Docket: 2016-2107(EI)

BETWEEN:

LEAH HENDRIKS,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent,

and

UPRISE.FM INC.,

Intervener.

Appeal heard on November 28, 2016 and September 11, 2017,
at Montreal, Quebec.

Before: The Honourable Justice Patrick Boyle

Appearances:

Counsel for the Appellant:	Élise Robert-Breton
Counsel for the Respondent:	Amelia Fink
Counsel for the Intervener:	Samuel Julien

JUDGMENT

The appeal made under the *Employment Insurance Act* is allowed and the decision rendered by the Minister of National Revenue on April 21, 2016 is varied on the basis that Leah Hendriks was engaged in insurable employment with Uprise.FM Inc. from September 3, 2014 to December 12, 2014 within the meaning of paragraph 5(1)(*a*) of the EI Act, in accordance with the attached reasons for judgment.

Signed at Edmonton, Alberta, this 8th day of March 2018.

"Patrick Boyle"

Boyle J.

Citation: 2018 TCC 50
Date: 20180308
Docket: 2016-2107(EI)

BETWEEN:

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REASONS FOR JUDGMENT

Boyle J.

Introduction

[1] This appeal requires me to decide whether the proper characterization of the work done by the Appellant, Leah Hendriks, for Uprise.FM Inc., formerly named Live in your City Inc., was done by her as an employee or an independent contractor for purposes of the *Employment Insurance Act* — that is, was it pursuant to a contract of service or a contract for services.

[2] The work period was from September 3, 2014 to December 12, 2014. It began as full-time, but was scaled back considerably during that period. There were no withholdings at source made, nor was federal or provincial sales tax charged on the invoices for her work. She received approximately $18,000 in the period. It appears the Appellant may have avoided the characterization issue altogether by not reporting this income at all for tax purposes.

[3] The Canada Revenue Agency ("CRA") initially characterized the work as employment in a ruling. Uprise.FM objected and CRA recharacterized the relationship as independent contractor. The Appellant appealed to this Court and, oddly, the Respondent's reply maintained that the Appellant was an employee until the Respondent moved to amend the reply at the opening of the first day of hearing. Uprise.FM has intervened.

[4] The Court heard from the Appellant, Leah Hendriks, as well as a CRA CPP/EI Appeals agent responsible for this file, and from Gary Silverman, the President and Chief Executive Officer of Uprise.FM and the owner of Gary Silverman & Associates Inc., an insurance brokerage firm in Montreal.

[5] Uprise.FM was, at the relevant time, in the business of starting up a music streaming business. The business is run from, and this work was done in, Montreal.

[6] The outcome of this case turns largely on a factual analysis. The testimonies of Ms. Hendriks and Mr. Silverman regarding the relevant facts have significant differences between them. Not only are their testimonies not consistent with each other's, in some respects they are not internally consistent with their own testimony, nor consistent with some of the considerable number of documents placed in evidence. Given the credibility considerations with both key witnesses' testimonies, the documents take on a heightened significance in my determination of the facts. In this case, contemporaneous documents are often the best evidence, unless both sides agree something recorded is not reflective of reality. That did not happen. Where only one party disagrees with the accuracy of a contemporaneous writing, I accept that the document is best reflective of the reality and reject the witness's alternate version. Where the contemporaneous documentary evidence corroborates a witness's testimony on a material point, I will accept that witness's testimony on matters relating to that point.

[7] As between these two witnesses, where Mr. Silverman's testimony on any material point is not corroborated by contemporaneous documents and is inconsistent with the testimony of Ms. Hendriks (that is not itself inconsistent with relevant contemporaneous documents), I accept Ms. Hendriks' version of events over Mr. Silverman's. My concerns with Mr. Silverman's credibility include that he told CRA at the Appeals stage that there was no written agreement produced, created or signed. In fact, he had personally emailed a draft version of "our standard employment" to Ms. Hendriks at the very outset of their discussions. I do not accept his sworn testimony that he guessed he forgot about it because it was not relevant. This is a very material point and I do not accept Mr. Silverman's

testimony as being wholly truthful. Other concerns giving rise to my serious doubts about his credibility are:

- He said he first heard of the Todoist application, designed to help create, manage and track performance of to-do lists, during the hearing. However, he had earlier referred to it in his communications with CRA Appeals.

