

Citation: 2010 TCC 345  
Date: **20101108**  
Dockets: 2009-3461(EI),  
2009-3629(CPP)

BETWEEN:

DWANE D. TRAVERSE OPERATING  
AS JT TRUCKING CO.,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

### **AMENDED REASONS FOR JUDGMENT**

Bédard J.

[1] The Minister of National Revenue (the “Minister”) decided that James Reyenga (the “worker”) was employed in insurable and pensionable employment within the meaning of paragraph 5(1)(a) of the *Employment Insurance Act* (the “Act”) and paragraph 6(1)(a) of the *Canada Pension Plan* (the “CPP”) during the period from January 1, 2007 to December 31, 2007 (the “Relevant Period”). The Appellant is appealing the Minister's decisions.

[2] The Appellant was in the trucking business, hauling containers from Kitchener to Toronto for Vitran Corporation (“Vitran”), the Appellant's sole client. He was providing Vitran with a truck and a driver during the Relevant Period. The worker was hired as a driver by the Appellant.

[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. 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 each 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.A. 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 decisions in the CPP case (2009-3629(CPP)) and in the EI case (2009-3461(EI)) are set out in paragraph 10 of each Reply to the Notice of Appeal as follows:

- (a) the Appellant was a sole proprietorship; **(admitted)**
- (b) the Appellant's business involved the transportation of goods by way of tractor-trailer (the "Business"); **(admitted)**
- (c) the Appellant was an independent freight contractor for Vitran Corporation, which was a provider of freight services; **(admitted)**
- (d) the Appellant and his spouse, Keri-Lee Traverse, made the major decisions for the Business and controlled the day-to-day operations; **(admitted)**
- (e) the Appellant hired the Worker to deliver goods; **(denied)**
- (f) the Worker drove the Appellant's tractor from Kitchener to Toronto; **(admitted)**
- (g) the Worker worked from Monday to Friday each week; **(denied)**
- (h) the Worker started working between the hours of 4:00 PM and 6:00 PM and finished between the hours of 4:00 AM and 6:00 AM; **(denied)**
- (i) the Worker normally made 2 or 3 return trips each day; **(admitted)**
- (j) each trip took approximately 3.5 hours; **(admitted)**
- (k) the Worker was hired under a written agreement; **(denied)**
- (l) the Worker reported to the Appellant once or twice per week; **(denied)**

- (m) the Worker also reported to Vitran's office; **(admitted)**
- (n) the Worker picked up the containers from the warehouse and delivered them according to Vitran's instructions; **(denied)**
- (o) the Worker contacted the Appellant with any issues relating to the tractor; **(admitted)**
- (p) the Worker contacted the warehouse with any issues regarding materials or paperwork; **(admitted)**
- (q) the Worker was required to perform his services personally; **(denied)**
- (r) the Worker could not hire a substitute or replacement to perform the services on his behalf; **(denied)**
- (s) the Worker was required to work solely for the Appellant; **(denied)**
- (t) the Worker required an AZ Driver's Licence, driving experience and a clean driver's abstract; **(admitted)**
- (u) Vitran provided the Worker with training concerning the handling of dangerous goods; **(admitted)**
- (v) the Worker's services were terminated because there was not enough work; **(denied)**
- (w) the Appellant provided the tractor driven by the Worker; **(admitted)**
- (x) the Appellant owed the tractor; **(admitted)**
- (y) there was no charge to the Worker for the use of the tractor; **(admitted)**
- (z) the tractor was valued at \$120,000; **(admitted)**
- (aa) the Appellant was responsible for the maintenance and repairs on the tractor; **(admitted)**
- (bb) the Appellant provided the Worker with a fuel card to purchase gas for the tractor; **(admitted)**
- (cc) the Appellant paid Vitran a percentage of income to cover the insurance on the tractor; **(admitted)**

- (dd) the Appellant provided the Worker with a cell phone for business use only; **(admitted)**
- (ee) the Appellant was reimbursed by Vitran for some of the cell phone costs; **(admitted)**
- (ff) the Appellant paid for the Worker's coverage under the Workplace Safety and Insurance Board; **(admitted)**
- (gg) the Worker did not incur any expenses personally in performing his services for the Appellant; **(denied)**
- (hh) the Appellant paid the Worker \$65 for each round-trip delivery; **(admitted)**
- (ii) the Worker was also paid \$16 per hour for any wait time in excess of one hour; **(admitted)**
- (jj) the Worker was paid by cheque on a biweekly basis; and **(admitted)**
- (kk) the Worker did not receive bonuses, vacation pay or benefits. **(admitted)**

Keri-Lee Traverse's testimony

[6] The Appellant's wife's testimony is essentially the following:

- a. The Appellant had the opportunity to expand his contract with Vitran to include a night shift, so he decided that it would better serve him financially to accept Vitran's offer subject to his being able to find someone willing to do the night shift.
- b. The worker was recruited through an advertisement she put in a local newspaper.
- c. She made it clear to the worker during their first encounter that he was to work as an independent contractor and that he was consequently to report his income as income from self-employment. She added that the worker had no reservations regarding the nature of the relationship proposed by the Appellant.
- d. The Appellant asked the worker to sign a contract (Exhibit R-1) shortly after he was hired. She explained that this written contract reflects the oral agreement entered into at the beginning of their relationship. The written contract reads as follows:

R-1

CN Trips (Kitchener to Brampton to Kitchener) paid by the trip at at rate of \$65.00

Waiting time is paid at a rate of \$16/hr after the first hour at CN, verification by the CN stamp or else not paid.

