Docket: 2009-2547(EI)

BETWEEN:

OBIDA SADDEN,

appellant,

and

THE MINISTER OF NATIONAL REVENUE,

respondent.

Appeal heard on August 18, 2010, at Lethbridge, Alberta.

Before: The Honourable Justice Gaston Jorré

Appearances:

For the appellant:	The appellant himself
Counsel for the respondent:	**Gregory Perlinski** Neil Goodridge **(student-at-law)**

AMENDED JUDGMENT

In accordance with the attached reasons for judgment, the appeal is dismissed, without costs, and the decision rendered by the Minister of National Revenue on May 25, 2009 under the *Employment Insurance Act* is confirmed.

This amended judgment is issued in substitution for the judgment signed on September 26, 2011.

Signed at Ottawa, Ontario, this 25th day of October 2011.

"Gaston Jorré"

Jorré J.

Citation: 2011 TCC 450
Date: 20110926
Docket: 2009-2547(EI)

BETWEEN:

OBIDA SADDEN,

appellant,

and

THE MINISTER OF NATIONAL REVENUE,

respondent.

REASONS FOR JUDGMENT

Jorré J.

Introduction

[1] This is an unfortunate case insofar as it arises, at least in part, because of what, based on a number of cases I have heard, appears to be a common misconception.

[2] The appellant appeals from the decision of the Minister of National Revenue (Minister) dated May 25, 2009.

[3] In that decision the Minister concluded that Edward Himour, the payee, was employed under a contract of service with the appellant, the payor, for the period from August 15, 2006 to January 9, 2008 with the result that the payee was engaged in insurable employment.[1]

[4] The appellant contends that Mr. Himour was an independent contractor.

---

[1] This is the result of paragraph 5(1)(*a*) of the *Employment Insurance Act*:

> . . . insurable employment is
>
> (*a*) employment in Canada . . ., under any express or implied contract of service . . ., written or oral, . . . whether the earnings are calculated by time or by the piece, or partly by time and partly by the piece, or otherwise;

The Law

[5] In *Doan-Gillan v. M.N.R.*, 2009 TCC 157, V.A. Miller J. gives the following succinct summary of the law:

> 16 The leading case on the differences between a contract of service and a contract for services is *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.* [2001 SCC 59]. Major J. delivered the judgment of the Court and he reviewed the four-factor test from *Wiebe Door Services Ltd. v. M.N.R.* [[1986] 3 F.C. 553]. At paragraphs 47 and 48 of his decision, he held that the key is set out in *Market Investigations Ltd. v. Minister of Social Security* [[1968] 3 All E.R. 732]. He stated:
>
> > 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. (emphasis added)
> >
> > 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.

[6] Many other factors may be relevant including the intention of the parties. While intention may in some cases be an important factor, particularly if the other factors are close, it is not determinative if the other factors are inconsistent.[2]

Facts and Analysis

[7] In making the determination, the Minister relied on the following assumptions of fact (in the assumptions the respondent refers to Mr. Himour, the payee, as the "Worker"):

[2] See paragraphs 60 to 62 of the reasons of Sharlow J.A. in *Royal Winnipeg Ballet v. Canada*, 2006 FCA 87.

(a) the Appellant was in the business of blowing insulation into the attics of residential and commercial buildings;
(b) the Appellant obtained the contracts and the work;
(c) the Worker was hired as an insulation applicator and his duties included operating the blower hose in the attic of buildings;
(d) the Appellant also employed a hopper operator who emptied bags of insulation into the blower hopper;
(e) the Worker and the hopper operator worked as a crew;
(f) the Worker and the Appellant did not enter into a written agreement;
(g) the Worker performed his services in the field;
(h) the Worker was paid by piece work as follows:
- $.05 per square foot for new buildings,
- $.06 per square foot for existing buildings;
(i) the Worker also received a set wage of $16.00 per hour for travel time, for out-of-town jobs;
(j) the Appellant guaranteed the Worker a minimum monthly wage of $2,300.00;
(k) the Appellant determined the Worker's pay rate;
(l) the Appellant determined the amount of work to be performed;
(m) the Worker did not bid for jobs;
(n) the Worker did not invoice the Appellant;
(o) the Appellant calculated the Worker's earnings based on the work completed;
(p) the Appellant paid the Worker on a monthly basis with a mid-month advance;
(q) the Appellant also paid the Worker a year-end bonus;
(r) the Worker worked whatever hours were required to complete the assigned work;
(s) the Worker normally worked from 7:00AM to 6:00PM during the busiest period of fall and winter;
(t) the Worker worked shorter hours in summer;
(u) the Worker was under the direction and control of the Appellant;
(v) the Appellant scheduled the work;
(w) the Appellant assigned work to the Worker;
(x) the Worker did not have the power to accept or reject work;
(y) the Appellant instructed the Worker regarding the amount of insulation to install;
(z) the Worker informed the Appellant of any leave required;
(aa) the Worker could not hire his own helper or replace himself;
(bb) the Appellant supplied and paid all helpers and replacements;
(cc) the Appellant provided all of the tools and equipment required including a 5 ton truck with a blower system, 200 feet of hose, knives, coveralls, masks, safety glass and boots;
(dd) the coveralls provided by the Appellant had the Appellant's business name on the back;
(ee) the Worker did not provide any tools or equipment;
(ff) the Appellant provided all of the supplies and materials required including the insulation;

