

Dockets: 2011-2056(EI)
2011-2057(CPP)

BETWEEN:

INTEGRANUITY MARKETING LTD.,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

Appeal heard on December 12, 2011 in Edmonton, Alberta

Before: The Honourable Justice J.M. Woods

Appearances:

Counsel for the Appellant: Gordon Beck
Counsel for the Respondent: Gergely Hegedus

JUDGMENT

The appeal with respect to decisions of the Minister of National Revenue under the *Employment Insurance Act* and the *Canada Pension Plan* that Ian Leslie was engaged by the appellant in insurable and pensionable employment is dismissed, and the decisions are confirmed. Each party shall bear their own costs.

Signed at Toronto, Ontario this 4th day of January 2012.

“J. Woods”

Woods J.

Citation: 2012 TCC 4
Date: 20120104
Dockets: 2011-2056(EI)
2011-2057(CPP)

BETWEEN:

INTEGRANUITY MARKETING LTD.,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

REASONS FOR JUDGMENT

Woods J.

[1] Integranuity Marketing Ltd. (“Integranuity”) appeals with respect to decisions of the Minister of National Revenue that Ian Leslie was engaged in insurable and pensionable employment for purposes of the *Employment Insurance Act* and the *Canada Pension Plan*. The sole issue is whether Mr. Leslie was engaged as an employee or independent contractor.

[2] The period at issue is from October 10, 2009 to February 22, 2010.

Background

[3] In relevant period, Integranuity was in the business of providing direct sales services for large organizations such as financial institutions and telecommunications firms. Sales were carried out by various methods such as door-to-door campaigns, at events and through kiosks.

[4] Integranuity was based in Burnaby, British Columbia and was managed and owned by Reynold Cha.

[5] The worker at issue in this appeal, Ian Leslie, was engaged by Integranuity in door-to-door sales for Shaw Communications and was paid on a commission basis. Shaw approved Mr. Leslie's engagement and issued a Shaw badge to him.

[6] Mr. Leslie signed a standard form contract which stated that he was engaged as an independent distributor and did not qualify for benefits such as minimum wage, worker's compensation or employment insurance.

[7] The contract describes that the worker is an independent businessperson, with the opportunity for profit and risk of loss, and with control over the place, time and method by which products are offered for sale. It states that the worker is not assigned routes, that the worker can select his own days and hours of work and that the worker is not required to ask permission for time off. Integranuity could, however, designate a time to pick up or return products. The contract also states that the worker is free to develop their own sales presentation.

Analysis

[8] The principles to be applied in a case such as this were recently set out in *TBT Personnel Services Inc. v The Queen*, 2011 FCA 256. Leave to appeal this decision is currently pending, but the decision succinctly sets out the relevant principles as they currently stand. The relevant parts are reproduced below:

[8] The leading case on the principles to be applied in distinguishing a contract of service from a contract for services is *Wiebe Door Services Ltd. v. M.N.R.*, [1986] 3 F.C. 553 (C.A.). *Wiebe Door* was approved by Justice Major, writing for the Supreme Court of Canada in *67112 Ontario Ltd. v. Sagaz Industries Canada Inc.*, 2001 SCC 59, [2001] 2 S.C.R. 983. He summarized the relevant principles as follows at paragraphs 47-48:

47. [...] 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.

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.

[9] In *Wolf v. Canada*, 2002 FCA 96, [2002] 4 F.C. 396 (C.A.), and *Royal Winnipeg Ballet v. Canada (Minister of National Revenue - M.N.R.)*, 2006 FCA 87, [2007] 1 F.C.R. 35, this Court added that where there is evidence that the parties had a common intention as to the legal relationship between them, it is necessary to consider that evidence, but it is also necessary to consider the *Wiebe Door* factors to determine whether the facts are consistent with the parties' expressed intention.

[9] The central question, then, is whether Mr. Leslie was carrying on business on his own account.

[10] I will first consider the parties' intent. The contract is well drafted in this respect. Based on this document, the parties intended that Mr. Leslie carry on business on his own account.

