

Docket: 2010-1824(EI)

BETWEEN:

NEIL DRADER,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent,

and

JOSEPH CLAUDE WAGNER,

Intervener.

Appeal heard on common evidence with the appeal of *Neil Drader*
(2010-1823(CPP)) on November 25, 2010 in Victoria, British Columbia

Before: The Honourable Justice L.M. Little

Appearances:

Counsel for the Appellant: Robert Connolly

Counsel for the Respondent: Rob R.S. Whittaker

For the Intervener: The Intervener himself

JUDGMENT

The appeal is allowed, without costs, and the decision of the Minister is vacated in accordance with the attached Reasons for Judgment.

Signed at Ottawa, Canada, this 11th day of March 2011.

"L.M. Little"

Little J.

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Citation: 2011 TCC 157
Date: 20110311
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Intervener.

REASONS FOR JUDGMENT

Little J.

A. FACTS

[1] The Appellant is a Partnership between Neil Drader, Calay Drader and Doug Drader. Neil Drader represented the Partnership in this appeal.

[2] The Partnership owns a mobile home trailer park and campground located south of Duncan on Vancouver Island, British Columbia. The park is known as the Malahat Mountain Meadows RV Park and Campground and it is located at 304 Trans Canada Highway, Malahat, BC (the “Park”).

[3] The principal operator of the Park for the Partnership was Neil Drader.

[4] In early 2007, Joseph Claude Wagner (the “Worker”) became a guest at the Park and stored his truck and trailer at the Park. The Worker also stored his gardening equipment at the Park.

[5] The Appellant maintained that originally he retained the Worker to provide gardening services for the Park.

[6] Throughout the summer of 2007, the Worker provided gardening services to the Park and invoiced the Park for the gardening services.

[7] The Appellant maintained that the Worker used his own gardening equipment to provide the gardening services. The Appellant stated that the gardening equipment owned by the Worker included his truck, trailer, lawn mower, leaf blower and chain saw.

[8] The Worker was classified as the Park manager.

[9] The Worker lived in the Park before and during his tenure as Park manager.

[10] The Worker hired additional helpers to carry out casual labour at the Park.

[11] The Worker paid cash to the helpers and was reimbursed by the Appellant for these payments.

[12] The Appellant maintained that, from October 1, 2007 to September 30, 2008 and from October 1, 2008 to December 31, 2008 (the "Periods"), the Worker was a Contractor who provided gardening services for the Park, administrative duties, rent collection, labour and cleaning duties, customer relations, tenant recruitment, evictions, dealing with complaints, and moving recreation vehicle trailers around the Park with his truck.

[13] The Minister of National Revenue (the "Minister") maintained that the Worker was an employee of the Partnership during the Periods.

[14] The Minister also maintained that the Appellant made the Worker an employee from January 1, 2009 to May 19, 2009 when the employment was terminated. In the appeal that was filed by the Appellant with the Canada Revenue Agency (the "CRA"), the Appellant stated that he takes no position in regard to the CRA ruling for the period January 1, 2009 to May 19, 2009.

[15] The Minister maintained that the majority of tools and equipment required by the Worker to perform his duties were provided by the Appellant. The evidence indicated that there were tools owned by the Partnership, there were various

gardening tools owned by the Worker and there were tools and equipment owned by Drader Environmental Services Ltd..

[16] Drader Environmental Services Ltd. was an incorporated company owned and operated by Neil Drader.

[17] The Worker owned and used a personal cellular phone during the Periods. The costs of the cellular phone were paid for by the Appellant.

[18] Neither the Worker nor the Appellant recorded the Worker's hours.

[19] In 2007 and 2008, the Worker was paid \$3,000 per month. Sometime in late 2008, the payment made to the Worker was increased to \$3,600 per month.

[20] In the 2009 year, i.e., commencing on January 1, 2009, the Worker was paid as an employee of the Appellant at the rate of \$4,000 per month.

[21] The Minister maintained that the Worker was accountable to the Appellant in the performance of his duties. The Appellant does not agree with this statement.

[22] The Minister maintained that the Worker was not free to provide his services elsewhere. The Appellant does not agree with this statement.

[23] The Appellant performed the duties that were performed by the Worker for the Partnership prior to October 1, 2007 and after the Worker's employment was terminated on May 19, 2009.