- He testified he did not care where Ms. Hendriks worked from, including her home if she wanted. This is at odds with Uprise.FM's job posting on Indeed quoted later in these reasons under the heading of "Subordination and Control".

- He testified she was hired on a bring-your-own-computer-and-device basis, but that she later complained after she was already working that she needed Uprise.FM to buy her a new computer and an improved phone plan. In fact, he had emailed her twice on September 2, 2014, before her work started, that he would drop off a company computer that night. In one of those emails, he suggests Uprise.FM upgrade her phone plan so she does not have to bear any phone expense.

- He testified that there was no discussion of vacation pay or benefits. However, his cover email with the standard employment contract raises the addition of benefits after the probationary period — which, along with vacation pay, is also set out in the agreement he sent her.

- He said that after starting work, she started making other demands, like an employment contract. Again, she had asked in writing for a digital copy of the contract on September 2, 2014 and he sent her the Uprise.FM standard employment agreement on September 4, 2014.

Overall, I conclude Mr. Silverman was somewhat more concerned with telling his story in a way that best served his interests than he was with its accuracy.

[8] At the relevant time, Uprise.FM's business was a start-up music streaming site. The work the Appellant was hired to do had two principal aspects. Firstly, she was to be the executive assistant to the CEO, Gary Silverman. Secondly, she was to be involved in reaching out to media artists, agents and fans, etc. in a media relations role. I find that in her role as executive assistant to the CEO, her work was dictated, delegated and supervised by Mr. Silverman, and by his needs as perceived by others at Uprise.FM. I also find that Ms. Hendriks was wholly supervised in her media relations activities by Lisa Mac on behalf of Uprise.FM, as well as at times by Mr. Silverman. It does not matter whether the supervising staff were themselves employees or independent contractors of Uprise.FM. Their supervision, control and dictates were those of Uprise.FM.

[9] Much was made of the fact that Ms. Hendriks may also have continued to carry on yoga instructor activities and/or her yoga studio while working for Uprise.FM, and that she appeared less than candid with the CRA and the Court about those facts. This is simply not material because, given the nature of her yoga activities and the times she was available for them, they were not inconsistent with her being an employee. Mr. Silverman was generally aware of them and did not think yoga instruction or its scope was relevant to her Uprise.FM position that was to be 37.5 very largely weekday office hours. The evidence does not support a finding that any yoga instruction was done in the course of her work days at Uprise.FM. Canadians have all sorts of reasons for gaps in their resumés that they try to creatively fill in. On these facts the existence of yoga activities being offered outside Uprise.FM's work hours is not material or relevant to the extent any occurred. It will not assist in characterizing the work relationship as either employment or independent contractor. It is relevant to Ms. Hendriks' credibility on the material points and is among the reasons I have not simply accepted her version of events.

The Applicable Law

[10] In *Romanza Soins Capillaires et Corporels Inc. v. M.N.R.*,[1] I set out the applicable law in cases such as this as follows:

> 18 Insurable employment under the EI Act is defined in paragraph 5(1)(*a*) of that Act to be as follows:

[1] 2015 TCC 328.

INSURABLE EMPLOYMENT

5. (1) Type of insurance employment — Subject to subsection (2), insurable employment is

(a) employment in Canada by one or more employers, under any express or implied contract of service or apprenticeship, written or oral, whether the earnings of the employed person are received from the employer or some other person and whether the earnings are calculated by time or by the piece, or partly by time and partly by the piece, or otherwise;

19 Article 2085 of the *Civil Code of Québec* (the "Civil Code") defines contract of employment as follows:

CHAPTER VII

CONTRACT OF EMPLOYMENT

Art. 2085. A contract of employment is a contract by which a person, the employee, undertakes for a limited period to do work for remuneration, according to the instructions and under the direction or control of another person, the employer.