(gg) the Worker did not incur any expenses in the performance of his duties;
(hh) the Worker was not liable for any damages;
(ii) the Worker did not have a chance of profit or risk of loss;
(jj) the intent of the Worker was employment;
(kk) the Appellant considered the hopper operator an employee;
(ll) the Worker did not carry his own liability insurance;
(mm) the Worker did not charge the Appellant GST, and
(nn) the Worker was not in business for himself while performing services for the Appellant.

[8] The appellant, the appellant's wife and the payee, Mr. Himour, testified.

Intention

[9] There was a good deal of evidence relating to the question of what the parties intended.

[10] The appellant and the payee did not enter into a written contract.

[11] The evidence was somewhat unusual. The appellant testified that he had always wanted the relationship to be an employment relationship, but that the payee had refused and insisted on being an independent contractor. The payee testified that he wanted the relationship to be one of employment, but that the appellant refused and insisted on his being an independent contractor.

[12] Obviously the payor and payee cannot both be right. Whatever the truth of the matter is, there could not have been a common intention.[3]

[13] In the absence of a common intention, intention is not a helpful factor. As a result, with respect to intention, I do not need to make a factual finding as to whose version is correct.

[14] With respect to the evidence relating to the other factors, the evidence of the payor and the payee was more or less broadly consistent even if there was some disagreement.

[3] Given the evidence, I cannot conclude that the parties to the contract had, due to their inability to agree on an employment contract, by default agreed on the payee being an independent contractor. For example, while the appellant issued T5018 forms (statement of contract payments) to the payee and wrote on the subject line of cheques to the payee such notations as "subcontractor advance" and "subcontractor wages", he also, in a letter dated March 13, 2007, represented to the Royal Bank of Canada that the payee was a full-time employee who had been promoted to senior applicator. The payee was asked questions about whether his tax returns were filed on the basis that the receipts from the appellant were business income or employment income. The payee responded that, at the time for filing tax returns, he had not filed because he did not know how to file given that he had received T5018 forms instead of T4 forms. Given that the other factors point to a clear answer, none of this matters.

The Other Factors

[15] The critical questions are: When the payee was doing work as an applicator for the appellant, whose business was he carrying out? Was the payee engaged in his own business or was he simply doing part of the work necessary for the appellant's business?

[16] During the period in question, the payee performed the functions of an applicator of blown-in insulation for the appellant. Occasionally, he would put batts in walls for the appellant.

[17] The work was done at a wide variety of locations both in and out of town.

[18] At the relevant time the appellant had one crew for blowing insulation although there was some variation in the membership of the crew.

[19] Other than on very rare occasions where a third person was required, a crew consisted of two persons: the applicator, who was at the far end of the hose directing the insulation into the correct location, and the helper, who would empty bags of insulation into the hopper of the blower system on the truck.

[20] Much of the time, it was the payee's job to pick up the helper and bring that person to the work site. The appellant gave the payee a certain amount for gasoline on a monthly basis in recognition of the fact that the payee picked up the helpers. The appellant also loaned the payee money in order for the payee to buy the car. The payee repaid the appellant a certain amount per month; these repayments were deducted from the appellant's payments to the payee.

[21] The payee had a business of his own installing batt-type insulation. In that batting business, his mother and various friends worked with him.

[22] During the fall and winter, the busiest time for the appellant's business, the payee would work between roughly 7:00 and 18:00, although the hours could vary.

[23] During the summer, the payee testified that he could usually work shorter hours from Monday to Friday. It was during these slower times that the payee would take jobs for his own business.

Control

[24] In taking this factor into account, one must consider not only actual control, but also the power to exercise control, whether or not that power is used.

[25] The appellant would inform the payee where the jobs were, specify the job to do and give him a rough timeline. Because of weather and other factors, it was not always possible to follow the timeline.

[26] Most of the time the appellant did not go out to job sites and relied on the payee to get the work done properly.

[27] There was conflicting evidence as to whether the payee refused to do certain jobs. The appellant's evidence was that this occurred a number of times. The payee's evidence was that this was rare and that generally he had difficulty taking time off; he also testified that some of these issues arose because his common law spouse at the time had health issues which made it necessary for him to take time off.

[28] Exhibit R-2 is a handwritten note from the appellant to the payee. It is headed "Ed: Things we need to see improvement on as a team" and contains statements such as:

> (2) . . . practice more patience with everyone we are associated with.
> (3) Limit text messaging <u>if</u> it stops you from working.
> . . .
> (5) Problem solve job & employee issues more so you don't have to call me as much.
> . . .
> (B) I believe our future is bright and will continue to grow which will make our pay cheques grow as well.
> . . .
> (D) Ed these issues that I have mentioned <u>must</u> be addressed.
>
> [Underlining in original.]