[24] After the Worker's employment was terminated by the Appellant on May 19, 2009, the Worker met with officials of the Department of Human Resources and Skills Development Canada ("HRSDC") and advised the officials of HRSDC that he had been an employee of the Appellant for the following periods: October 1, 2007 to September 30, 2008 and October 1, 2008 to December 31, 2008. HRSDC advised officials of the CRA of its decision.

[25] By letter addressed to the Appellant and dated September 30, 2009, officials of the CRA stated that they had received a request on the tax status of the Worker from officials of HRSDC. The letter from the CRA to the Appellant states, in part, as follows:

Based on our analysis, we have ruled that for the periods under review, Joseph Claude Wagner was an employee and his employment was insurable under paragraph 5(1)(a) of the Employment Insurance Act and pensionable under 6(1)(a) of the Canada Pension Plan.

(Attachment – Notice of Appeal)

B. ISSUES

[26] The issue under the *Employment Insurance Act* (the “*Act*”) is whether the Worker was employed in insurable employment during the Periods for the purposes of the *Act*.

[27] The issue under the *Canada Pension Plan* (the “*Plan*”) is whether the Worker was employed in pensionable employment during the Periods within the meaning of subsection 2(1) and 6(1) of the *Plan*.

C. ANALYSIS AND DECISION

[28] An examination of what Canadian Courts have stated to constitute a contract of service is required. Canadian Courts have developed a series of tests focusing on the total relationship of the parties, with the analysis centered around five elements:

- (a) degree of control and supervision;
- (b) ownership of tools;
- (c) chance of profit;
- (d) risk of loss; and
- (e) intention.

A. Control

[29] The Appellant maintained that he did not supervise the Worker's activities on a day-to-day basis.

[30] The Appellant did not give the Worker a schedule during which he had to work and the Worker was free to provide services on his own schedule.

[31] The Appellant said that the Worker was able to hire and pay casual labourers to work at the Park and the Appellant reimbursed the Worker for the payments made to the casual labourers.

[32] The Appellant also maintained that the Worker was able to provide services to other organizations;

[33] In his argument, the Appellant's lawyer, Mr. Connolly, said:

Well, my submissions on that would be, that comes down to an issue of credibility and whether you believe that Mr. Wagner truly thought he was entering an employment relationship. If you believe Mr. Drader's evidence as to who drafted the draft contract to the handshake deal he referenced, then I still think intention can be a factor to consider. ...

(Transcript, page 3, lines 6 to 11)

[34] With respect to Mr. Connolly's comments, I wish to state that, as far as credibility goes, I accept the testimony of Mr. Drader and I do not accept the testimony of the Worker. I find that Mr. Wagner's evidence lacks credibility in connection with the relationship of the parties and in other items which I will refer to in my Reasons.

[35] With respect to control, Mr. Connolly said that it is not credible to believe that the Worker was being directed by the Appellant on a day-to-day basis with respect to the operation of the Park.

[36] On this point, I accept the evidence of Mr. Drader. I do not find the evidence of the Worker re control to be credible.

[37] I will now deal with the relationship between the parties and the method of payment of the Worker. The Appellant filed Exhibit A-2. Exhibit A-2 contains copies of forty-one cheques issued primarily to the Worker from the bank account of Malahat RV Park and signed by Mr. Drader. (Note: I use the word "primarily" because some of the cheques were issued to Kywo Industries/ Claude Wagner). At

Exhibit A-1, Tab 3, there is a letter dated May 16, 2007. The letter contains a number of statements from the Worker. I cite the following:

The Times [this is a reference to the Victoria newspaper] pays me as Kywo Industries, c/o Claude Wagner. If I bill you under Kywo I have a GST number and have to apply it.