20 In contrast, article 2098 defines a contract of enterprise or for services as follows:

CHAPTER VIII

CONTRACT OF ENTERPRISE OR FOR SERVICES

SECTION I
NATURE AND SCOPE OF THE CONTRACT

Art. 2098. A contract of enterprise or for services is a contract by which a person, the contractor or the provider of services, as the case may be, undertakes to carry out physical or intellectual work for another person, the client or to provide a service, for a price which the client binds himself to pay.

21 Article 2099 provides as follows:

Art. 2099. The contractor or the provider of services is free to choose the means of performing the contract and no relationship of

> subordination exists between the contractor or the provider of services and the client in respect of such performance.

22 Article 1425 is relevant to the interpretation to the contract and it provides as follows:

> **Art. 1425.** The common intention of the parties rather than adherence to the literal meaning of the words shall be sought in interpreting a contract.

23 It is apparent from several decisions of the Federal Court of Appeal, including *Le Livreur Plus Inc. v. Canada (Minister of National Revenue)*, 2004 FCA 68, that the traditionally common law criteria or guidelines mentioned in *Wiebe Door Services Ltd. v. M.N.R.*, [1986] 3 F.C. 553, 87 DTC 5025, are points of reference in deciding whether there is between the parties a relationship of subordination which is characteristic of a contract of employment or whether there is instead a degree of independence which indicates a contract of enterprise under the Civil Code. It is also the case that the parties' mutual intention or stipulation as to the nature of their contractual relations should be considered and may prove to be a helpful tool in interpreting the nature of the contract for purposes of characterizing it under the Civil Code. See for example the decisions of the Federal Court of Appeal in *D & J Driveway Inc. v. Canada (Minister of National Revenue)*, 2003 FCA 453, and in *Grimard v. Canada*, 2009 FCA 47, 2009 DTC 5056, wherein the intention of the parties is described as an important factor to be considered in characterizing a contract for purposes of the Civil Code. The comments of the Federal Court of Appeal regarding the intention of the parties in these Quebec cases is consistent with its more recent comments regarding the significance of intention at common law in *1392644 Ontario Inc. (Connor Homes) v. Canada (M.N.R.)*, 2013 FCA 85 below.

24 The traditional common law tests or guidelines for a contract of service/employment versus a contract for services/independent contractor are well-settled. Insurable employment is to be resolved by determining whether the individual is truly operating a business on his or her own account. See the decisions in *Market Investigations, Ltd. v. Minister of Social Security*, [1968] 3 All E.R. 732 (Q.B.D.), in *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, 2001 SCC 59, [2001] 2 S.C.R. 983, and in *Wiebe Door Services Ltd. v. M.N.R.*, [1986] 3 F.C. 553, 87 DTC 5025.

25 This question is to be decided having regard to all of the relevant circumstances and having regard to a number of criteria or useful guidelines including: 1) the intent of the parties; 2) control over the activities; 3) ownership of tools; 4) chance of profit or risk of loss. There is no predetermined way of applying the relevant factors and their relative importance and their relevance will depend upon the particular facts and circumstances of each case.

26 The antinomy between civil law and common law analyses of insurable employment for EI purposes is detailed by the Federal Court of Appeal in *Grimard*, at paragraphs 27 through 46. I would refer in particular to paragraph 43:

> 33 As important as it may be, the intention of the parties is not the only determining factor in characterizing a contract: see *D&J Driveway Inc. v. Canada (M.R.N.)*, 2003 FCA 453; *Dynamex Canada Inc. v. Canada*, 2003 FCA 248. In fact, the behaviour of the parties in performing the contract must concretely reflect this mutual intention or else the contract will be characterized on the basis of actual facts and not on what the parties claim.
>
> …
>
> 36 In *Wolf v. The Queen*, [2002] 4 F.C. 396, our colleague Mr. Justice Décary cited the following excerpt written by the late Robert P. Gagnon in his book entitled *Le droit du travail au Québec*, 5th ed. (Cowansville: Les Éditions Yvon Blais, 2003), page 67, and clarifying the content of the notion of subordination in Quebec civil law:
>
> > [TRANSLATION]
> >
> > Historically, the civil law first developed a so-called strict or classical concept of legal subordination that was used as a test for the application of the principle of the civil liability of a principal for injury caused by the fault of his agents and servants in the performance of their duties (art. 1054 C.C.L.C.; art. 1463 C.C.Q.). This classical legal subordination was characterized by the immediate control exercised by the employer over the performance of the employee's work in respect of its nature and the means of performance. Gradually, it was relaxed, giving rise to the concept of legal subordination in a broad sense. The diversification and specialization of occupations and work techniques often mean that the employer cannot realistically dictate regarding, or even directly supervise, the performance of the work. Thus, subordination has come to be equated with the power given a person, accordingly recognized as the employer, of determining the work to be done, overseeing its performance and controlling it. From the opposite perspective, an employee is a person who agrees to be integrated into the operating environment of a business so that

