Docket: 2009-3049(EI)

BETWEEN:

OLDHAM ROBINSON INTEGRATED TECHNOLOGIES INC.,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

Appeal heard on common evidence with the appeal of
Oldham Robinson Integrated Technologies Inc. (2009-3050(CPP))
on June 2, 2010, at Hamilton, Ontario.

Before: The Honourable Justice Paul Bédard

Appearances:

Agent for the Appellant:	Jason A. Robinson
Counsel for the Respondent:	Mark Tonkovich

JUDGMENT

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

Signed at Ottawa, Canada, this 22nd day of November 2010.

"Paul Bédard"

Bédard J.

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"Paul Bédard"

Bédard J.

Citation: 2010 TCC 596
Date: 20101122
Dockets: 2009-3049(EI)
2009-3050(CPP)

BETWEEN:

OLDHAM ROBINSON INTEGRATED TECHNOLOGIES INC.,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

REASONS FOR JUDGMENT

Bédard J.

[1] These appeals are from decisions by the Minister of National Revenue (the "Minister") under the *Canada Pension Plan* ("CPP") and the *Employment Insurance Act* (the "Act") that during the period from January 1, 2005 to December 9, 2008 (the "relevant period") Cori Jeffrey (the "Worker") was employed by the Appellant in pensionable and insurable employment.

[2] The Appellant operated a sales, service and support business for engraving machines and software. The worker was first hired under a verbal agreement on an indeterminate basis to perform for the Appellant and the Appellant's three sister companies (International Distribution Experts, Hyper and Bossing Inc., and Primerica Agent) the following services: regular administration and clerical work such as answering the telephone, shipping, receiving, performing office duties, dealing with sales orders, and bookkeeping.

[3] The Appellant's position is that the worker was an independent contractor and was not employed under a contract of service.

[4] Each case in which the question of whether a person is an employee or an independent contractor arises must be dealt with on its own facts. Each of the four components (control, ownership of tools, chance of profit and risk of loss) of the composite test enunciated in *Wiebe Door Services Ltd. v. M.N.R.*, 87 DTC 5025, and *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, [2001] 2 S.C.R. 983, must be assigned its appropriate weight in the circumstances of the case. Moreover, the intention of the parties to the contract has, in recent decisions of the Federal Court of Appeal, become a factor whose weight seems to vary from case to case (*Royal Winnipeg Ballet v. M.N.R.*, 2006 FCA 87; *Wolf v. Canada*, [2002] 4 F.C. 396; *City Water International Inc. v. Canada*, 2006 FCA 350; *National Capital Outaouais Ski Team v. M.N.R.*, 2008 FCA 132).

[5] The facts on which the Minister relied to render his decision in the CPP case (2009-3050(CPP)) and in the EI case (2009-3049(EI) are set out in paragraph 9 of each Reply to the Notice of Appeal, as follows:

a. the Appellant operated a business of sales, service and support of engraving machines and software (the "Business"); **(admitted)**

b. the Appellant's shareholders and their percentages of holdings from September 1, 2004 to November 30, 2008 were as follows:

• Christopher ("Chris") Edgar	60%
• Jason Robinson	40%

(denied)

c. Jason Robinson was the Appellant's sole shareholder from December 1, 2008 and onwards; **(denied)**

d. Chris Edgar and Jason Robinson controlled the day-to-day operations and made the major business decisions for the Business; **(denied)**

e. the Worker had no ownership in the Business; **(denied)**

f. the Worker was interviewed for the position; **(denied)**

g. the Worker was hired under a verbal agreement for an indeterminate basis; **(denied)**

h. the Worker performed work for the Appellant's three companies: International Distribution Expert, Hyper and Bossing Inc., and Primerica Agent from the Appellant's office; **(admitted)**

i. the Worker's duties included the following:

(i) administrative assistant;
(ii) personal assistant to Chris Edgar and Jason Robinson; and
(iii) regular administration and clerical work, such as answering the telephones, shipping, receiving, office duties, sales orders and bookkeeping;

