the work as he saw fit, to arrange his deliveries in the order that suited him, and to hire a substitute driver when he was unavailable, so long as the driver was pre-approved by Dynamex. In my view, the control factor favours the conclusion sought by the appellant.

[16] Ownership of the tools also favours the view that Mr. Palmer was engaged under a contract for services. The vehicle was the major piece of equipment used in his work, and he had to supply that. Dynamex invested some capital in radio equipment, but it was much less than the drivers' investment in the vehicles, and it recovered that investment through the monthly rental payments that the drivers were, for the most part, required to make.

[17] There are a number of ways in which Mr. Palmer, and the other owner-operators, were able to increase their net incomes, both by increasing their revenues and by controlling their expenses. The choice of an economical vehicle rather than a gas guzzler, and careful operation and maintenance to minimize fuel consumption and repairs could significantly reduce their expenses. Efficient organization of the route for deliveries could do the same. In Mr. Palmer's case, he had the opportunity to accept on-call work that could be efficiently integrated into his Mercantile Bank delivery route. Mr. Aitken's evidence was that the drivers also had at least some opportunity to negotiate commission rates on some of the work. All these factors provided the drivers with an opportunity to affect their profitability by their conduct – certainly one of the hallmarks of entrepreneurship.

[18] The contract also carried with it the risk for Mr. Palmer of significant loss. Traffic fines, damage to his vehicle and the potential for liability to others for damage

---

[9] [2001] 2 S.C.R. 983.

caused in the course of the work were all potential sources of loss. Some of these risks were quite significant, and some he could insure against. Indeed, he was required to insure against liability to third parties. But the potential for unforeseen losses is always a hazard in those cases where the worker provides the vehicle at his own expense.

[19] All these factors are indicative, in varying degrees, of a contract for services. Mr. Palmer's business was necessarily integrated into that of the appellant, as will always be the case with a dependant contractor, but that is not inconsistent with the contract being for services rather than a contract of service. Counsel for the appellant referred me to a number of decisions of this Court in cases involving the same issues in respect of couriers,[10] as well as to the decision of the British Columbia Supreme Court in *Tajarobi v. Corporate Couriers Ltd,*[11] and that of the New Brunswick Court of Queen's Bench in *Erb v. Expert Delivery Ltd.*[12] In all these cases the facts were very similar to the facts of the present case; in all of them the couriers, usually owner-drivers, were found to be contractors rather than employees.[13] It does not appear that any of these decisions were appealed. It is difficult to understand the reluctance of the Minister of National Revenue, and of the Attorney General, to either accept these judgments of this Court as settling the question insofar as it applies to dependant contractors, or else appeal them to the Federal Court of Appeal.

[20] The appeals are allowed, and the decisions of the Minister made under section 93 of the *Act* and section 27.2 of the *Plan* are varied to provide that during the period Mr. Palmer was not engaged by the appellant in insurable employment under the *Act*, or in pensionable employment under the *Plan.* In view of the number of previous decisions of this Court that have reached the same result in similar circumstances, I regret that I am unable to make a substantial award of costs to the appellant.

Signed at Ottawa, Canada, this 31st day of January, 2008.

---

[10] *DHL Express (Canada) Ltd. v. Canada*, 2005 TCC 178; *Velocity Express Canada Ltd. v. Canada*, QL [2002] TCJ No. 136; *Tiger Courier Inc. v. Canada*, 2001 CanLII 699; *Flash Courier Services Inc. v. Canada,* 2000 CanLII 164; *Mayne Nickless Transport Inc*., 1999 CanLII 266.

[11] 2006 BCSC 454.

[12] QL [1995] NBJ No. 381.

[13] In *Tajarobi* and *Erb* this conclusion was *obiter*, as the issue in each of these cases was the right to reasonable notice of termination.

"E.A. Bowie"

Bowie J.

CITATION:	2008TCC71
COURT FILE NO.:	2005-2696(EI) and 2005-2697(CPP)
STYLE OF CAUSE:	DYNAMEX CANADA CORP. and THE MINISTER OF NATIONAL REVENUE
PLACE OF HEARING:	Ottawa, Ontario
DATE OF HEARING:	December 11, 2006
REASONS FOR JUDGMENT BY:	The Honourable Justice E.A. Bowie
DATE OF JUDGMENT:	January 31, 2008

APPEARANCES:

Counsel for the Appellant:	Guy Dussault
Counsel for the Respondent:	Josée Tremblay

COUNSEL OF RECORD:

For the Appellant:

Name:	Guy Dussault
Firm:	Cain Lamarre Casgrain Wells

For the Respondent:	John H. Sims, Q.C. Deputy Attorney General of Canada Ottawa, Canada