> it may receive benefit of his work. In practice, one looks for a number of indicia of supervision that may, however, vary depending on the context: compulsory attendance at a workplace, the fairly regular assignment of work, imposition of rules of conduct or behaviour, requirement of activity reports, control over the quantity or quality of the work done, and so on. Work in the home does not preclude this sort of integration into the business.

37 This excerpt mentions the notion of control over the performance of work, which is also part of the common law criteria. The difference is that, in Quebec civil law, the notion of control is more than a mere criterion as it is in common law. It is an essential characteristic of a contract of employment: see *D&J Driveway*, *supra*, at paragraph 16; and *9041-6868 Québec Inc. v. Canada (Minister of National Revenue)*, 2005 FCA 334.

38 However, we may also note in the excerpt from Mr. Gagnon that, in order to reach the conclusion that the legal concept of subordination or control is present in any work relationship, there must be what the author calls [translation] “indicia of supervision”, which have been called “points of reference” by our Court in *Le Livreur Plus Inc. v. MNR*, 2004 FCA 68 at paragraph 18; and *Charbonneau v. Canada (Minister of National Revenue – M.N.R.)* (1996), 207 N.R. 299, at paragraph 3.

39 For example, under Quebec civil law, integration of a worker within a business is an indicator of supervision that is important or useful to find in order to determine whether legal subordination exists. Is that not also a criterion or a factor that is used in common law to define the legal nature of an existing employment contract?

40 Likewise, as a general rule, it is the employer and not the employee who makes the profits and incurs the losses of the business. In addition, the employer is liable for the employee's actions. Are these not practical indicators of supervision, indicating the existence of legal subordination in Quebec civil law as well as in common law?

> 41 Finally, is the criterion of the ownership of work tools that is used by the common law not also an indicator of supervision that would be useful to examine? Depending on the circumstances, it may reveal the degree of an employee's integration into the business or his or her subordination to or dependence on it. It may help to establish the existence of legal subordination. In a contract of employment, more often than not, the employer supplies the employee with the tools required to perform the work. However, it seems to me to be much more difficult to conclude that there is integration into a business when the person performing the work owns his or her own truck with his or her name advertised on the side and containing some $200,000 worth of tools to perform the tasks that he or she does and markets.
>
> 42 It goes without saying, in both Quebec civil law and common law, that, when examined in isolation, these indicia of supervision (criteria or points of reference) are not necessarily determinative. For example, in *Vulcain Alarme Inc. v. Canada (Minister of National Revenue – M.N.R.),* [1999] F.C.J. No. 749, (1999), 249 N.R. 1, the fact that the contractor had to use expensive special detection equipment supplied by the client to check and gauge toxic substance detectors was not considered to be sufficient in itself to transform what was a contract for services into a contract of employment.
>
> 43 In short, in my opinion there is no antinomy between the principles of Quebec civil law and the so-called common law criteria used to characterize the legal nature of a work relationship between two parties. In determining legal subordination, that is to say, the control over work that is required under Quebec civil law for a contract of employment to exist, a court does not err in taking into consideration as indicators of supervision the other criteria used under the common law, that is to say, the ownership of the tools, the chance of profit, the risk of loss, and integration into the business.