(denied)

j. the Worker performed her duties at the Appellant's place of business; **(denied)**

k. the Worker was required to obtain the Appellant's approval prior to sending out accounts payable information and incurring office expenses; **(denied)**

l. the Worker was supervised by Chris Edgar until December 2008, at which time Jason Robinson began supervising the Worker; **(admitted)**

m. the Appellant provided on-the-job training to the Worker when she began working for the Appellant; **(denied)**

n. the Worker was required to comply with company policies, procedures and protocol; **(admitted)**

o. Chris Edgar and Jason Robinson gave the Worker directions and instructions as to what work had to be done on a daily basis; **(denied)**

p. the Worker was required to inform the Appellant of any absences; **(denied)**

q. the Appellant provided the Worker with the facilities, tools, equipment and supplies (computer, desk, telephone, printer, filing cabinets, fax machine, and copier and supplies), and supplies at no cost to the Worker; **(denied)**

r. the Appellant was responsible for the maintenance and repairs of the tools and equipment that the Worker used; **(admitted)**

s. the Worker was required to provide her services personally; **(denied)**

t. the Worker could not, and did not, hire substitutes or helpers; **(denied)**

u. the Appellant was responsible for hiring helpers, assistants, and replacements; **(denied)**

v. the Worker did not incur any expenses in the performance of her duties; **(denied)**

w. the Appellant's business hours of operation were 9:00 am to 5:00 pm Monday to Friday; **(admitted)**

x. the Worker's hours were 9:00 am to 5:00 pm Monday to Friday; **(denied)**

y. the Worker was required to work 40 hours a week; **(denied)**

z. from 2005 to July 2008, the Worker was required to record her hours of work in a notebook; in August 2008, she was required to record her hours in QuickBooks; **(denied)**

aa. the Worker's pay was based on an hourly rate; **(admitted)**

bb. the Appellant determined the Worker's rate of pay; **(denied)**

cc. the Appellant provided Christmas bonuses to the Worker; **(denied)**

dd. the Appellant did not provide a benefit plan, vacation pay or paid vacation to the Worker; **(admitted)**

ee. the Appellant paid the Worker profit sharing of 3% ($1000 to $2000 per year); **(denied)**

ff. the Worker was paid by cheque on a bi-monthly basis; **(admitted)**

gg. the Worker received payments without invoicing the Appellant; **(denied)**

hh. the Appellant was responsible for the work performed by the Worker; **(denied)**

ii. the Appellant determined if work needed to be redone, and covered all the costs related to the work; **(denied)**

jj. the Worker was required to wear a uniform during trade shows; **(admitted)**

kk. the Worker did not have a business presence during the Period:

(i) no registered business name or number;
(ii) no GST number;
(iii) no business bank account; and
(iv) no other clients;

(denied)

ll. the Worker was put on the Appellant's payroll as an employee in August 2008 in order to be entitled to receive EI maternity benefits; **(admitted)**

mm. there were no changes in the Worker's job description or duties for the entire period that she worked for the Appellant; and **(denied)**

nn. the Worker has not been claiming expenses on her personal income tax returns for the 2005 to 2008 taxation years. **(accepted)**

[6] Mr. Jason A. Robinson and Mr. Christopher Edgar testified in support of the Appellant's position. The Worker and her husband testified in support of the Respondent's position.

[7] First, I would like to make a general comment on the Worker’s credibility. She came and she simply told her story. She was not vague. She applied herself to answering the specific questions asked. She held up remarkably well under cross-examination. She provided details and examples. She did not give the Court any reason to doubt her previous testimony. No inconsistencies were flagged or proved, and she answered all of Appellant’s questions head on. On the other hand, Mr. Edgar and Mr. Robinson too often made general and unverifiable comments and provided evasive explanations. Moreover, I would say that the hesitancy of Mr. Edgar and Mr. Robinson, the amount of time they took to answer questions and their attitude raised even more doubts in my mind with respect to their credibility.

The Worker's testimony

[8] The Worker's testimony was essentially the following:

i. She did not understand the meaning of the term independent contractor when she entered into a verbal agreement with the Appellant. She accepted the job and consequently the status of independent contractor because she needed work at that time, and she took the job trusting that the Appellant would provide further explanation of independent

contractor status when the time came for her to file her tax returns for the 2005 taxation year.

ii. She felt forced by the Appellant to sign a written contract (see Exhibit A-1). She signed the contract in "late 2006", when the contract had almost expired. She explained that her impression was that if she did not sign the contract she either might or definitely would lose her job. I would point out immediately that the duration of the contract was from January 2006 to December 2006 and that the date of signature appearing on the contract is December 16, 2005.

iii. She gradually became aware of the meaning of independent contract or/and took steps to make sure that her liability would be minimal if it was ever decided that what the Appellant had told her originally was wrong. I would point out immediately in this regard that the Worker did not claim expenses in her personal income tax returns for the 2005 to 2008 taxation years. Even if at some point she became aware that she was not an independent contractor, she no longer argued with the Appellant about her tax status because she felt she might lose her job if she did.

