Dockets: 2011-3768(CPP)
2011-3769(EI)

BETWEEN:

NORTH DELTA REAL HOT YOGA LTD.,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent,

and

SUKHDEV PANGALIA,

Intervenor.

Appeal heard on June 22 and September 24, 2012
at Vancouver, British Columbia

By: The Honourable Justice J.M. Woods

Appearances:

Agent for the Appellant:	Makan Parhar
Counsel for the Respondent:	Devi Ramachandran
For the Intervenor:	The Intervenor himself

JUDGMENT

The appeal with respect to decisions of the Minister of National Revenue under the *Employment Insurance Act* and the *Canada Pension Plan* that Sukhdev Pangalia was engaged in insurable and pensionable employment by the appellant for

the period from May 1 to October 15, 2010 is dismissed and the decisions are confirmed. Each party shall bear their own costs.

Signed at Ottawa, Ontario this 19th day of October 2012.

"J. Woods"

Woods J.

Citation: 2012 TCC 369
Date: 20121019
Dockets: 2011-3768(CPP)
2011-3769(EI)

BETWEEN:

NORTH DELTA REAL HOT YOGA LTD.,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent,

and

SUKHDEV PANGALIA,

Intervenor.

REASONS FOR JUDGMENT

Woods J.

[1] Sukhdev Pangalia worked at the appellant's yoga studio for about six months, after which he was terminated and applied for employment insurance benefits. This led to a determination by the respondent that Mr. Pangalia was engaged in insurable and pensionable employment for purposes of the *Employment Insurance Act* and the *Canada Pension Plan*.

[2] The appellant appeals from this determination and submits that Mr. Pangalia was engaged as an independent contractor. Mr. Pangalia has intervened in these proceedings.

[3] The engagement turned out to be an unhappy affair and it resulted in several legal proceedings being instituted by Mr. Pangalia.

[4] I would note in particular that the British Columbia Employment Standards Tribunal concluded that Mr. Pangalia was an employee for purposes of the relevant legislation. The conclusion of the Tribunal is not dispositive of the issue in this appeal, partly because the Tribunal takes an expanded view of the meaning of "employment" in order to further the policy objectives of the legislation (Employment Standards Tribunal, file no. 2011A/189, paragraphs 53-59). Nevertheless, it is useful to have regard to the findings of the Tribunal, especially as to the facts. Those findings are consistent with the conclusion that I have reached on the evidence before me.

Background

[5] The appellant's yoga studio is located in Delta, British Columbia. It is a small family-run business with Makan Parhar as President and his spouse, Rapinder Lalli, providing administrative support. Mr. Parhar and Ms. Lalli each testified on behalf of the appellant.

[6] Mr. Pangalia testified on behalf of the respondent.

[7] Mr. Parhar and Mr. Pangalia originally became acquainted in another yoga studio and became friends. After Mr. Parhar opened his own studio, he was interested in Mr. Pangalia's previous business experience since Mr. Pangalia had been an owner of a dance studio.

[8] The working relationship between Mr. Parhar and Mr. Pangalia was strained, to put it mildly, and it was evident at the hearing that there was considerable animosity between the two men. This animosity appeared to affect the reliability of all of the testimony, including the testimony of Ms. Lalli. As an example, Mr. Parhar and Mr. Pangalia each accused the other of fabricating a draft agreement for purposes of the employment standards' dispute.

[9] It is difficult to untangle the substance of the relationship in these circumstances. All that can be done is to determine what are the most likely facts based on the evidence as a whole.

[10] As for the nature of the duties performed, Mr. Pangalia testified that he was hired for front desk duties. These were set out in considerable detail and were under the control of the appellant.

[11] Mr. Parhar and Ms. Lalli testified that Mr. Pangalia was not hired for front

desk duties, but as a manager and consultant on business matters.

[12] I have concluded that it is most likely that Mr. Pangalia was engaged to perform a front desk shift on a full-time basis, and that he was also to have some managerial duties and provide business assistance. It does not make sense that Mr. Pangalia would be hired only for front desk duties since he was to be paid much more than other staff, $3,000 per month.

Applicable legal principles

[13] The general legal principles to be applied were most recently set out by Sharlow J.A. in *TBT Personnel Services Inc. v The Queen*, 2011 FCA 256, at para. 8 and 9:

> [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.

[14] The application of these general principles to a particular case is largely a fact-driven exercise. However, some principles have emerged from the cases which have

been expertly summarized by Hershfield J. in a case dealing with in-home nursing care: *Direct Care In-Home Health Services Inc. v The Queen*, 2005 TCC 173. The relevant parts are reproduced below.