27 Similarly, this has been addressed by the Federal Court of Appeal in *Livreur Plus Inc.*, at paragraphs 18 through 20 as follows:

> 18 In these circumstances, the tests mentioned in *Wiebe Door Services Ltd. v. M.N.R.*, 87 D.T.C. 5025, namely the degree of control, ownership of the work tools, the chance of profit and risk of loss, and finally integration, are only points of reference: *Charbonneau v. Canada (Minister of National Revenue - M.N.R.)* (1996), 207 N.R. 299, paragraph 3. Where a real contract exists, the Court must determine whether there is between the parties a

> relationship of subordination which is characteristic of a contract of employment, or whether there is instead a degree of independence which indicates a contract of enterprise: *ibid*.
>
> 19 Having said that, in terms of control the Court should not confuse control over the result or quality of the work with control over its performance by the worker responsible for doing it: *Vulcain Alarme Inc. v. The Minister of National Revenue*, A-376-98, May 11, 1999, paragraph 10, (F.C.A.); *D & J Driveway Inc. v. The Minister of National Revenue*, *supra*, at paragraph 9. As our colleague Décary J.A. said in *Charbonneau v. Canada (Minister of National Revenue - M.N.R.), supra*, followed in *Jaillet v. Canada (Minister of National Revenue - M.N.R.)*, 2002 FCA 394, "It is indeed rare for a person to give out work and not to ensure that the work is performed in accordance with his or her requirements and at the locations agreed upon. Monitoring the result must not be confused with controlling the worker".
>
> 20 I agree with the applicant's arguments. A subcontractor is not a person who is free from all restraint, working as he likes, doing as he pleases, without the slightest concern for his fellow contractors and third parties. He is not a dilettante with a cavalier, or even disrespectful, whimsical or irresponsible, attitude. He works within a defined framework but does so independently and outside of the business of the general contractor. The subcontract often assumes a rigid stance dictated by the general contractor's obligations: a person has to take it or leave it. However, its nature is not thereby altered, and the general contractor does not lose his right of monitoring the results and the quality of the work, since he is wholly and solely responsible to his customers.

28 The Federal Court of Appeal similarly wrote in *D & J Driveway Inc.* as follows:

> 2 It should be noted at the outset that the parties' stipulation as to the nature of their contractual relations is not necessarily conclusive and the Court which has to consider this matter may arrive at a contrary conclusion based on the evidence presented to it: *Dynamex Canada Inc. v. Canada*, [2003] 305 N.R. 295 (F.C.A.). However, that stipulation or an examination of the parties on the point may prove to be a helpful tool in interpreting the nature of the contract concluded between the participants.

29 The Court in *D & J Driveway Inc.* went on to acknowledge at paragraph 4 that the criteria developed in *Wiebe Door Services* can be referred to in assessing whether a relationship of subordination exists under the Civil Code.

[11] Consistent with the line of cases I referred to in *Romanza Soins Capillaires et Corporels*, is *NCJ Educational Services Limited v. Canada (National Revenue)*,[2] a decision of the Federal Court of Appeal which the Respondent's counsel raised in argument. In that case, the Court wrote:

> 55 In *Wiebe Door Services Ltd. v. Canada (Minister of National Revenue – M.N.R.)*, [1986] 3 F.C. 553, our Court emphasized the importance of the criterion of control both under the civil law as it stood at the time (the *Civil Code of Lower Canada*) and under the traditional common law. It stated at paragraph 6 and in footnote 1 of the decision:
>
> > 6 The traditional common-law criterion of the employment relationship has been the control test, as set down by Baron Bramwell in *Regina v. Walker* (1858), 27 L.J.M.C. 207, at page 208:
> >
> > > • It seems to me that the difference between the relations of master and servant and of principal and agent is this:-- A principal has the right to direct what the agent has to do; but a master has not only that right, but also the right to say how it is to be done.
> >
> > That this test is still fundamental is indicated by the adoption by the Supreme Court of Canada in *Hôpital Notre-Dame de l'Espérance and Théoret v. Laurent*, [1978] 1 S.C.R. 605, at page 613, of the following statement: "the essential criterion of employer-employee relations is the right to give orders and instructions to the employee regarding the manner in which to carry out his work."[1].
>
> ---
>
> 1 Although this is a civil-law case, the Court's expressed view is that that law is in this respect the same as the common law.
>
> [Emphasis added.]
>
> 56 The history of the concept of subordination in the *Civil Code of Québec* is found in Robert P. Gagnon, *Le droit du travail du Québe*c, an author, now deceased, often cited by our Court (*Wolf v. The Queen*, [2002] 4 F.C. 396, per Décary J.A.; *9041-6868 Quebec Inc.*, par. 12; *Michel Grimard v. The Queen*, 2009 FCA 47, para. 36). The history he gives is strikingly in the same lines as the development shown in the common law (see *Lord Wright in Montreal (City) v.*