iv. The Appellant provided her with the facilities, tools, equipment and supplies (except for a keyboard) for her work at no cost. In this regard, I would point out that the Worker did not claim expenses in her personal income tax returns for the 2005 to 2008 taxation years. I would also point out immediately that the Appellant submitted no evidence to the contrary.

v. She could not and did not hire substitutes or helpers. I would point out again that the Worker did not claim expenses in her personal income tax returns for the 2005 to 2008 taxation years. I would also point out immediately that the Appellant's allegation that the Worker had hired and paid her husband and Shannon Holdson was not supported by the testimony of those persons. In fact, only the Worker's husband testified. Essentially, he confirmed the Worker's version that on one occasion he had made a delivery of a printer for the Appellant and that he was paid for that delivery by the Appellant.

vi. She never owned shares in the Appellant's share capital.

vii. She was paid at an hourly rate ranging between $9 (when she started) and $12 (when she was finally terminated). She also received Christmas bonuses ranging from $300 to $500 a year. She explained that she had no discussions with the Appellant prior the payment of those bonuses and that there was no established framework for how those bonuses would be paid. In other words, she affirmed that the bonuses were purely discretionary. I would point out immediately that the Appellant's allegations that those bonuses were paid to the Worker according to the compensation scheme established for the shareholders or owners of the Appellant were not credible. First, the Appellant could have submitted objective evidence that the Worker was a shareholder of the company. This the Appellant did not do. I infer therefrom that such evidence would not have been favourable to the Appellant. Also, the Appellant's representative's testimony that the bonuses were paid to the Worker according to a profit-sharing plan set up for the Appellant's shareholders or owners was simply vague, imprecise and ambiguous. In other words, the Appellant was unable to give any valid explanation of the functioning of the alleged profit-sharing plan.

viii. During the relevant period, the Worker was required to record her hours of work.

ix. She was not a manager. She had to ask the approval of Chris Edgar or Jason Robinson (the Appellant's representatives) prior to sending out accounts payable information. She had to go to the Appellant's representatives when she needed money for office expenses. She had to go to the Appellant's representatives when she wanted days off or a vacation or when she thought she should have an increase in pay. Her work was supervised by Chris Edgar until December 2008, at which time Jason Robinson began supervising her. In this regard, she explained the nature of her work. In fact, she was doing various types of work, among which were the following: filing, answering the phone, getting coffee on occasion, going out and arranging purchases, and carrying on collection activities. The Worker explained that she received specific training with respect to each of those duties so that they would be performed in accordance with the Appellant's policies. I would point out that the Appellant admitted that the Worker was required to comply with the Appellant's policies, procedures and protocol. I would also point out immediately that Chris Edgar's testimony that the Worker, as an owner of the Appellant, did not receive

any direction appears to me to be simply implausible. I would point out as well that the Appellant did not submit objective evidence that the Worker was a shareholder or an owner of the Appellant.

x. The Worker was required to inform the Appellant of any absences.

xi. She was generally required to work 40 hours a week, from 9:00 am to 5:00 pm, Monday to Friday, for the Appellant and for the Appellant's three sister companies (International Distribution Experts, Hyper and Bossing Inc. and Primerica Agent) from the Appellant's office. On two occasions, she performed her work from her home. Her request to work from 8:00 am to 4:00 pm was denied by Mr. Edgar. As stated by counsel for the Respondent in argument, "Mr. Edgar said, 'No I need you here from nine to five', and that was the end of the matter." The Worker also adequately explained why the amounts of the pay cheques were different. She received different types of pay because she was instructed to take pay cheques from the Appellant and from the Appellant's three sister companies. She also added that the pay periods were not always the same because she occasionally worked more hours one day and fewer another day, but essentially she worked approximately 40 hours per week from nine to five.

xii. She was required to wear a uniform during trade shows.

xiii. From 2006, in exchange for the Worker's putting advertising on her Mazda, the Appellant was paying half of the cost of her lease.

xiv. She never advertised herself as an independent contractor performing administrative services.

xv. In August 2008, on her request, she was put on the Appellant's payroll as an employee in order to be entitled to EI maternity benefits. She explained that there were no significant changes in her job description or duties for the entire period that she worked for the Appellant. She explained that the changes "were more to do with the fact that Chris was no longer as available with Oldham Robinson".