[38] After reviewing the forty-one cheques I wish to note the following cheques:

	Date	Cheque No.	Description	Amount
1	Dec. 29/07	0273	Contract work – December 2007	\$2,500.00
2	Dec. 14/07	0266	Contract work – October 2007	\$2,500.00
3	Dec. 14/07	0272	Contract work – November 2007	\$2,500.00
4	Feb. 15/08	0279	Contract work – January 2008	\$2,500.00
5	Feb. 15/08	0281	Prepaid for February contract work	\$2,500.00
6	Apr. 14/08	0297	Contract work management – March 2008	\$2,500.00
7	May 25/08	0309	Contract work – May 1 to May 15	\$3,396.00
8	May 25/08	0310	Contract work – April	\$3,414.34
9	June 19/08	0318	Contract work – June 1 to June 15, 2008	\$3,634.96
10	July 24/08	0324	Contract management and labour – July 1 to July 24, 2008	\$5,180.00
11	July 31/08	0337	July 15 to July 31, 2008	\$2,925.00
12	Aug. 25/08	0342	Contract management	\$4,160.00
13	Sept. 17/08	0350	Contract management – September 1 to September 15, 2008	\$3,629.00
14	Sept. 12/08	0349	Contract management, labour part – August 22 to August 31, 2008	\$2,460.00
15	Oct. 15/08	0356	Contract management and costs – September 15 to September 30, 2008	\$2,991.00
16	Oct. 15/08	0355	Contract management – October 1 to October 15, 2008	\$1,500.00
17	Nov. 7/08	0359	Contract management services including out-of-pocket purchases (Note: This cheque was payable to	\$3,287.84

			Kywo Industries. This company was identified by the Worker as a company whose shares were owned by him).	
18	Nov. 24/08	0360	Extra bonus, holiday pay (Note: This cheque was payable to Kywo Industries/Claude Wagner).	\$3,300.00
19	Undated	0362	Contract work, supplies, etc. – November 1 to November 15, 2008 (Note: This cheque was payable to Kywo Industries/Claude Wagner).	\$2,346.00
20	Dec. 3/08	0364	Contract management – per invoice November 15 to December 1, 2008	\$2,821.17
21	Dec. 15/08	0366	Contract management – December 1, to December 15, 2008	\$1,800.00
22	Dec. 31/08	0367	Contract management – December 15 to December 31, 2008	\$1,500.00

(Note: All of these cheques were issued after the Worker presented invoices to the Appellant).

Comment: The above cheques were all of the cheques issued by the Appellant to the Worker during the Periods in connection with the services that he provided to the Appellant as a “Contractor”. (Note: There were also some cheques issued by the Appellant to reimburse the Worker for expenses).

[39] From an examination of this evidence, it will be noted that all of the cheques indicated refer to Contract Work for a period, i.e., the work provided to the Appellant as a Contractor. In my opinion, these cheques clearly indicate that the Worker was a Contractor and not an employee of the Partnership during the Periods. If the Worker were an employee, the cheques would probably say “salary for the period” or “wages for the period”.

[40] With respect to the relationship of the parties, it should also be noted that the Appellant paid the Worker by cheque, without deductions for Income Tax, Employment Insurance and Canada Pension Plan and the Worker accepted this arrangement from October 1, 2007 to December 31, 2008.

B. Tools

[41] With respect to tools, Mr. Connolly noted that the Worker had some tools and the Appellant had some tools and there was really no clear breakdown of one side bringing all the tools to the table. Mr. Connolly said:

... And I'd submit that, in these circumstances, tools and equipment really isn't going to be of much assistance.

(Transcript, page 9, lines 2 to 3).

[42] In his argument, Counsel for the Minister noted that the Appellant:

... has the burden of demolishing the Minister's assumptions. That's the general proposition. The Minister's assumptions included the fact that the worker primarily used the tools of the appellant. So, I submit with the evidence before the court, the appellant hasn't demolished that assumption. So that's the general comment.

... He mentioned on two occasions he used his own tools, but his evidence was basically he used the park's, or the environmental company's tools. And so I would submit that that evidence wasn't destroyed or demolished, or undermined in cross-examination. And so I submit, on the tools question, that evidence supports the proposition that the worker was using the employer's tools, and that supports the finding of an employment relationship. ...