[2] 2009 FCA 131.

Montreal Locomotive Works Ltd., [1947] 1 D.L.R. 161 (P.C.) at pages 169-170 (the *Montreal Locomotive Works* case).

57 The difficulty raised by the application of the concept of subordination in modern times is well explained by Marie-France Bich, *Le Contrat de travail, Code civil du Québec*, chapitre septième, (Articles 2085-2097, C. c. Q.) La Réforme du Code civil, *Obligations, contrats nommés*, 1983, *Les Presses* de l'Université Laval, p. 752.

58 While the test of control and the presence or absence of subordination are the benchmarks of a contract of service, the multiplicity of factual situations have obliged the courts to develop indicia of analysis in their search for the determination of the real character of a given relationship.

59 In the most recent edition of the book of Robert Gagnon (6e édition, mis à jour par Langlois Kronström Desjardins, sous la direction de Yann Bernard, Audré Sasseville et Bernard Cliche), the indicia (underlined below) have been added to those found in the earlier 5th edition. Those added indicia are the same as those developed in the *Montreal Locomotive Works* case and applied by this Court in *Wiebe Door*.

> 92 – Notion – Historiquement, le droit civil a d'abord élaboré une notion de subordination juridique dite stricte ou classique qui a servi de critère d'application du principe de la responsabilité civile du commettant pour le dommage causé par son préposé dans l'exécution de ses fonctions (art. 1054 C.c.B.-C.; art. 1463 C.c.Q.). Cette subordination juridique classique était caractérisée par le contrôle immédiat exercé par l'employeur sur l'exécution du travail de l'employé quant à sa nature et à ses modalités. Elle s'est progressivement assouplie pour donner naissance à la notion de subordination juridique au sens large. La diversification et la spécialisation des occupations et des techniques de travail ont, en effet, rendu souvent irréaliste que l'employeur soit en mesure de dicter ou même de surveiller de façon immédiate l'exécution du travail. On en est ainsi venu à assimiler la subordination à la faculté, laissée à celui qu'on reconnaîtra alors comme l'employeur, de déterminer le travail à exécuter, d'encadrer cette exécution et de la contrôler. En renversant la perspective, le salarié sera celui qui accepte de s'intégrer dans le cadre de fonctionnement d'une entreprise pour la faire bénéficier de son travail. <u>En pratique, on recherchera la présence d'un certain nombre d'indices d'encadrement, d'ailleurs susceptibles de varier selon les contextes</u> : présence obligatoire à un lieu de travail, assignation plus ou moins régulière du travail, imposition de règles de conduite ou de comportement, exigence de rapports d'activité, contrôle de la quantité ou de la qualité de la prestation, <u>propriété des outils,</u>

> possibilité de profits, risque de pertes, etc. Le travail à domicile n'exclut pas une telle intégration à l'entreprise.
>
> [Emphasis added.]

Analysis

Intention of the Parties

[12] Ms. Hendriks wanted an employment position at the outset, to the extent that she understood the difference between employment and independent contractor. Mr. Silverman testified that he always intended it to be an independent contractor position and that Ms. Hendriks agreed to that.

[13] Mr. Silverman points to Ms. Hendriks' email of late September 2014, weeks after her work period started, wherein she proposed reduced work hours for a finite contract. This was after the work period had started and was clearly a reflection of Uprise.FM's expressed dissatisfaction with her work productivity. In his testimony, Mr. Silverman tied this to his wanting to reduce her hours and her hourly rate of pay. It is clearly not the proposal pursuant to which she commenced to work for Uprise.FM.