0-15 min \$4  
16-30 min \$8  
31-45 min \$12  
46-59 min \$16 } F.R.

If no containers are available at CN, or order # has expired, chassis must be brought to Vitran in Concord. See Vitran dispatch for further instructions ( either bring back empty or bobtail), this is paid at a rate of \$20 per drop at Vitran Concord.

The cell phone located in the truck is for business use only and is to stay in the truck.

Fueling the truck-- it must be filled before 1/4 tank at Hogg Fuel with the fuel card supplied.

This is a contract position (no deductions) paid on a bi-weekly basis accompanied by an invoice of the work that is paid. A signature is required on each invoice, one for J.T. Trucking Co. and one for the employee records.

Cleanliness and respect for the truck is appreciated.

Mgmt.

Read and Agreed upon dated MAY 8, 2007

\_\_\_\_\_  
Dwane Traverse  
J. T. Trucking Co.

\_\_\_\_\_  
J. T. Trucking Co.

1st DAY - APRIL 10/07  
LAST DAY - OCT. 23/07

GROSS EARNINGS - \$21,316

- e. She approached the worker with a view to helping him get a Business Identification Number ("BIN").
- f. The worker reported to the witness or to her husband only if there was a problem with the truck or with Vitran.
- g. The worker had the ability to choose how many trips he would make each night.

- h. The worker could have hired a substitute to perform his services, with Vitran's permission. The witness added that the worker had in fact hired substitutes to perform his services, with Vitran's permission, and that, she had had no say in the matter.
- i. The worker's services were not terminated because there was not enough work. She explained that the worker simply left the job.

The worker's testimony

[7] The worker, whose testimony appeared credible, testified as follows:

- a. His understanding was that he was being hired as an employee. He explained that since he worked as a truck driver he had always been an employee, and that his relationship with the Appellant was no different than the relationship he had had with his other employers, except that the Appellant, contrary to those other employers, did not deduct and remit EI premiums and CPP contributions.
- b. The Appellant's wife asked him to sign the written contract (Exhibit R-1) shortly after he started to work for the Appellant. He added that he still does not understand the meaning of the provision of the contract stating: "This is a contract position (no deductions) . . .".
- c. He was required to perform his services personally. He added that he had never hired a substitute or replacement to perform the services on his behalf.
- d. He had no choice but to make the trips he was required to make by Vitran.

[8] Starting with the issue of intention, what evidence do I have of the Appellant's and the worker's intention as regards the legal relationship they entered into. Firstly, it should be pointed out that the common intention cannot be ascertained from the written contract. Secondly, the oral evidence in this regard is contradictory. Consequently, 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.

[9] Turning now to the facts, what factors suggest that the worker was in business on his own account?

Control

- i. He was not really under any direct supervision by the Appellant.
- ii. He was a professional driver who knew what to do and who knew all the regulations applying to the hauling of containers.

Chance of Profit / Risk of loss

- iii. By working more days, he could increase his income.

[10] What factors suggest that the worker was an employee of the Appellant?

Tools / Equipment

1. The Appellant provided all the tools and equipment required, including the truck.
2. Vitran provided the trailer for hauling the containers.

Responsibility for investment and management

3. The worker had no such responsibility.

Chance of profit/Risk of loss

4. The **worker** had no expenses and no liability exposing him to a risk of loss.
5. There was in reality no opportunity for him to increase his income.

Control

6. The worker received instructions from Vitran. In fact, the worker reported to Vitran on a daily basis. Vitran assigned work to the worker. The Appellant delegated most of his authority over the worker to Vitran.
7. The worker contacted the Appellant regarding any issues relating to the truck.
8. The worker was required to follow the instructions set out in the written contract (Exhibit R-1).

[11] Here we have a worker, who, if I accept the Appellant's submissions, was an independent contractor and yet brought no truck to his alleged truck-driving business: he was not responsible for insurance on the truck, he did not pay for gas, and he effectively had no exposure to liability. He just showed up to drive the Appellant's

truck. I cannot find in these circumstances that a degree of absence of control by the Appellant when it came to supervising how the worker drove the truck outweighs the overall view that the worker was not in business on his own account.

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

Signed at Ottawa, Canada, this **8th** day of **November** 2010.

“Paul Bédard”

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Bédard J.



CITATION: 2010 TCC 345

COURT FILE NOS.: 2009-3461(EI), 2009-3629(CPP)

STYLE OF CAUSE: DWANE D. TRAVERSE OPERATING AS  
JT TRUCKING CO. v. M.N.R.

PLACE OF HEARING: Hamilton, Ontario

DATE OF HEARING: June 3, 2010

**AMENDED** REASONS FOR  
JUDGMENT BY: The Honourable Justice Paul Bédard

DATE OF JUDGMENT: **November 8, 2010**

APPEARANCES:

Agent for the Appellant: Keri-Lee Traverse

Counsel for the Respondent: Khashayar Haghgouyan

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Firm:

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