[29] While much of the evidence relating to the existence, or not, of the power to control would not appear to be decisive, Exhibit R-2 removes any doubt in respect of this factor.

[30] Not only is the tone of the note in Exhibit R-2 far more consistent with an employment relationship than with an independent contractor relationship, the note reflects the actual exercise of control.

[31] This factor points to an employment relationship.

Chance of Profit/Risk of Loss

[32] The appellant paid the payee based on the work done although the rate would be determined in different ways depending on the circumstances.

[33] For travel outside of Medicine Hat, the payee would receive $16 an hour. Most jobs were paid at the rate of 5 cents per square foot for new buildings and 6 cents per square foot for old buildings. However, certain jobs were paid on the basis of a fixed rate for the job.

[34] Finally, according to the payee, there were times when he was paid for application work at different hourly rates which varied depending on what the appellant had bid to do the work.

[35] The appellant testified that these rates were negotiated. The payee testified that he did not have much of a say in setting the pay rates.

[36] The payee was guaranteed a minimum of $2,000 and also received a mid-month advance.

[37] The payee received a year-end bonus.

[38] The appellant provided the insulation, gasoline for the truck and also maintained the truck.

[39] The payee did not have any expenses to pay in relation to the job. Whether, in the end, the job took more or less insulation than expected did not affect the amount he received.

[40] The payee had no financial risk; he could not suffer a loss.

[41] He was simply paid for work. Because some of the work was paid on a piecework rate, the payee might on occasion spend less time to earn his pay. He could not however earn more than the agreed pay.

[42] This factor is consistent with an employment relationship.

Ownership of Tools and Equipment

[43] The major piece of equipment used was a five-ton truck together with a blower system on it and a lengthy hose. This was provided by the appellant who also provided coveralls, masks and knives.

[44] The payee had to have his own squares for cutting and different tubes for caulking; the payee also had some other small tools such as tackers, hammers and nails.

[45] The investment in equipment by the appellant was much more significant than that of the payee. Again, this factor points towards an employment relationship.

Other Factors

[46] It was the appellant who would decide whether or not to hire a particular individual as a helper; the appellant also paid the helpers.

[47] When the payee was not available, the appellant would hire and pay the replacement person although the payee was expected to help ensure that someone else was available. It appears that in general a friend of the payee would replace him when he took time off.

[48] Both the payee and the helper wore coveralls with the company logo and name on the back.

[49] These factors are again consistent with employment income.

[50] What is the effect of the fact that the payee had his own business as an insulation subcontractor?

[51] I would note that in his own business the payee would install batt-type insulation whereas the bulk of the appellant's business was blown-in insulation. In his own business, the payee also hired his own helper and his customers contracted for a result, insulation of the building, and not for him to do certain work necessary to produce that result.

[52] The nature of the payee's business was quite distinct from the work that he did for the appellant as an applicator.

[53] Accordingly, I conclude that the work done by the payee for the appellant was not part of the payee's business of installing batt-type insulation.

Integration

[54] Often the integration test is compatible with both types of contract.

[55] In this case, however, the nature of the work performed, doing only the application of the insulation when the work must be done together with another person and the use of specialized equipment, makes it rather difficult for someone to establish a business consisting solely of providing the application labour, but not the other worker and the machinery. The customer would have to simultaneously arrange for the provision of the two other essential elements necessary to actually have the insulation blown in.

[56] Such a unique business model might in unusual circumstances be possible, but here I think the integration of the appellant's work into the application process is supportive of the conclusion that the relationship is one of employment.

Conclusion

[57] Given all these factors which are consistent with an employment relationship and inconsistent with the appellant being an independent contractor, I am satisfied that the Minister was correct in his conclusion that the relationship between the appellant and Mr. Himour was one of employment.

[58] The appeal will be dismissed without costs.

[59] At the beginning, I said that this case was unfortunate. I said that because I gathered the impression that there may have been a misapprehension on the appellant's part that the intention of the parties was determinative no matter what the actual arrangements between the parties were.

Signed at Ottawa, Ontario, this 26th day of September 2011.

"Gaston Jorré"

Jorré J.

CITATION:	2011 TCC 450
COURT FILE NO.:	2009-2547(EI)
STYLE OF CAUSE:	OBIDA SADDEN v. M.N.R.
PLACE OF HEARING:	Lethbridge, Alberta
DATE OF HEARING:	August 18, 2010
REASONS FOR JUDGMENT BY:	The Honourable Justice Gaston Jorré
DATE OF JUDGMENT:	September 26, 2011
DATE OF REASONS FOR JUDGMENT:	September 26, 2011
DATE OF AMENDED JUDGMENT:	October 25, 2011

APPEARANCES:

For the appellant:	The appellant himself
Counsel for the respondent:	**Gregory Perlinski** Neil Goodridge **(student-at-law)**

COUNSEL OF RECORD:

For the appellant:	
Name:	
Firm:	
For the respondent:	Myles J. Kirvan Deputy Attorney General of Canada Ottawa, Ontario