[14] On September 2, 2014, Mr. Silverman wrote to Ms. Hendriks that his legal department would get her a copy of her contract that day or the next and assured she would not have any issues with it as he was tailoring it for her.

[15] On September 6, 2014, Mr. Silverman emailed the Appellant attaching "our standard employment contract" and specifying that her contract started September 3, 2014. The attachment was named "LIYC – Hendriks employment.doc".

[16] The employment agreement describes the position as "Assistant to the CEO, Gary Silverman". One of the recitals states that these are the "terms and conditions under and pursuant to which the Employee shall perform his duties and obligations under this employment agreement". Article 1.1 provides for a probationary period from September 1 to December 31, 2014 for a $25 hourly rate for a 37.5-hour week. Article 1.2 headed "Employment" specifies that she would be hired as a full-time employee for a $26 hourly rate and get three weeks of vacation time if the work period continued after the probationary period. Mr. Silverman refers to this specifically in his one-page, five-point cover email to her. Throughout this employment agreement, the relationship is described as one of employment and Ms. Hendriks as an employee. Mr. Silverman had no explanation for this but to blame his lawyer.

[17] In these circumstances, it appears that there was either a shared intention that the relationship would be employment by both Mr. Silverman and Ms. Hendriks, or that Mr. Silverman wanted to mislead Ms. Hendriks for his own interests into believing he would be hiring her as an employee.

[18] It appears that this agreement may never have been signed by the parties. That does not preclude me from my finding that it sets out the terms upon which the work relationship was agreed to verbally at the outset between Ms. Hendriks and Uprise.FM.

[19] Whether or not this employment agreement was ever signed, I find that it is the basis upon which Ms. Hendriks started her work for Uprise.FM. It is described in Mr. Silverman's cover email as their standard employment contract, which suggested that there was to be no negotiation. This is consistent with the fact that his cover email says "as of January 1, 2015 — you and I will negotiate a new contract which will include group benefits" — this would follow a successful probationary period. There is no reference to negotiating this contract. Further, this is the contract that was produced within days of the start of work pursuant to an ongoing request for such a contract.

[20] I conclude that Mr. Silverman was incorrect in his assertions that he never produced or created an employment agreement.

[21] I will carry on to consider the traditional *Wiebe Door* criteria given that in these circumstances it appears unwise to place much weight upon a shared intention which may have been intentionally misrepresented by Mr. Silverman for his own purposes.

Subordination and Control

[22] In her role as assistant to the CEO, it is not surprising that the evidence very largely supported Ms. Hendriks' work being directed and supervised as to what was to be done, how it was to be done, when it was to be done and whether it was done correctly, by Mr. Silverman. The emails in evidence amply attest to this and support Ms. Hendriks' version of events.

[23] Similarly, in her role as what has been described as media relations (or in the job posting on Indeed as artist relations/customer service) the documents clearly demonstrate the extent of the supervision and control by Lisa Mac of Uprise.FM, along with Mr. Silverman, over Ms. Hendriks' work, including what was to be done and when, the order in which things were to be attended to, and approval for adequacy of work to go on to Mr. Silverman or to go out to Uprise.FM's contacts or clients.

[24] Again this is consistent with the job posting on Indeed that says that her job tasks will have her working "under the digital media producer and CEO (we're both cool)" (emphasis added).

[25] There is no evidence to support the suggestions that any real work was to be done outside of Uprise.FM's premises by Ms. Hendriks. It was virtually all done at the shared La Commune loft co-op being used by Uprise.FM at the time. I believe there were two very distinct exceptions acknowledged by Ms. Hendriks, one day being when there was no internet at the loft space so she went to a café and the other day being when there was some construction activity at the loft while calls were to be made so she worked from home. Her work was expected to be done during normal office hours between Monday and Friday at Uprise.FM's premises.