(Transcript, page 20, lines 9 to 15)

[43] I do not agree with the position as outlined by Counsel for the Minister. In my opinion, the Appellant did demolish the Minister's assumption on this point. I accept the evidence of Mr. Drader and I do not accept the evidence of the Worker because the Worker's evidence was not credible. In connection with the Worker's evidence, I note that the Worker was charging the Partnership for the use of the Worker's tools. I refer to the following notes found at Exhibit A-1, Tab 2. I cite the following:

Invoice May 1 to 15, 2008	
Claude Wagner's tool fee	\$125.00
Invoice June 1 to 15, 2008	
Tool rental	\$225.00
Invoice July 25 to 31, 2008	
Tools	\$225.00

Invoice August 22 to 31, 2008 Equipment	\$225.00
Invoice September 15 to September 30, 2008 Equipment	\$225.00
Invoice October 15 to October 31, 2008 Equipment rental/September	\$225.00
Invoice November 1 to 15, 2008 Equipment rental	\$225.00

[44] In other words, the Worker testified that he primarily used the tools and equipment owned by the Appellant. However, the invoices prepared by the Worker indicate that the Worker was charging the Partnership either \$125.00 or \$225.00 per month for the use by the Partnership of the Worker's tools. This is another example which indicates that the Worker's evidence was unreliable and not credible. I reject the Worker's evidence on this issue.

[45] I prefer the evidence of Mr. Drader on this point and I reject the evidence of the Worker because his testimony was not reliable and was not credible.

C. Intention

[46] There was no common intention here because the Appellant claims that the Worker was a Contractor during the Periods and the Worker claims that he was an employee during the Periods.

[47] It should also be noted that the relationship between the Appellant and the Worker appears to have fallen apart and the Worker commenced a "vendetta" against Mr. Drader. I cite the following:

- (a) The Worker sent an e-mail dated April 10, 2009 to the members of the Partnership (Exhibit A-4). The e-mail contained the following comment:

The present situation is as untenable today as it was in Oct./08 when I point out to MMM the incredible conflict of interest between myself as gen. mgr., and partner Neil Drader in that although I took over his responsibilities as gen. mgr., he continues to draw a most substantial salary for the sole purpose of opposing everything I do, the latest his refusal to install a sewer pipe (Cost \$1,000) that will

negate thousands in revenue to wit the cancellation of a Quebec booking company promising up to 150 reservations?

- (b) The Worker also sent an e-mail to Mr. Drader dated April 17, 2009 (Exhibit A-3). This e-mail contained a number of comments that were critical of Mr. Drader. I cite the following:

3. Not true the entire crew of addicts and pushers you had on the payroll robbed you blind and did nothing to stop it?

...

You [referring to Mr. Drader] have no business experience or acumen. Nothing and if not where would you have acquired such experience? Who did you ever work for so you can glean experience? No one.

Your daily decision making is oh so flawed.

- (c) After the Worker was fired, he went to HRSDC and claimed that he was an employee during the Periods.
- (d) The Worker also sued Mr. Drader in Small Claims Court and recovered some money from Mr. Drader.
- (e) The Worker also brought an action against Mr. Drader under the *Employee Standards Act*.
- (f) The Worker attempted to report Mr. Drader under the *Human Rights Act* but he discovered that he was too late to file a complaint under that Act.

[48] Based on the evidence and the comments made in the e-mails, I have concluded that the Worker was so bitter regarding his relationship with Mr. Drader that he did everything that he could do to damage Mr. Drader. The comments referred to above are a further reason for not accepting the testimony of the Worker.

[49] In conclusion, I accept the evidence of Mr. Drader and I reject, in its entirety, the evidence of the Worker because, in my opinion, the Worker's evidence on all of the relevant issues was not credible.

[50] I have concluded that the Worker was not an employee of the Appellant but was an independent Contractor during the Periods for the purposes of the *Employment Insurance Act* and the *Canada Pension Plan*.

[51] The Appellant's appeals are allowed, without costs.

Signed at Ottawa, Canada, this 11th day of March 2011.

"L.M. Little"

Little J.

CITATION: 2011 TCC 157

COURT FILE NOS.: 2010-1824(EI) and
2010-1823(CPP)

STYLE OF CAUSE: Neil Drader and The Minister of
National Revenue and Joseph Claude
Wagner

PLACE OF HEARING: Victoria, British Columbia

DATE OF HEARING: November 25, 2010

REASONS FOR JUDGMENT BY: The Honourable Justice L.M. Little

DATE OF JUDGMENT: March 11, 2011

APPEARANCES:

Counsel for the Appellant: Robert Connelly

Counsel for the Respondent: Rob R.S. Whittaker

For the Intervener: The Intervener himself

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