[11] Mr. Leslie testified that he did not carefully read the contract. I accept this testimony but it does not negate his intention. Mr. Leslie willingly signed the contract, and by that action he intended to accept the contract's terms.

[12] I now turn to the *Wiebe Door* factors of control, chance of profit, risk of loss and ownership of equipment.

[13] The written contract suggests that many of the *Wiebe Door* factors are supportive of the parties' expressed intent. The worker is to have considerable freedom as to how to perform the work and he has to bear expenses relating to the work, such as transportation. Mr. Cha confirmed in his oral testimony that the contract properly reflects the nature of the relationship.

[14] The problem here is that Mr. Leslie's experience, as expressed in his testimony, was different than that suggested by the written contract. He testified that he worked six days a week and that workers worked in teams, not independently. They started work each day at a set time at Integranuity's office where they learned about the applicable promotions for the day and were given a list of houses to visit in a particular area (called "lead sheets"). The team traveled together in one of the worker's vehicles to the designated area, the team arranged when to take a break for a short dinner, and they returned to Integranuity's offices after work to review the daily sales with management.

[15] Mr. Leslie testified that he was criticized on one occasion when he and a friend did not travel with the team and they took a break before starting work. He also stated

that Integranuity sent someone to accompany his friend on the door-to-door sales, presumably to boost performance.

[16] This testimony, which I accept, calls into question Integranuity's lack of control which is outlined in the written contract.

[17] Counsel for Integranuity suggests that there could be reasons to explain Mr. Leslie's experience which are not inconsistent with the written contract. I agree with this, but the evidence did not satisfy me in this respect. On the whole, I am not satisfied that the terms of the written contract were being respected by Integranuity.

[18] As for Mr. Cha's testimony, which supported the contract, I would note that his testimony was self-interested and that he was the only witness on behalf of Integranuity. None of the other workers were called to testify. Further, Mr. Cha's testimony focussed to a great extent on the worker's rights as expressed in the contract. These rights are virtually meaningless unless Integranuity endorsed them in practice. Mr. Leslie's experience suggests to me that the corporation did not endorse them, at least with respect to Mr. Leslie's engagement. To the extent that there was inconsistency between the testimony of Mr. Leslie and Mr. Cha, I prefer Mr. Leslie's testimony, which appeared to be more straightforward.

[19] Based on the assumptions by the Minister, and the evidence as a whole, I have concluded that Integranuity considered that it could exercise significant control over most of the aspects of how Mr. Leslie's work was performed.

[20] The control factor strongly points to an employment relationship in this case.

[21] As for the other *Wiebe Door* factors, the lack of reimbursement for expenses supports Integranuity's position because it is not typical of an employment relationship. However, it is not a significant factor since the expenses incurred were modest – car pooling expenses to work sites and the use of personal cell phones to call in sales. The other *Wiebe Door* factors tend to be neutral. The workers had a chance of profit through commissions, but this is not uncommon in an employment relationship. There was no significant risk of loss.

[22] After considering the factors as a whole, I have concluded that the relationship was not consistent with the intention expressed in the contract. In my view, Mr. Leslie was engaged as an employee.

[23] The appeal is dismissed, and the decisions of the Minister are confirmed. Each party shall bear their own costs.

Signed at Toronto, Ontario this 4th day of January 2012.

“J. Woods”

Woods J.

CITATION: 2012 TCC 4

COURT FILE NOS.: 2011-2056(EI)
2011-2057(CPP)

STYLE OF CAUSE: INTEGRANUITY MARKETING LTD. and
THE MINISTER OF NATIONAL
REVENUE

PLACE OF HEARING: Edmonton, Alberta

DATE OF HEARING: December 12, 2011

REASONS FOR JUDGMENT BY: The Honourable Justice J.M. Woods

DATE OF JUDGMENT: January 4, 2012

APPEARANCES:

Counsel for the Appellant: Gordon Beck
Counsel for the Respondent: Gergely Hegedus

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