[26] Again, these are consistent with the Indeed job posting which says: "You enjoy the freedom of flexible work hours with a steady paycheck. At Uprise, we believe in the work/life balance so although we want you [to] work at the office most of the time, you can work from home also sometimes too." (emphasis added). The posting also says "You . . . work well in an open concept office in a cool loft space".

[27] Lisa Mac required Ms. Hendriks to be signed into Google Chat and to be logged onto Todoist to manage and supervise her planned and completed activities and her work times. I reject Mr. Silverman's suggestion that Lisa Mac was probably monitoring these for her own knowledge as if it were distinct from Uprise.FM's.

[28] These considerations lean very strongly towards an employment relationship.

Tools and Supplies

[29] The tools and supplies needed for Ms. Hendriks to complete her work for Uprise.FM were provided by Uprise.FM. That includes the rented La Commune shared loft space in which she was expected to complete her work, and the necessary computer, two computer monitors and telephone headset, all of which were acquired by Uprise.FM for her.

[30] Ms. Hendriks used her own phone but the phone plan was reimbursed by Uprise.FM. In his September 2, 2014 email to her about the contract she wanted from him, Mr. Silverman wrote he wanted to update her phone plan so she would not have to bear any expense.

[31] I find this consideration leans more towards employment than self-employment.

Financial Risk and Opportunity

[32] Ms. Hendriks was paid a fixed hourly rate for hours worked. She could only make more money by working more hours or getting a raise, neither of which were in her control. Mr. Silverman of Uprise.FM controlled both the hours and rate of pay and exercised that through regular reductions in both throughout her period of work.

[33] The employment agreement specifically required loyalty and precluded Ms. Hendriks from working for others in this sector.

[34] There is no suggestion that Ms. Hendriks had the ability to subcontract any or all of her work to another person.

[35] This consideration also leans strongly in favour of an employment relationship.

Conclusion

[36] Having considered all of the relevant facts as they relate to the parties' intention and the indicia or considerations of subordination and control, tools and supplies, and financial risk and opportunity, I conclude that the relationship between Ms. Hendriks and Uprise.FM was an employment relationship.

[37] Given especially the extent of Uprise.FM's direction of the performance of the work duties and its actual monitoring and approval rights and requirements in practice, and given the very limited financial risks to the worker, the absence of any financial investment by Ms. Hendriks and her relatively fixed financial rewards by which she could only generate more income by working more hours, these particular facts and circumstances considered as a whole quite strongly give rise to an employment relationship that constitutes insurable employment under the *Employment Insurance Act*.

[38] The decision by CRA CPP/EI Appeals to reverse the ruling that this relationship was employment was entirely inappropriate and the findings or concerns of the Appeals agent are inconsistent with the evidence before this Court. The Appeals agent was concerned that (i) Ms. Hendriks may have misrepresented her yoga activities and (ii) Ms. Hendriks was inconsistent in her answers as to whether the employment agreement was ever signed. These were the credibility concerns given by the Appeals agent for instead accepting Mr. Silverman's version of the facts and events. This is very surprising given that it is apparent from the Appeals Report that Mr. Silverman misled CRA by saying he never produced or signed an employment agreement, or in the words of the Appeals agent that he never created one. Given that a digital unsigned version was provided to the Appeals agent by Ms. Hendriks along with its cover email indicating it was Uprise.FM's standard employment agreement, it is surprising the Appeals agent did not recognize Mr. Silverman's credibility as an issue. The Appeals agent never dealt with this in reaching her decision. There was no satisfactory explanation for this.

[39] The appeal is allowed.

Signed at Edmonton, Alberta, this 8th day of March 2018.

"Patrick Boyle"

Boyle J.

CITATION:	2018 TCC 50
COURT FILE NO.:	2016-2107(EI)
STYLE OF CAUSE:	LEAH HENDRIKS v. M.N.R. and UPRISE.FM INC.
PLACE OF HEARING:	Montreal, Quebec
DATES OF HEARING:	November 28, 2016 and September 11, 2017
REASONS FOR JUDGMENT BY:	The Honourable Justice Patrick Boyle
DATE OF JUDGMENT:	March 8, 2018

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