

Dockets: 2011-593(CPP)
2011-597(EI)

BETWEEN:

WORLDWIDE SCHOOL SEARCH AND RELOCATION SERVICES INC., c.o.b.
as EDUCATIONAL CONNECTIONS,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

Appeal heard on March 7, 2012 at Toronto, Ontario

By: The Honourable J.M. Woods

Appearances:

Counsel for the Appellant: David A. Whitten
Cédric P. Lamarche

Counsel for the Respondent: Stephen Oakey

JUDGMENT

The appeal with respect to assessments made under the *Employment Insurance Act* and the *Canada Pension Plan* regarding the engagement of Amelia Woo during 2008 is allowed, and the assessments are vacated.

Each party shall bear their own costs.

The Registry is directed to amend the style of cause to conform with the judgment.

Signed at Ottawa, Ontario this 26th day of April 2012.

“J. M. Woods”

Woods J.

Citation: 2012 TCC 137
Date: 20120426
Dockets: 2011-593(CPP)
2011-597(EI)

BETWEEN:

WORLDWIDE SCHOOL SEARCH AND RELOCATION SERVICES INC., c.o.b.
as EDUCATIONAL CONNECTIONS,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

REASONS FOR JUDGMENT

Woods J.

[1] The appellant, Worldwide School Search and Relocation Services Inc. (“Worldwide”), appeals from assessments made under the *Employment Insurance Act* and the *Canada Pension Plan* with respect to work performed by Amelia Woo during 2008. The question is whether Ms. Woo was engaged as an employee or independent contractor while working as an educational assessor.

[2] Worldwide’s business involves testing and evaluating persons for potential learning disabilities. The corporation is owned by Dr. Bill Ford and his spouse, Louise Ford.

[3] Worldwide engages assessors to assist with this work. They perform the tests and co-author the evaluation reports with Dr. Ford. Typically, the assessors are trained professionals having advanced degrees in this specialized area.

[4] Assessors are engaged by Worldwide under written contracts which provide that the assessors are engaged as independent consultants. The arrangement is

flexible, with no obligation on Worldwide to provide work and no obligation on the consultants to accept work except for two assignments per month. It is clear that the assessors may work elsewhere and some do.

[5] Ms. Woo was engaged as an assessor in 2008 during a period that she was a post-graduate student in this field. She was already familiar with many of the tests that she administered, but she did not have any work experience. In this regard, Ms. Woo had not yet completed her practicum which would have provided her with hands on experience. Worldwide provides training on tests that assessors are not familiar with.

[6] Ms. Woo undertook the engagement with Worldwide partly to learn from Dr. Ford and he undertook to act as her mentor. She perceived the relationship to be as mentor and mentee.

Assessment procedures

[7] It is useful to set out the steps that are undertaken in order to provide an assessment for a client.

[8] The first step is that Dr. Ford meets with the client for the purposes of obtaining background information and making an arrangement for the assessment. He forms an initial view as to the tests that are appropriate, but the assessor also has input into the tests that are actually performed.

[9] The office manager then arranges an appointment for the tests to be performed by an assessor. The manager contacts assessors based on matching clients to the specialities of the assessors and on the manager's knowledge of the assessors' availability.

[10] The tests are conducted at Worldwide's premises in controlled circumstances so that the test results are valid. The tests generally take about six hours to complete, although the time does vary depending on the circumstances. The assessor then completes the scoring for the tests.

[11] The test results are then discussed between the assessor and Dr. Ford (and perhaps other assessors). A diagnosis is agreed upon.

[12] A report is then prepared with the input of both Dr. Ford and the assessor. A first draft is prepared by the assessor, and it is given to Dr. Ford for his review. Dr.

Ford may make changes to the report, or he may ask the assessor to make changes. Ultimately the report is signed by Dr. Ford or the office manager on his behalf. The report has a signing line for the assessor but the report is not always signed by the assessor. Ms. Woo generally did not sign the reports.

Analysis

[13] The legal principles to be applied in a case such as this are well known. At their core, it is necessary to determine whether Ms. Woo was in business for herself. The *Wiebe Door* factors of control, chance of profit, risk of loss, and ownership of tools should be among the factors considered. Further, if the parties have a mutual intention that their relationship be one of independent contractor or employment, this will be respected if the relationship is consistent with this intent. (*TBT Personnel Services Inc. v The Queen*, 2011 FCA 256.)

[14] An important consideration in this case is whether Worldwide had the power to control the manner in which Ms. Woo's work was done.