[9] The evidence also revealed, *inter alia*, the following:

(i) The Worker did not have during the relevant period a registered business name or number except for a business (Wrap Your Ride) that was not performing administrative services. I would point out that the evidence revealed that this business operated for a very short period of time;

(ii) The worker did not have a GST number or a business bank account.

(iii) During the relevant period, the Worker performed administrative services exclusively for the Appellant and the Appellant's three sister companies, except during a period of two weeks when she had to work for her former employer in order to fulfil her obligations as an employee to that former employer.

Analysis and conclusion

[10] Starting with the issue of intention, what evidence do I have of the Appellant's and the Worker's intention with regard to the legal relationship they had entered into? The evidence indicates that the Worker did not understand the meaning of self-employment when she first verbally entered into the contract with the Appellant. It seems clear from the Worker's credible testimony that she subsequently felt forced to sign the written contract. When she became convinced that she was not an independent contractor, she ceased arguing with the Appellant about her tax status because she felt that she might lose her job if she did argue. From the moment she was aware of her tax status she did take steps to make sure she would not have much liability if ever it was decided by the authorities that she was not an independent contractor. I cannot infer from the evidence that the parties shared a common understanding that the Worker was to be self-employed and not an employee. Where the intention of the parties cannot be ascertained, it is quite proper, indeed necessary, to look at all the facts to see what legal relationship they reflect. In that regard, the four components of the composite test enunciated in *Wiebe Door* are relevant and helpful in ascertaining the intent of the parties to the contract and the legal nature of the contract.

[11] Turning now to the facts of this case, what factors suggest that the Worker was in business on her own account?

Tools

- She provided her own keyboard.

[12] What factors suggest that the Worker was an employee of the Appellant?

Tools / Equipment

- The Appellant provided all the tools and equipment required, except for a keyboard.

Responsibility for investment and management

- The Worker had no such responsibility.

Chance of profit/Risk of loss

- The Worker had no expenses and no liability exposing her to a risk of loss.
- There was, in reality, no opportunity for her to increase her income.

Control

- The Worker received instructions and directions from Mr. Edgar or Mr. Robinson on a daily basis as to what work had to be done. The work assigned had to be performed in compliance with the Appellant's policies, procedures and protocol. The Worker had to work during the Appellant's business hours, which were from 9:00 am to 5:00 pm, and at on Appellant's premises. The Worker had to record her hours. The Worker was required to wear a uniform The Worker informed the Appellant regarding any leave she wished to take. The Worker also reported regularly to Mr. Edgar or Mr. Robinson.

[13] Here we have a Worker who, if one is to accept the Appellant's submission, was an independent contractor, and yet brought no tools to her alleged business. She had no responsibility for investment and management. She did not incur any expenses and effectively had no exposure to liability. She just showed up on a daily basis to perform the work she was directed and instructed to do, and she did so in compliance with the Appellant's policies, procedure and protocol. I cannot find in these circumstances that the Worker was carrying on a business on her own account.

[14] The Appellant spent quite a lot of time making the point that the Worker worked for more than one company, suggesting by this that the Worker was necessarily providing services as a person in business on her own account. What the Court must do here is determine the relationship between the Appellant and the Worker, not characterize the relationship between the Worker and the Appellant’s sister companies. I would add that if I had had to do so, I would have decided, in light of the four components of the composite test enunciated in *Wiebe Door Services Ltd.*

v. M.N.R., *supra*, that the Worker was also an employee of those sister corporations, considering the evidence submitted. The Appellant has to understand that the fact that a person works for more than one employer does not necessarily indicate that he or she is an independent contractor rather than an employee. There is no rule in common law that an employee cannot work for more than one employer.

[15] For these reasons, the appeals are dismissed.

Signed at Ottawa, Canada, this 22nd day of November 2010.

"Paul Bédard"

Bédard J.

CITATION:	2010 TCC 596
COURT FILE NO.:	2009-3049(EI) 2009-3050(CPP)
STYLE OF CAUSE:	OLDHAM ROBINSON INTEGRATED TECHNOLOGIES INC. v. M.N.R.
PLACE OF HEARING:	Hamilton, Ontario
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REASONS FOR JUDGMENT BY:	The Honourable Justice Paul Bédard
DATE OF JUDGMENT:	November 22, 2010

APPEARANCES:

Agent for the Appellant:	Jason A. Robinson
Counsel for the Respondent:	Mark Tonkovich

COUNSEL OF RECORD:

For the Appellant:

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Firm:	

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