> Control
>
> [11] Analysis of this factor involves a determination of who controls the work and how, when and where it is to be performed. If control over work once assigned is found to reside with the worker, then this factor points in the direction of a finding of independent contractor; if control over performance of the worker is found to reside with the employer, then it points towards a finding of an employer-employee relationship. However, in times of increased specialization this test may be seen as less reliable, so more emphasis seems to be placed on whether the service engaged is simply "results" oriented; i.e. "here is a specific task - you are engaged to do it". In such case there is no relationship of subordination which is a fundamental requirement of an employee-employer relationship. Further, monitoring the results, which every engagement of services may require, should not be confused with control or subordination of a worker.
>
> Tools and Equipment
>
> [13] The question to be asked in relation to this factor is who, of the employer or the worker, owns the assets or equipment that is necessary to perform the work. This factor points to a finding of independent contractor if it is the worker who controls the assets or equipment. Conversely, a finding of employee is likely if it is the employer who controls them.
>
> Risk of Loss/Opportunity for profit
>
> [16] This factor examines the worker's potential of profit or loss. An independent contractor normally assumes the risk of loss and chance for profit resulting from the performance of work, while in the case of an employee it is the employer who bears that burden and has that opportunity.
>
> Whose Business is it?
>
> [22] One ought not, however, fall into the trap of thinking that only that which has the trappings of a "business" qualifies as such for the purposes of this analysis. I refer to paragraph 13 of *D & J Driveway*:
>
> > ... It is important to guard against a reflex of thinking solely of a business corporation or an organized commercial undertaking when one is dealing with work which is done or services which are provided other than under a contract of employment. The examples of electrical, plumbing or building contractors

> immediately spring to mind in such a context. However, there is a whole range of services which are offered under a contract for services. In fact, article 2098 of the Civil Code of Quebec was very careful to place on an equal footing a "contract of enterprise" and a "contract for services" and to describe as a "contractor" the person who performs a contract of enterprise and a "provider of services" the person who carries out a contract for services.
>
> [23] Although the *Civil Code of Quebec* does not apply in this case, I nonetheless find the words of Letourneau J. instructive. […]

Analysis

[15] I start with the factors from *Wiebe Door*.

[16] As for control, the preponderance of the evidence suggests that Mr. Pangalia was subject to the control of the appellant. I find that he was assigned full-time shift work during which he performed front desk duties that were performed by all front desk staff (e.g., opening the premises, cleaning, monitoring students coming in). He also performed a few managerial-type duties.

[17] Mr. Parhar suggests that Mr. Pangalia did not work full time and that he falsified the work schedule. I would conclude that the schedule was not falsified. It is unlikely that Mr. Pangalia would be assigned less than full-time hours given that he was paid at a fixed rate that was considerably higher than other staff.

[18] As for whether Mr. Parhar had the ability to dictate the manner in which Mr. Pangalia's work was done, I find that he did. In addition to the oral testimony, several email exchanges between the two men suggest that Mr. Pangalia was working under the detailed instructions of Mr. Parhar.

[19] In terms of business consulting, the evidence suggests that very few services of this nature were performed, if any. The poor relationship between Mr. Parhar and Mr. Pangalia likely prevented the relationship developing in this way.

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

[21] As for the other *Wiebe Door* factors, they are fairly neutral. As for tools and equipment, Mr. Pangalia used the computer and other equipment owned by the appellant. He used his own car without reimbursement, but this likely was a rare occurrence.

[22] As for profit and loss, these also are not significant factors in this case. Mr. Pangalia was to be paid a fixed monthly amount. There was little opportunity for profit or risk of loss, but this is not uncommon in both employment and independent contractor relationships.

[23] I have concluded that the evidence as a whole points to an employment relationship. There are very few factors which suggest that Mr. Pangalia had his own business.

[24] In light of this conclusion, the intention of the parties is not relevant. However, if it were, I would conclude that the parties likely agreed that Mr. Pangalia would be an independent contractor. He accepted an arrangement on which source deductions would not be made. I do not accept Mr. Pangalia's evidence that his remuneration was to be $3,000 on a net basis. I find that it was to be $3,000 without source deductions. As a former business owner, Mr. Pangalia likely understood that this meant that he was to be an independent contractor.

[25] The actual dealings between the parties, however, were not consistent with an independent contractor relationship. If parties wish to have an independent contractor relationship respected for purposes of the *Employment Insurance Act* and the *Canada Pension Plan*, their actions need to be consistent with their intent. Unfortunately for the appellant in this case, the evidence as a whole suggests that the parties did not act in a manner consistent with an independent contractor relationship.

[26] The appeal will be dismissed, with each party bearing their own costs.

Signed at Ottawa, Ontario this 19th day of October 2012.

"J. Woods"

Woods J.

CITATION:	2012 TCC 369
COURT FILE NOS.:	2011-3768(CPP) and 2011-3769(EI)
STYLE OF CAUSE:	NORTH DELTA REAL HOT YOGA LTD. and THE MINISTER OF NATIONAL REVENUE and SUKHDEV PANGALIA
PLACE OF HEARING:	Vancouver, British Columbia
DATES OF HEARING:	June 22 and September 24, 2012
REASONS FOR JUDGMENT BY:	The Honourable Justice J.M. Woods
DATE OF JUDGMENT:	October 19, 2012

APPEARANCES:

Agent for the Appellant:	Makan Parhar
Counsel for the Respondent:	Devi Ramachandran
For the Intervenor:	Sukhdev Pangalia

COUNSEL OF RECORD:

For the Appellant:

Name:	n/a
Firm:	

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