[15] I find that Worldwide had only limited control. The reports given to clients are clearly a joint work product of two professionals. Dr. Ford and Ms. Woo both contributed to the report and the diagnosis, and the signature lines in the report represent to clients that it is a joint report, regardless of whether Ms. Woo signed it or not.

[16] The respondent forcefully submits that Worldwide had considerable power to control Ms. Woo's work. I think this misconceives the nature of the engagement.

[17] Worldwide engages professionals to perform tasks that they are trained to do. If the assessors were merely under the control of Worldwide, this would conflict with their professional responsibilities.

[18] Further, the assessors know that they are represented as being a joint author of the reports. They have a professional responsibility to ensure that they agree with the evaluation.

[19] I readily accept that Ms. Woo was in a learning phase in her career and that she deferred to Dr. Ford's opinions. This is the case with most professionals who are inexperienced. However, the professional responsibility is still there.

[20] Ms. Woo understandably deferred to someone with more experience, but there is a difference between deference and control. In my view, Ms. Woo misunderstood her role as a professional if she thought that she was under the control of Dr. Ford.

[21] Ms. Woo suggested that her role in drafting reports was limited and that the wording of the reports was largely provided by Dr. Ford. She also testified that she could not write the reports at home.

[22] According to the testimony, Dr. Ford made precedents of reports available to assessors, which reflected his preferred style. This should be viewed as suggestions rather than dictating how the reports should be written. Further, it is the assessors that did the testing. It makes no sense to say that Dr. Ford dictated how the reports were to be written.

[23] As for taking reports home, this was a necessary restriction in light of the confidential nature of the reports. The evidence indicated that assessors now are able to write reports at home because the security features on computers have been enhanced.

[24] The fact that the arrangement was loose and that assessors were free to accept or decline work assignments strongly supports the position that Ms. Woo was engaged as an independent contractor. Quite simply, Ms. Woo was a professional hired on an informal basis to do a specific job at a time of her choosing. The control factor favours an independent contractor relationship.

[25] As for tools, all the tools used by assessors were provided by Worldwide. It provided sound proof test rooms, the tests, computers and reference books. Some assessors also used tests that they personally owned.

[26] The respondent suggests that the use of tools is an important factor in this case. I disagree.

[27] There is no reason that Worldwide could not engage independent contractors to come in and perform assessing work for Worldwide's clients using Worldwide's equipment. Professionals are often hired as independent contractors under similar conditions. Tools are not a strong factor in this case.

[28] As for profit and loss, it is admitted that the consultants have some control over profit because of the manner in which compensation was determined. They

assessors were paid an hourly rate based on the time taken to perform the tests. The profit could vary depending on the assessor's efficiency in writing reports.

[29] The profit element in my view is neutral, and is not a significant factor.

[30] As for risk of loss, I also think this is not a significant factor. The evidence on this point was limited, and I am not satisfied that it was reliable. Although there may be a risk from potential lawsuits, there was no evidence that assessors commonly obtain liability insurance. I am not satisfied that the risk is perceived to be significant.

[31] Finally, I would consider intention. Ms. Woo's testimony on this point was not entirely clear. The fact that she signed a written contract which evidenced an independent consultant relationship, and the fact that she knew there would be no source deductions, suggests that Ms. Woo knew and accepted that she was not an employee.

[32] Ms. Woo testified that she did not understand the full significance of being an independent consultant. It is unfortunate that Worldwide did not provide a more in depth explanation to Ms. Woo, but the intention in my view supports an independent contractor relationship.

[33] In the result, I would conclude that Ms. Woo was engaged by Worldwide as an independent contractor and not as an employee during 2008. The appeal is allowed and the assessments are vacated.

[34] Each party shall bear their own costs.

Signed at Ottawa, Ontario this 26th day of April 2012.

"J. M. Woods"

Woods J.

CITATION: 2012 TCC 137

COURT FILE NOS.: 2011-593(CPP) and
2011-597(EI)

STYLE OF CAUSE: WORLDWIDE SCHOOL SEARCH AND
RELOCATION SERVICES INC., c.o.b. as
EDUCATIONAL CONNECTIONS v.
THE MINISTER OF NATIONAL
REVENUE

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: March 7, 2012

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

DATE OF JUDGMENT: April 26, 2012

APPEARANCES:

Counsel for the Appellant: David A. Whitten
Cédric P. Lamarche

Counsel for the Respondent: Stephen Oakey

COUNSEL OF RECORD:

For the Appellant:

Name: David A. Whitten

Firm: Whitten & Lublin LLP
Toronto, Ontario

For the Respondent: Myles J. Kirvan
Deputy Attorney General of Canada
Ottawa, Ontario